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THE
FEDERAL REPORTER.

VOLUME 37.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

JANUARY—MAY, 1889.

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² Deceased.

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ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

CUDAHY *et al.* v. MCGEOCH *et al.*

(Circuit Court, E. D. Wisconsin. December 12, 1888.)

REMOVAL OF CAUSES—ALIENS—SUIT IN STATE OF RESIDENCE.

An alien sued in the state of his residence by citizens of another state upon an ordinary debt cannot remove the action to the circuit court of the United States under the provisions of act Cong. March 3, 1887, authorizing removal of causes "by the defendant or defendants therein not being residents of that state," and also the removal of a cause in which there is a controversy "wholly between citizens of different states."

On motion to remand to state court.

Shepard & Shepard, for plaintiffs.

Finches, Lynde & Miller, for defendants.

GRESHAM, J. This suit was commenced in the circuit court of Milwaukee county to recover a debt due the plaintiffs from the defendants jointly, as copartners. The plaintiffs are citizens of Illinois, McGeoch is an alien residing in Wisconsin, and some, if not all, of the other defendants are citizens of Illinois. The suit was removed to this court on the application of McGeoch, who was, and still is, the only defendant served with process.

It is provided by a Wisconsin statute that in a suit on a joint contract against two or more defendants, when one or more, but not all, are served with process, judgment may be rendered in form against all, including the defendants not served, and bind the joint property of all, and the individual property of the defendant served. Rev. St. § 2884. A single controversy exists between the plaintiffs and McGeoch, and the case may proceed to trial and judgment against him, although his co-defendants are not before the court. Not being citizens of Wisconsin, the

absent defendants may never be served with process, and, as the record now stands, they are not to be treated as parties.

Section 1 of the act of March 3, 1887, confers upon the circuit courts of the United States original jurisdiction (1) of suits arising under the constitution and laws of the United States, and treaties made in pursuance thereof; (2) of suits in which the United States are plaintiff; (3) of suits between citizens of different states; (4) of suits between citizens of the same state claiming lands under grants from different states; and (5) of suits between citizens of a state and foreign states, citizens and subjects. In suits of the first, second, third, and fifth classes the matter in dispute, exclusive of interest and costs, must exceed the sum or value of \$2,000. So much of section 2 as calls for notice reads:

"That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district, by the defendant or defendants therein, being non-residents of that state; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy, may remove said suit into the circuit court of the United States for the proper district."

This is not a suit arising under the constitution or laws of the United States. It is a suit between citizens of Illinois and an alien, and is not, therefore, a suit between citizens of different states; and if it were, when the jurisdiction depends upon the citizenship of the parties, the suit cannot be removed by a defendant who is sued in the district of his residence. It is not a suit between citizens of the same state claiming lands under grants from different states; and it is not a suit within the meaning of the third clause of the second section of the act, involving a controversy wholly between citizens of different states, and which can be fully determined as between them. That clause limits the right of removal to a citizen of a state who is sued out of the state of his residence, and who is one of two or more defendants in a suit involving two or more controversies, one of which is separable as between him and the plaintiffs. An alien who is sued in a state in which he resides, as here, is not authorized by the act of 1887 to remove the suit. The motion to remand is sustained.

KANSAS CITY & T. R. CO. v. INTERSTATE LUMBER CO.

(Circuit Court, W. D. Missouri, W. D. December 10, 1888.)

1. REMOVAL OF CAUSES—JURISDICTION OF COURT—NON-RESIDENTS OF DISTRICT.

Under the act of March 3, 1887, providing that the circuit courts shall have original cognizance of actions between citizens of different states; that no suit shall be brought by original process in any district other than that whereof defendant is an inhabitant, but that where jurisdiction is founded only on diverse citizenship suit may be brought in the district of the residence of either party; and that any suit of which the circuit courts are thereby given jurisdiction may be removed,—an action pending in a state court may be removed by defendant to the federal court, though neither party is a resident of the district; the restriction as to the place of bringing suit being in the nature of a personal privilege, which defendant may waive. Overruling *Harold v. Mining Co.*, 83 Fed. Rep. 529.

2. SAME—ACTIONS AT LAW—EMINENT DOMAIN.

A proceeding by a railroad company for the condemnation of land, is an action at law, and removable to the federal court. Following *Searl v. School-Dist.*, 124 U. S. 197, 8 Sup. Ct. Rep. 460.

3. SAME—MOTION TO REMAND—HEARING AT SPECIAL TERM.

Where an act changing the time of holding a term of court is passed, but too late to permit the holding of a term at the substituted time, and a special term in lieu thereof is called, proceedings for the removal of a cause, the petition and bond in which were filed before the time for holding the regular term as fixed either by the act or the former law, are before the special term for the purposes of a motion to remand; the act providing that process from the clerk's office shall be returnable at the substituted term, and Rev. St. §§ 669, 670, enabling a special term to transact all business that may be transacted at a regular term.

On Motion to Remand.

For opinion on a previous motion to remand, see 36 Fed. Rep. 9.

Crittenden, McDougal & Stiles, for plaintiff.

Brumback & Brumback and Kagy & Brennerman, for defendant.

BREWER, J. This case now stands on a motion to remand. The proceeding in the state court was one for the condemnation of a right of way. It was commenced on the 5th day of June, 1888, by the filing in the office of the clerk of the circuit court of Jackson county, Mo., of a petition. On the 16th day of June the defendant filed its petition and bond for removal, and on August 27th the plaintiff took a copy of the record from the state court, filed it in this, and with it a motion to remand. Defendant objected to the hearing of that motion, on the ground that it was prematurely filed; that by the terms of its application for removal it had until the first day of the next succeeding term of the federal court in which to file the record; and that, while the plaintiff might undoubtedly at once take and file a copy of the record here, yet the case was not thereby so fully transferred to this court as to justify it in making such a final order as is involved in the decision of a motion to remand. It was conceded that the jurisdiction of the state court ceased on the filing of the petition and bond, and that, when the record was filed here, this court had jurisdiction for any provisional remedies and orders necessary to preserve the rights of the parties *ad interim*, and only the right to make

full and final determination was denied. After due consideration, this court sustained the positions of defendant, and held that the motion to remand could not then be entertained; and the first question presented is whether the case now stands in any different shape than at that time. The next regular term of this court commenced on the third Monday of October, and at that time the defendant, by the terms of its bond, was to have the record filed in this court. Before that date an act of congress took effect, changing the time of the fall term from the third Monday of October to the first Monday of September. This act was not passed until about the middle of September; too late for a regular September term this fall, and yet without any saving clause as to this year's October term. Hence a regular term became impossible. Under sections 669 and 670 of the Revised Statutes, a special session was called for the fourth Monday of October. By the provisions of these sections any business which could be transacted at a regular term could be transacted at this special term, and the act changing the terms provided in its second section as follows:

"All process issued from the clerk's office of said courts when the act takes effect shall be taken and considered as returnable to the next term or terms hereby established in lieu of the term or terms existing at the time such process was issued."

While this, in terms, refers to process issued from the clerk's office, and may not in the letter apply to removal proceedings, yet in spirit it does. The September term was in lieu of the October term. The removal proceedings were commenced in August, and that was before the time fixed for a September term. Of course no subsisting and substantial right of either plaintiff or defendant can be destroyed by a mere change in the time of a term; but it will be sacrificing substance to form, and upholding the letter as against the spirit, to refuse to consider the case fully before the court at this special term, and to defer till next spring the consideration of the motion to remand. We therefore hold, the record having been filed in this court for some months, and a special term being held at which all business transactable at a regular term may be transacted, and the September term being in lieu of the October term, and both of these terms being after the commencement of the removal proceedings, that the case is fully before us, and that it is our duty to entertain and determine this motion to remand.

The second question is whether the proceeding was removable from the state court at the time the removal proceedings were had, and this depends upon the question whether the proceeding was then a suit of a civil nature at law or in equity, within the purview of the removal acts. This question might have been one of considerable difficulty but for the ruling of the supreme court in the case of *Searl v. School-Dist.*, 124 U. S. 197, 8 Sup. Ct. Rep. 460, which seems to settle the question adversely to the plaintiff.

The remaining question, and the one of the most difficulty, is this: It appears that both plaintiff and defendant are non-residents of this district. It is clear that under the act of March 3, 1887, the plaintiff could

not have brought the defendant into this court by original process, or at least could not have compelled it to stay here against its will, and the contention is that, as this court could not take original jurisdiction, it cannot take jurisdiction by removal. This requires an examination of the two sections of the act of March, 1887; an examination in the light of the construction placed by the supreme court on prior removal acts. The first section, so far as is material, reads: "That the circuit courts of the United States shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, * * * in which there shall be a controversy between citizens of different states," and in a subsequent sentence: "And no civil suit shall be brought before either of said courts against any person by any original process of proceeding in any other district than that whereof he is an inhabitant. But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." The second section provides that "any suit of a civil nature at law or in equity, * * * of which the circuit courts of the United States are given original jurisdiction by the preceding section, may be removed," etc. It will be observed that the right to object to this court taking jurisdiction of the case if the suit had been originally commenced here is a personal privilege of the defendant, and may be waived by it. There is no lack of power in the court, but only a personal right of defendant. Under the judiciary act of 1789 the question arose whether an attachment could be issued out of the circuit courts of the United States against a non-resident of the district, and it was decided in *Toland v. Sprague*, 12 Pet. 300, that it could not. But in the same case it was held that, although the attachment was improperly issued and levied upon the property of the defendant, yet, inasmuch as the defendant appeared and pleaded to the issue, the court had jurisdiction. I quote these words:

"Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The court had jurisdiction over the parties and the matter in dispute. The objection was, that the party defendant not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him, and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam*. Now, this was a personal privilege or exemption which it was competent for the party to waive. The cases of *Pollard v. Dwight*, 4 Cranch. 421, and *Barry v. Foyles*, 1 Pet. 311, are decisive to show that, after the appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves that exemption from liability to process—and that in case of foreign attachment, too—is a personal privilege which may be waived; and that appearing and pleading will produce that waiver."

It was also held under the act that a suit pending in a state court between citizens of different states could be removed by the defendant into a federal court, although by reason of his not being an inhabitant of or

found within the district, he could not have been sued originally in that court. *Sayles v. Insurance Co.*, 2 Curt. 212; *Barney v. Bank*, 5 Blatchf. 107; *Bushnell v. Kennedy*, 9 Wall. 387; *Green v. Custard*, 23 How. 484. And the same rule was enforced where the plaintiff was debarred from an original suit in that court by reason of his being an assignee of some note or other chose of action from a party citizen of the same state with the defendant. See *City of Lexington v. Butler*, 14 Wall. 282. I quote therefrom:

"Suits may properly be removed from a state court into the circuit court in cases where the jurisdiction of the circuit court, if the suit had been originally commenced there, could not have been sustained, as the twelfth section of the judiciary act does not contain any such restriction as that contained in the eleventh section of the act defining the original jurisdiction of the circuit courts. Since the decision in the case of *Bushnell v. Kennedy*, all doubt upon the subject is removed, as it is there expressly determined that the restriction incorporated in the eleventh section of the judiciary act has no application to cases removed into the circuit court from a state court, and it is quite clear that the same rule must be applied in the construction of the subsequent acts of congress extending that privilege to other suitors not embraced in the twelfth section of the judiciary act."

And the same distinction was applied to the act of March 3, 1875, between the right of removal and the right to bring a party in by original process. *Claffin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. Rep. 507. Now, turning to the act of 1887, and the portions above quoted, it is obvious that the first part of section 1 describes in general terms the jurisdiction of the circuit courts, while the provisions of the latter part of the section refer, not to the general matter of jurisdiction, but to the particular court in which a case may be brought and tried. It is said by Chief Justice WAITE, in *Ex parte Schollenberger*, 96 U. S. 378:

"That the act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases; and certainly jurisdiction will not be ousted because he has consented."

The same distinction between the general matter of jurisdiction and the particular court for suit and trial is recognized in *Fales v. Railway Co.*, 32 Fed. Rep. 673; *Gavin v. Vance*, 33 Fed. Rep. 84; *Loomis v. Coal Co.*, Id. 353. Turning to the second section, we find that the removable suits are those of which, by the first section, the federal courts are given jurisdiction. The language speaks of jurisdiction generally, and of courts in the plural. Any suit is removable of which any federal circuit court might take jurisdiction, and the mere fact that the defendant could have successfully objected to being sued in any one or more particular federal courts, does not destroy the general jurisdiction of federal courts, or prevent its removal. Take the case at bar. If the suit had been commenced in this court, and process served personally upon the defendant, and it had raised no question other than upon the merits of the controversy, this court would have had undoubted jurisdiction, and the judg-

ment it rendered would have been valid. If the jurisdiction of the court upon his failure to insist upon his personal privilege be conceded in the one case, why should there be doubt of the jurisdiction when he voluntarily seeks the court. I am aware that in the case of *Harold v. Mining Co.*, 33 Fed. Red. 529, I concurred with Judge HALLETT in an opinion different from that herein expressed, but further reflection, after hearing the question discussed at length and frequently, has satisfied me that that opinion was erroneous. It is perhaps unnecessary to carry this discussion any further, and it is enough to say that we hold that the fact that both parties are non-residents of this district does not oust this court of jurisdiction in a case removed from the state court by a non-resident defendant. It follows, therefore, that the motion to remand must be overruled, and the plaintiff will have leave to apply for the appointment of commissioners.

ROSENBAUM *et al.* v. COUNCIL BLUFFS INS. CO.

(Circuit Court, N. D. Iowa. December 22, 1888.)

1. COURTS—FEDERAL COURTS—FOLLOWING STATE PRACTICE—INSURANCE—REFORMATION OF POLICY.

In an action at law, in the federal court sitting in Iowa, on an insurance policy, it appeared from the petition that the person named in the policy as the party assured was not the real party in interest. The court sustained a demurrer for want of interest in the assured, but granted plaintiffs' leave to file a bill in equity for reformation of the contract, and continued the action at law pending the proceedings in equity. *Held*, that such order was not contrary to Code Iowa, § 2654, which provides that on the decision of a demurrer, if the unsuccessful party fails to amend, the same consequences shall ensue as though verdict had passed against him. If the case had been heard in the state court, the plaintiffs could have amended their petition by setting out the facts relied on for reformation, and in making the order the federal court followed the state practice as near as possible, retaining the separate forms of actions.

2. SAME.

Nor was such order contrary to the provision of the policy that no action could be maintained thereon unless brought within six months after the happening of the loss. Had the cause remained in the state court, the petition could have been amended, and the defendant cannot complain of the proceeding in equity rendered necessary by its removal of the cause to the federal court.

At Law. On motion to set aside order granting leave to file a bill in equity, and also motion for judgment on demurrer.

Blake & Hormel and *C. A. Clark*, for plaintiffs.

Sapp & Pusey and *Henderson*, *Hurd*, *Daniels & Kiesel*, for defendant.

SHIRAS, J. On the 12th day of September, 1882, the defendant issued a policy of insurance against fire upon an elevator and its contents, the contract of insurance being made with one H. Eyler, and his name appearing in the policy as the party assured. The property having been destroyed by fire, the present action was brought by the plaintiffs, who

sue as assignees of the rights of Eyler and one G. Abraham, to whom as mortgagee the loss was to be paid by the terms of the policy. From the averments in the petition contained it appears that the real party interested in the property insured was the said G. Abraham, it being averred that he was the owner of the elevator and the business carried on therein, the same, however, being carried on in the name of Eyler; and that in fact the contract of insurance was made with Abraham. The defendant demurred to the petition, and the court held that, the action being at law, the plaintiff was bound by the legal effect and meaning of the written contract of insurance, to-wit, the policy sued on; that upon its face it showed that the contract was to insure Eyler's interest in the property; and that upon the face of the policy plaintiffs could not recover, unless it was shown that Eyler had an actual interest in the property covered by the policy; and that plaintiffs could not by parol evidence show a contract contradicting the written policy on which the suit was based; that if the policy as signed did not represent the real contract made by the parties, it could be reformed in equity, but that, unless so reformed, an action at law thereon could not be maintained to recover the loss caused to the property of Abraham. Thereupon, at the request of plaintiffs, the court granted leave to file a bill in equity for the reformation of the written contract, and continued this action, awaiting the result of the proceedings in equity. A bill for the purpose named was thereupon filed upon the equity side of the court, and is still pending. The defendant now moves for an order expunging and rescinding the leave granted for filing the bill, and also for final judgment on the demurrer, upon the ground that the statute of Iowa, (section 2654, Code,) provides that upon the decision of a demurrer, if the unsuccessful party fails to amend or plead over, the same consequences shall ensue as though a verdict had passed against the plaintiff; and that the court, as a court of law, cannot do otherwise than to render a strictly legal judgment upon the demurrer.

Taking the ground assumed by defendant's counsel, that the statutory rule is binding upon this court, what is the result? When the time comes for entering final judgment on the demurrer, the rule cited will be applicable, but the section of the Code relied on was never intended to bear the narrow construction now claimed to be applicable, nor are the powers of a court at law so limited as counsel seem to assume. The section relied on by counsel provides that if the party beaten on the demurrer fails to amend or plead over, then certain consequences ensue; but the section does not provide when and how such amendment must be made. That is a matter that is within the power of the court, and the time within which an amendment may be made must depend upon the circumstances of each case. Section 2638, Code Iowa. The practical effect of the ruling upon the demurrer was that, to enable the plaintiffs to rely upon the contract of insurance, which it was averred had in fact been made, it was necessary to reform the written contract or policy, and then to declare on it as amended. If the case had been pending in the state court, the plaintiffs, upon the sustaining of the demurrer, could have filed an amended petition in the cause, setting up the facts relied on as justifying

the reformation of the contract of insurance, and praying for appropriate relief. The issue thus made would be equitable, to be heard and determined by the court as a court of equity; but this would have been entirely proper under the state practice. Thus in *Nowlin v. Pyne*, 47 Iowa, 293, which was commenced as an action at law upon a written contract, a demurrer was interposed to the action; and after the decision thereon an answer was filed, setting forth grounds for the reformation of the written contract, and, this answer being treated as a cross-petition in equity, the court below reformed the contract, and decided the cause upon the terms of such reformed contract; and upon appeal the supreme court affirmed the decision. In *McTucker v. Taggart*, 29 Iowa, 478, the action was commenced at law upon the covenant as a deed. The defendant averred that there was a mistake in the deed, and prayed its reformation. The cause was transferred to the chancery docket, heard upon the evidence, and a decree entered reforming the deed. Upon appeal the supreme court reversed the case on the facts, but sustained the practice followed in presenting the issue. In *Habitzel v. Latham*, 35 Iowa, 550, it appears that the action was at law, to recover against the defendants as stockholders in an insurance company. The defendants filed a cross-bill, making the insurance company a party thereto, as well as the plaintiffs, and charged collusion between them, setting up various facts showing the need for equitable interference, and asked that the cause be transferred to the equity docket, and that plaintiff's action at law be stayed. The court appointed a receiver, as asked in the cross-bill, and granted an order staying the plaintiff's action at law. Upon appeal the supreme court affirmed the action of the trial court. It is hardly necessary to cite further authorities for the purpose of showing that, under the provisions of the Code of Iowa, the courts of the state have full power, when an action at law is brought, and it appears that cause exists for reforming the written contract sued on, or when for any good reason it is necessary to hear and determine equitable issues, to allow a proper amendment to the pleadings to be filed, and to hear and determine such equitable issues, and in the mean time to stay the hearing of the action at law. The act of congress assimilating the practice in law actions in the United States courts to that obtaining in the state courts requires that the courts of the United States shall follow the state rules, as near as may be. Owing to the rule in the United States courts that matters cognizable in equity only cannot be heard and determined in an action at law, but that equitable relief can be had only upon a proper proceeding brought in the court of equity, it was impossible for the court to permit an amendment to be filed upon the ruling on the demurrer, setting up the grounds alleged to exist for the reformation of the contract. Could this practice have been permitted, then, upon the filing of the amendment, no final judgment could have been rendered upon the demurrer, but the issue of law would remain undetermined until action had been had upon the equitable issue touching the reformation of the contract. Under these circumstances, the court, following the rule of the state practice as nearly as could be done, stayed the law action for the purpose of permitting the

plaintiffs to file a bill in equity for the reformation of the written contract. In so doing, the spirit of the state practice was observed and enforced, and the difference in mode is one of mere form, due to the existence of the rule of this court forbidding the admixture of legal and equitable proceedings in one cause; if upon the proceedings in equity it is held that the policy sued on should be reformed, then this court can permit an amendment to the petition to be made setting forth the reformation of the policy, and its terms as reformed; and, this being done, then, under section 2654, the defendant cannot claim final judgment on the demurrer, because the amendment will have obviated the objection to the petition as originally brought. The question is not, as is argued by defendant's counsel, dependent upon the character of the judgment which a court of law is authorized to enter upon the decision of a demurrer, but upon the power of the court to permit an amendment to be made, which will preclude the entry of a final judgment on the demurrer. There can be no question that under the provisions of the Code of Iowa the power to allow the filing of an amendment exists, and that the time within which such amendment shall be filed is within the discretion of the court, to be exercised with due regard the facts of the particular case. So far, therefore, as the present motion is based upon the ground of lack of power to make the order continuing the cause for the purpose of enabling plaintiffs to procure the reformation of the policy sued on, if the facts justify it, and, when reformed, to amend the petition in the present cause by declaring on the policy as reformed, the same must be overruled.

Counsel further argue that, granting the right to make the order complained of to exist, the order was improvidently and improperly made in this case, for the reason that the policy contains a provision that in case of loss no suit or action can be maintained thereon unless brought within six months after the happening of the loss, and that the action of the court may deprive the company of the benefit of this provision, which the court has not the right to do. The theory of the defendant's counsel is that the court should, upon the hearing of the demurrer, have rendered a final judgment dismissing the action, and that then, when the bill was filed for the reformation of the contract, this limitation could have been pleaded in bar of the proceeding in equity, and, if not held a bar to that suit, it could be pleaded in bar of the action based upon the reformed contract. Counsel, in their argument, assume that if the attention of the court had been called to this provision of the policy at the time the order complained of was made the court would have refused to make the order, and would have given judgment on the demurrer, so as to have enabled the defendant to avail itself of this limitation. This assumption is ill founded. The existence of the limitation referred to was one of the reasons why the order was made that is now sought to be set aside. The action on the policy was brought before the expiration of the six months; being commenced in the district court of Benton county. It was removed to this court by the defendant in October, 1884, more than a year after the occurrence of the fire. Had the cause remained

in the state court, as already pointed out, the plaintiffs could have amended the petition, setting up the grounds for equitable relief, and thus no defense could have been made based upon the limitation in the policy. Having removed the cause into this court, the defendant has no ground for complaint for that the court has continued the action at law, for the purpose of enabling the plaintiffs to reform the policy of insurance, and thus, if the facts justify, complete their evidence needed to sustain the action at law. In principle, there is no difference between this action on the part of the court, and in granting a continuance to enable plaintiffs to procure the testimony of witnesses residing at a distance. Courts of law have undoubtedly the right to grant continuance for the purpose of enabling either party to properly prepare for trial, and this right exists, whether the time is needed to procure the testimony of absent witnesses, or to procure documentary evidence, or to supply, by the aid of a court of equity, written evidence in cases wherein by the rules of law evidence in that form is necessary to the maintenance of the parties' rights. By the bringing of the action on the policy, within the six months, and the subsequent proceedings thereon, the defendant has been duly notified that a claim upon the contract of insurance was asserted against it, and has received notice of the happening of the fire, of the amount of the loss, and of all the other facts necessary to enable the defendant to protect its rights in the premises. The suggestion is made that by the lapse of time caused by awaiting the outcome of the proceedings in equity for the reformation of the contract, the defendant may be deprived of the testimony of important witnesses. The action, however, is pending, and it is within the power of defendant to take the testimony of all of its witnesses and thus perpetuate the same. This danger of loss of testimony is no other than occurs in all instances wherein a cause is continued from one term to another, and it is evident that it did not greatly impress the defendant, when it delayed the trial of the case, by removing the same from the state to the federal court. If the plaintiffs do not promptly prepare the cause in equity for trial, the remedy is not in attacking the order made allowing the bill to be filed, but by forcing the equity cause to a hearing, or perhaps by having the court set down the case at law for further proceedings. The plaintiffs must use due diligence in preparing themselves for trial, or otherwise the cause may be brought to a hearing. The motion now presented is overruled.

LEE v. SIMPSON.

(Circuit Court, D. South Carolina. December 18, 1888.)

1. EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

A fund was given to a trustee for the separate use of a married woman for her life, with power of appointment in her by will, in default thereof to her child in fee. It was used by her husband, who was substituted as trustee, in purchasing real estate, he adding his own money, taking title to himself as trustee to these uses. The wife died. Her child died in her life-time, leaving Isabella, an infant, her heir at law. The trustee afterwards died, leaving the property to A., in trust to convey it to the state of South Carolina. To a bill filed in behalf of Isabella, alleging default in the exercise of the power, and claiming the property from A. with an account of the rents and profits, A. demurred on the ground that she had a plain, adequate, and complete remedy at law. Demurrer overruled.

2. TRUSTS—EXECUTED USE.

In this case the use was not executed upon the death of the married woman if she failed to exercise the power of appointment, but the legal estate remained in the trustee, and his devisee, a volunteer, took it and the property bound by the trust.

3. INJUNCTION—RIGHTS PROTECTED.

The devise to A. was upon trust to convey the property to the state of South Carolina upon certain conditions, ignoring the claim of complainant. The devisee, after this bill was filed and subpoena served, addressed a letter to the general assembly of South Carolina asking its acceptance of the property, and of the conditions annexed to it. The general assembly at once put an act on its passage for this purpose. *Held*, that the right of complainant to assert her claims in this court was imperiled, and an interlocutory injunction was issued.

4. SAME—AGAINST CONVEYANCE TO STATE.

When a defendant *pendente lite* in a circuit court of the United States seeks to convey the land, the subject of controversy, to a state, he will be restrained by injunction.

(Syllabus by the Court.)

In Equity. On motion for preliminary injunction.

Bill by Isabella Lee, an infant, by *prochein ami*, against Richard W. Simpson.

Le Roy F. Youmans and *James P. Carey*, for complainant.

Wells & Orr and *Smythe & Lee*, for defendant.

SIMONTON, J. This is a motion for a preliminary injunction. It comes up on bill, answer, affidavits, with exhibits. From these it appears that Mrs. Floride Calhoun, the grandmother of the mother of the complainant, left in force a last will and testament. That in clauses of this will she gave to Edward Noble, as trustee, a fund then invested in the bond of her son, Andrew P. Calhoun, secured by a mortgage of Fort Hill plantation, in Oconee county, and certain slaves. The purpose of the trust was that the fund be held for the sole and separate use of Mrs. Anna M. Clemson, for her natural life, with a power of appointment thereof by a last will and testament, as she pleases; and, in default of such appointment, to her daughter, of whom the complainant is the only child. That proceedings were taken in the life-time of Mrs. Calhoun to foreclose this mortgage. These proceedings were not consummated until after her death. At the sale for foreclosure the plantation of Fort

Hill was purchased by Thomas G. Clemson, who had in the mean time been substituted as trustee in lieu of Noble, and a conveyance thereof was made to him as such trustee under the last will and testament of Mrs. Floride Calhoun. Complainant alleges that the purchase money was paid by a receipt for Mrs. Clemson's share in the bond. Defendant avers that this share was supplemented by moneys of Mr. Clemson to the extent of some \$6,000. Mrs. Clemson died in 1875, some years after this conveyance, leaving, it is said, a last will and testament. Complainant charges that she did not execute the power of appointment by reason whereof the property devolves on her. Thomas G. Clemson, so being in possession as trustee of his wife, remained in possession of Fort Hill after her death, continuously until his own death, in 1888. In his answer the defendant avers that Clemson left a last will and testament, with a codicil, wherein he was named as executor, and whereby the Fort Hill property was devised to him upon certain trusts. In the exhibit is his letter to the general assembly, and copy of this document, wherein it appears that he was the devisee in fee of this Fort Hill plantation, and that the trust was to execute a conveyance thereof to the state of South Carolina, upon the acceptance of the gift thereof on certain conditions by the said state. On the 4th December, 1888, the defendant sent in to the general assembly of South Carolina, then in session, his said letter, accompanied by a copy of the said will, and in it asked the acceptance of this property thus given, on behalf of the state. This bill was filed on 26th November, 1888, and subpoena was served on defendant on 28th November, 1888. The motion is for a preliminary injunction, based on this letter of the defendant and the action of the general assembly thereupon. One house has passed the bill accepting the gift, and the bill is now on the calendar of the other house, awaiting early consideration. The general assembly proposes to adjourn at a not distant day.

As we have seen, the defendant has answered. But in his answer he makes defenses properly made by demurrer, and craves the same benefit thereof as if he had formally demurred. We must therefore consider them with the other grounds of defense in the answer, and not pass on the bill alone. The demurrer is to the jurisdiction,—that the complainant has a plain, adequate, and complete remedy at law. While it is true that in deciding upon motions for preliminary injunctions the courts must provide for the preservation of property or rights *in statu quo* without expressing, and, indeed, without having the means of forming, an opinion as to such rights, (1 High, Inj. § 5; *Railroad Co. v. Junction Co.*, 22 Eng. Ch. 602,) yet, when the jurisdiction of the court is challenged, that question must be met and decided. The position taken by the defendant is this: Complainant alleges that she is the owner in fee of this plantation—Fort Hill—under the will of Mrs. Calhoun. The defendant claims the fee under the will of Clemson. It is simply a question of title, cognizable by a court of law. In such an action a judgment can be had for the rents and profits. There is no occasion and no room for the peculiar jurisdiction of equity. The will of Mrs. Calhoun impressed with a trust the fund afterwards invested in Fort Hill. Of

this trust Clemson became the trustee, and so remained, certainly up to the death of his wife. After her death he continued in possession. Did his relation to the property change at the death of his wife? The complainant charges that he held the property in trust for his wife for life, with a power of appointment in her at her pleasure by will, and, in default thereof, to the limitations of Mrs. Calhoun's will; and that there was a default in the exercise of the power; that thus the legal estate remained in him, subject to these limitations. There is nothing before the court going to show that Clemson ever disavowed this trust, or that he gave any notice of his holding in his own or in any adverse right. If there was, it could not avail as against complainant, then and now an infant. Nor is there any place here for an executed use, devolving the legal title on the complainant. The property Fort Hill was purchased by Clemson at the master's sale. In paying the purchase money, as defendant claims, a part of it only was paid by the money provided under Mrs. Calhoun's will. The remainder was supplemented by himself out of his own funds. The conveyance to him was as trustee for Mrs. Clemson under the last will and testament and codicil of Mrs. Calhoun. This was confirmed by the court. The legal title was thus fixed in him, and could not pass out of him but by his deed or will. He made no such deed in his life-time. By his will he devised the property to the defendant, a volunteer, and so charged with all the equities with which his testator held it. The legal title being thus in Clemson, no suit at law could have been maintained against him for possession during his life. Nor can such suit be maintained at law against the defendant, his devisee of the legal estate. Whatever may be the final conclusion of the court on this point, the above reasons are sufficient to prevent the dismissal of this bill, or the refusal of this motion on the ground of a want of jurisdiction.

Do the circumstances of the case warrant a preliminary injunction? The defendant, as we have seen, was served with subpoena in this cause on 28th November, 1888. The bill gave him notice of the claim of complainant, and her prayer for an injunction against him. On the 4th December, 1888, he addressed his letter to the general assembly of the state of South Carolina. This, with the document accompanying it, informed the general assembly that he was the devisee in fee for the Fort Hill plantation, and that he had the right to convey it to the state of South Carolina upon compliance by the state with certain conditions therein stated. Thereupon he requested the general assembly to accept the property thus "donated for and in behalf of the state." Upon receipt of this letter, both houses, as has been stated, took action, and that promptly Bills were introduced into both houses accepting the gift. In each bill in each house is this section as section 1:

"Section 1. That the state of South Carolina hereby expressly declares that it accepts the devise and bequest of Thomas G. Clemson, subject to the terms and conditions set forth in his last will and testament, and that the treasurer of the state be, and is hereby, authorized and empowered to receive and securely hold the said property, both real and personal, and to execute all nec-

essary papers and receipts therefor so soon as the said executor shall convey and transfer the said devise and bequest to the state, as aforesaid."

This bill has passed one house. It is under consideration, with every prospect of its passage, in the other. It may very soon—in a day or two—become a law. If it does become a law, the property will be taken out of the jurisdiction of this court. No process can make the state of South Carolina a party to this suit. It can have no jurisdiction over the state in a civil action, except with her consent. So far as plaintiff's right to recover this plantation is concerned, if she has such a right, it will be irretrievably lost if the legal title be conveyed to the state. It is idle to say that the state will recognize and accede to the decision of this court if it establish any rights in complainant. Courts of justice enforce their decrees by mandates whose sanction is the court. No decree or mandate can be entered or issued obedience to which depends upon the will or courtesy of the party against whom it may be made. Without deciding, so as to commit the court, any question of right or property made in the papers submitted, and solely with the purpose of preserving the *status quo*, this motion will be granted. There is a principle which governs nearly all judges on applications for preliminary injunctions governing me. When the danger or injury threatened is of a character which cannot be easily remedied if the injunction be refused, and there is no doubt that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. *U. S. v. Duluth*, 1 Dill. 469, (Mr. Justice MILLER.)

The complainant has brought her action against the defendant, not as executor, but in his personal character. He is devisee of the Fort Hill plantation as well as executor. As such devisee he takes the legal estate, charged with the equities, but not with the defaults, of his testator. If there be any account for the rents and profits received by Clemson in his life-time, for such default R. W. Simpson, executor, *qua* executor, is liable; not R. W. Simpson, devisee. He takes the property, if he takes it, with notice of the trust, responsible only for his own enjoyment of the rents and profits. For the same reason, the defendant not being a party as executor, these proceedings cannot affect him so far as personalty in his hands to be administered as executor is concerned. The injunction, therefore, must be confined to Fort Hill plantation.

This cause came to be heard on motion for a preliminary injunction upon the bill, answer, affidavits, and exhibits. After hearing the same and argument thereon, and upon due consideration thereof, it is ordered, adjudged, and decreed that a writ of injunction do issue to the defendant, Richard W. Simpson, enjoining and restraining him from executing and delivering any deed or deeds of conveyance of, or parting with the possession of, the Fort Hill plantation, as described in the pleadings of this case, to any person or persons, or to or for any uses, intents, and purposes whatsoever, especially to the state of South Carolina, or to any person or persons whomsoever in behalf of the said state. This order and writ to remain in force until the further order of this court.

COUPE *et al.* v. WEATHERHEAD *et al.*

(Circuit Court, D. Rhode Island. November 15, 1888.)

1. EQUITY—PRACTICE—MOTION TO DISMISS AFTER DECISION AND REFERENCE TO MASTER.

After a suit has been decided in favor of the complainant, and the cause referred to a master to take an account of damages, the court will not reverse its former decision and dismiss the bill, where the alleged errors concern only disputed questions of fact, and the defendants do not point out any clear mistake of law, or clear and decisive mistake of fact.

2. PATENTS FOR INVENTIONS—INFRINGEMENT—MEASURE OF DAMAGES.

In an account taken to ascertain the profit of using the Coupe machine for stretching raw hides whole, described in letters patent No. 213,323, it is proper to compare the profit of using this machine with that of the former machine used for that purpose, and not with that of machines which stretch hides after they have been soaked in salt and alum, or with hand labor, since a raw hide cannot be thoroughly stretched by hand.

In Equity. On motion to dismiss and on exceptions to master's report.

Action by William Coupe and others against George Weatherhead and others for an infringement of letters patent No. 213,323, issued March 18, 1879, to plaintiff Coupe.

Benj. F. Thurston, for complainants.

Walter B. Vincent, for defendants.

COLT, J. This case now comes before the court on motion to dismiss, and exceptions to the master's report. In 1883, upon a full hearing of the case before two judges, the court determined that the defendants infringed the first and third claims of the Coupe patent, No. 213,323, and the cause was sent to the master to take an account. 16 Fed. Rep. 673. The present motion to dismiss is founded upon the proposition that this court may, at this stage of the cause, if it discovers that it has made a mistake, reverse its former decision, and dismiss the bill. Without questioning the rule that a court may at any time correct a mistake while the case is within its control, yet, where a cause has been deliberately heard upon pleadings and proofs, and a decision reached, and the party has a right of appeal, before the court should reverse a former decision, it must be perfectly clear that an error was committed. In the present case I am unable to reach such a conclusion. The decision turned largely upon questions of fact, and the defendants now seek to have the same issues of fact which were decided against them reviewed again by this court. Clearly such a practice as this, if countenanced at all, should be most carefully guarded, and the defendants should show a clear mistake of law, or point out a clear and decisive mistake of fact, before the court should entertain at this stage of the case a motion to dismiss. In the present case I am not referred to any such mistake of law or fact, though I am aware that defendant's counsel insists that with respect to certain disputed questions of fact the additional evidence taken before the master shows that the court was in error in some of its original findings; but

this the defendants deny. For these reasons the motion to dismiss is denied.

The defendant's exceptions to the master's report are properly before the court at this time for determination. These exceptions are 18 in number, but only those will be noticed which I think raise material questions. The main questions before the master were, with what prior machine or method should a comparison be made with plaintiff's machine, in determining the amount of gains and profits; and what was the amount of the gains and profits to be accounted for as a result of such comparison? The patent in controversy was for an improved hide-stretching machine, and in estimating the gains and profits the master found that a comparison should be made with what was known as the old "dog-machine," and he found the amount of gains to be accounted for was \$15,412.82. The fourth exception raises the question of the correctness of the master in making comparison with the old dog-machine, the defendant contending that comparison should have been made with the old splitter-machine, or with hand labor. I think upon the whole record and evidence before him the master was correct in his finding. In view of the prior state of the art the old dog-machine was the only machine with which it was proper to make comparison. A comparison clearly should not have been made with stretching by hand, because I think the record shows, as found by the master, that a raw hide cannot be as thoroughly stretched by hand as by a machine. Bearing in mind the scope of the Coupe invention, that it was for a machine for stretching raw hides whole, previous to the hides being manufactured into dressed leather, it seems to me that the master was entirely right, under the decision of *Mowry v. Whitney*, 14 Wall. 620, in the conclusion he reached.

The invention relates to stretching raw hides, and not to hides subjected to a salt and alum bath, which has the effect of softening the hide, and therefore the master was right in refusing to allow, for the purpose of establishing gains and profits, a comparison to be made with hides subjected to a salt and alum bath, or with machines in which such hides are operated upon. This was made the subject-matter of the third exception. As for the fifth exception, I do not understand that the master ruled out all testimony tending to show that the respondents since the injunction have produced an equally good quality of raw hide leather by the use of old devices, and have received the same prices for their goods as heretofore, and therefore the exception is not well taken.

I do not deem it necessary to discuss the other exceptions in detail. Some of them are immaterial, but most of them turn upon questions of fact. Upon consideration I find no error in the master's findings. The motion to dismiss and exceptions must be overruled, and it is so ordered.

LOUIS SNYDERS' SONS Co. v. ARMSTRONG.

(Circuit Court, S. D. Ohio. October 19, 1888.)

BANKS AND BANKING—NATIONAL BANKS—INSOLVENCY—ACTIONS—SET-OFF.

On the failure of a national bank a depositor was indebted to it on 11 notes to the amount of \$5,000, and had on deposit some \$2,900. The receiver of the bank agreed that this sum should go as a set-off on the indebtedness, the depositor to pay the notes first coming due, and the deposit to be applied on the last-maturing notes. After paying the first two notes it was found that the others were in the hands of third parties, and the depositor was compelled to pay them, and filed a bill to authorize the receiver to refund the money paid under a mutual mistake. This bill was heard by the district judge of the Western district of Tennessee sitting in the circuit court of the Southern district of Ohio. *Held*, that the deposit should properly be set-off against the claim of the bank, and the depositor should recover the sum paid by him; but as the district judge of the Southern district of Ohio had held in an action between the same bank and a creditor, the circuit judge concurring therein, that the plea of set-off was not available, in order that there might not be different rules of set-off in the same court, in the case of the same insolvent, and as the case cannot be appealed, it will be remanded for reargument before the regular judges, who may in their discretion provide for a dissent of record, or do what may to them seem right in the premises.

In Equity.

Jordan & Jordan, for plaintiff.

W. B. Burnet and J. E. Bruce, for defendant.

HAMMOND, J. When the Fidelity National Bank became insolvent, on the 21st day of June, 1887, the defendant here, David Armstrong, was appointed its receiver, on the 27th day of June, 1887, and took possession of its assets, as required by law, under the direction of the comptroller of the currency. Rev. St. U. S. § 5234; Act 1876, c. 156; 1 Supp. Rev. St. 216; 19 St. 63. At that time the petitioner had to its credit as a depositor the sum of \$2,828.29, taking no notice of disputed items arising out of protested drafts paid by the company, which were eliminated from this controversy by rulings made at the hearing. This balance on deposit arose out of its daily dealings with the bank, at which it kept an account, depositing from time to time both money and securities for collection on its account with the bank. It also at that date had procured discounts from the bank on 11 promissory notes for \$5,000 each, maturing at short dates from July to October next ensuing. The petitioner and the receiver both believed that all these notes were then held by the bank, but in fact all but the two earliest, maturing July 23d and July 29th, respectively, had been sent away, and used in the operations of the bank officials immediately preceding the failure, for which some of them are now enduring imprisonment under criminal convictions had in this court. The petitioner and the receiver agreed that the deposit should go as a set-off on this indebtedness, but at his request the petitioner agreed to take the credit on the last of the notes, to fall due in October, instead of the first, maturing July 23d, as aforesaid. Hence the company paid to the receiver that note and the next, maturing July

29th; and to its surprise, and that of the receiver, the subsequently maturing notes, nine in number, were found afterwards to be in the hands of outside holders, and the petitioner was compelled to pay them accordingly. The agreement as to the set-off could not therefore be perfected according to the intention of the parties, and this petition was filed to compel, or rather to authorize, the receiver to reinstate the petitioner by refunding to it the money paid under this mutual mistake of fact.

That the petitioner is entitled to this relief, if it be entitled to a set-off at all, there can be no kind of doubt. It is obvious, however, that the receiver, being a fiduciary agent, and a mere instrumentality for the administration of the assets, under the provisions of the law in that behalf cannot by his agreement add anything to the rights of petitioner in the matter of the set-off, which must be determined solely upon the legal right of the parties in the premises, and as if the receiver were suing at law upon the first of the notes, and the petitioner had pleaded the balance due it by way of set-off. If that plea would have availed, then well may the company claim here that the receiver shall be directed to refund to it the money and interest by a judgment to that effect, thereby correcting the mutual mistake of fact; or, if it has any standing in a court of equity, then according to the principles governing that court.

At the argument I had a very decided conviction that the claim of set-off should prevail, but being informed that another case involving the assets of this same insolvent bank was pending before the regular district judge, and wishing to be further advised, I have held this case, until now there has been filed the opinion of that learned judge, concurred in by the circuit judge, that the plea of set-off was not available, under the circumstances of that case. *Armstrong v. Scott*, 36 Fed. Rep. 63. The opinion cites also the earlier decision of the learned circuit judge in the case of *Bung Co. v. Armstrong*, 34 Fed. Rep. 94. The latter case, as reported, does not disclose the nature of the cross-demands which were asked to be set off in that case, and they were presumably not deposits, since as it seems to me that that class of debts due from the bank would not be of the character described in the opinion as wanting in that quality of mutuality which promotes the operation of the equitable doctrine of set-off, as contradistinguished from the right of set-off as at law, under the force of the statutes made in that behalf; for I can imagine no class of counter-claims where, to use the language of the learned circuit judge, "there has been mutual trust or understanding that an existing debt should be discharged by a credit given upon the ground of such debt," or "a knowledge on both sides of an existing debt due to one party, and a credit by the other party founded on and trusting to such debt as a means of discharging it," more clearly exhibited than in that class arising out of the dealings between a banker and his depositor. The petitioner here, who deposited the notes, bills, and other securities for collection on its account in this bank, surely expected to discharge whatever discounts it received by drawing upon that account; and all that mutual knowledge, trust, or understanding described by the circuit judge certainly exists in such a case, if it ever exists at all. The creditors in that

case were not entitled to their set-off as at law, because they had waived it by voluntary payment, which is not the case here, the payment having been made under a mutual mistake of fact, as before stated. Hence, standing alone, I should regard that case in favor of the equitable right of set-off in this case, which this court might allow by reason of its jurisdiction to correct the mistake of fact upon which the parties proceeded, and which of itself would be a sufficient foundation for the jurisdiction of a court of equity in granting any relief, either statutory or equitable, to which the petitioner would be entitled. But in his letter concurring in the opinion of Mr. District Judge SAGE, and in that opinion itself announcing such concurrence, there seems to be some reliance on a similarity between the two cases those learned judges have decided respectively.

The district judge in *Armstrong v. Scott*, *supra*, concedes, as I understand it, that the insolvency of a debtor, under the general doctrine of equitable set-off, admits to the privilege of set-off debts that were not matured at the date of insolvency, and such is unquestionably the law, as shown by the citations in the opinion, and numerous other authorities cited in the briefs of counsel now before me. Ordinarily, of course, a debt not due cannot be set off against one already due and immediately payable, for the obvious reason that this would be to change the contract, and advance the day of payment. Thus, if the petitioner here had demanded payment by the bank of its deposit, payable on call, the bank could not have said, "We have your notes which will mature in the near future, and we will apply this deposit to their payment;" but if the petitioner became insolvent the bank could clearly claim that privilege as against other creditors, in any court of equity, unless I greatly misunderstand the authorities; and most certainly when the conditions mentioned by Mr. Circuit Judge JACKSON, in *Bung Co. v. Armstrong*, *supra*, would exist. *Wat. Set-Off*, p. 149, § 128, and numerous cases cited in the briefs here, and in the *Scott Case*. On the other hand, also, if one has a demand against another presently payable, and that other has debts against him not yet due, and becomes insolvent, the party presently indebted may equitably claim the set-off upon the paper not yet due in the hands of his insolvent creditor, or his assignee in insolvency. *Id.* p. 151, § 131, and cases cited in the briefs. This principle arises out of the fact of insolvency, *ipso facto*, and finds the highest development in all of our insolvency and bankruptcy statutes, particularly the late bankruptcy act of the United States, where the very best judicial and legislative thought upon this subject finds expression in its provisions and the decisions concerning the subject of set-off, express provision being made for a just abatement of the amount in cases of debts not due. And it should be noted here that no legislation anywhere upon the subject of insolvency has so scrupulously preserved and insisted upon the most exact and perfect equality among creditors. Nor was it thought that the fact that by that act the United States, and the States, respectively, and certain other preferred creditors, had given to them the privileges of preference for their debts against the insolvent, in any

way militated against the equitable doctrine of set-off, there recognized and established. It was only out of the assets remaining after these just and equitable set-offs were allowed that the preferred and other creditors were to be paid. There the bankrupt was discharged, but here, in these bank insolvent systems, provision is made for a remedy against shareholders to make good any deficiency of assets, whether to pay preferred creditors or other claimants. To deny this right of set-off in cases like this is to exonerate the shareholders, or at least to force the depositor to a bill under section 2 of the act of June 30, 1876, (1 Supp. Rev. St. U. S. 217; 19 St. 63,) instead of leaving the receiver to proceed against them under section 1 of that act, or section 5234 of the Revised Statutes. This is adding to the injustice of the denial the expense and delay of litigation, which it is one of the objects of the statutes and law of set-off to reasonably avoid.

As stated in *Aldrich v. Campbell*, 4 Gray, 284, 285, cases like this are "not to be determined upon technical rules of set-off, but upon principles regulating the settlement of insolvent estates, whether of persons living or deceased." And, as said by the chancellor, in *Lindsay v. Jackson*, 2 Paige 581, 585: "Although equality among creditors is equity, here is a prior and a paramount equity which must be provided for; an equity which is distinctly recognized by the insolvent acts of this state, which have also declared the other principle, and enforced it to a certain extent." The case of *Bank v. Taylor*, 56 Pa. St. 14, or others like it, cited in *Armstrong v. Scott*, *supra*, does not affect this equity, because in that case the debt proposed to be set off was assigned to the debtor of the bank after the act of insolvency, which makes all the difference imaginable, for it is well settled that the rights of the parties become fixed at the moment and by the act of insolvency, and any subsequent change of the then situation, by assignment or other transfer, cuts off this equity of "insolvency set-off," if I may call it so. It is against this kind of transfer or assignment, and in declaration of this principle, that section 5242 of the United States Revised Statutes, prohibiting such transfers, is aimed. And it seems to me plain that that section is no more in the way of allowing a set-off where the note passed into the hands of the receiver before maturity, than where it passed to him after it became due. If it excludes one it should exclude both, for either would as much as the other disturb that equality of distribution among creditors, or that preference of certain claims, upon which the opinion insists. I take it, therefore, to be plainly manifest that the opinion in *Armstrong v. Scott*, *supra*, must be confined in the application of the fact, so much insisted upon, of the non-maturity of the note sought to be set off at the time it came to the possession of the receiver, to the ruling that the Ohio statutes of set-off do not apply, or allow a set-off, except when the debt was due; and that under those statutes the depositor cannot claim the right of equitable set-off as a statutory right or remedy, if one pleases to rely on that distinction; for it does not seem to me to be the intention of the opinion to deny the equitable doctrine of set-off which I have endeavored to outline as applicable to this case. But whether such was the intention or not,

or whether the ruling as to the Ohio statute be correct or not, I shall not here undertake to determine, because, comparatively with those learned judges, I am a stranger to the local laws of Ohio, and they can best decide them. I may properly say, however, and the parties are entitled to this expression of my opinion, that the petitioner is, in my judgment, entitled upon the general equity law to this set-off, unless the principle of that opinion has deprived it of it. That principle I understand to be this: that, notwithstanding this general equitable doctrine of set-off in insolvent estates, the acts of congress in relation to insolvent national banks have abrogated it, and, the statutes of Ohio not providing for it, but only providing for set-off where both debts are due, the set-off cannot be allowed. But I do not understand it to be decided that the general equitable doctrine does not prevail in Ohio; and, on the contrary, I understand that it does, and would be enforced but for the acts of congress in relation to national banks.

I regret exceedingly that I have been unable to reach the same conclusion as to the effect of the acts of congress, and that I cannot dispose of this case by giving judgment in accordance with the opinion of my learned brethren, for whose opinions I have unqualified respect. It seems to me that congress has the same power in providing a system of insolvency for the national banks to abrogate the statute of Ohio permitting a set-off where the two debts are due as it has to abrogate the general equitable law of set-off and insolvency where one of them is not yet mature, and that by the same implications the one is abrogated, if the other has been; wherefore, inasmuch as to allow a set-off under the statute between debts both of which are due would disturb that equality among creditors established by the act, and which belongs to all systems of insolvency, quite as effectually as to allow it in the case of a debt not due, both must go if the implication be well founded, and surely congress did not intend that effect. If it be said that the statutory right of set-off is protected, and its benefits secured, I can only ask by what words of this act of congress has it been done, or by what other act, any more than the general equitable right or remedy has been so secured? The national banking acts do not say anything specifically concerning the right or remedy of set-off anywhere, and congress has not, as in the bankruptcy acts, legislated upon the subject in these acts relating to national banks. Neither are they a complete and perfect system of insolvency like the bankruptcy act, or like our state systems of insolvency, respectively, legislatively declaring and defining the principles of insolvency that shall prevail in winding up the banks. Certain peculiar machinery is provided for winding them up, and some leading provisions are made, such as that note holders and deficiencies due the government shall be preferred claims, and transfers or assignments after the act of insolvency, or in contemplation thereof, shall be prohibited and avoided. Rev. St. §§ 5286, 5242. But it does seem to me a straining of these provisions to imply from them an intention to abrogate all the laws of set-off, legal and equitable, or any part of them. It does not seem to me a necessary implication from the language used; and without express legislative com-

mand I should hesitate to give to these provisions so formidable an effect as to nullify all the equities, and all statutory rights or remedies pertaining to insolvency prevailing in the states merely to exaggerate the equity of equality among creditors, which is, as I have shown, held elsewhere and generally to be subordinate to and not paramount to the equity of set-off in insolvency. It is my judgment that congress intends to leave this subject of set-off in insolvency administration to be regulated by the law of each state, statutory and general, so that the rules of insolvency should be as far as possible uniform in these cases with like insolvencies in that state, and that both the statutory and general law of set-off prevails in each state, unless it may be that in analogy to our general equity system the law of equitable set-off should be held to be uniform in all the states, and the law of legal set-off be regulated under the practice conformity act according to the procedure in each state; for it seems to be rather a matter of remedy than property right, though it is very close to the line, I should think, of that class of rights which are protected as property because they are in the nature of a trust that attaches by insolvency to the assets for a just distribution of them according to the recognized principles of the law of insolvency, everywhere prevailing; like, for example, the trusts relating to decedent's estates. At all events I should not hold our act of congress to have abrogated so important a principle of the administration of insolvent estates as the right of set-off, except upon the most explicit declaration to that effect, or the most imperative implication arising out of the necessities of construction that were equal to explicit enactment. I have not overlooked the position taken by counsel for the defendant, and the cases cited for it that treat the transaction as if it were an assignment of the undue notes to a stranger for value. The receiver is, in my judgment, under the acts of congress, only an insolvency assignee, representing in his relation to the depositors, on the subject of set-off, the bank itself.

But what should be done with this case, entertaining such a difference of opinion as that indicated? Unless the judges are very careful, we should, under the very absurd judicial system which we have, be led into many perplexities and frequent injustice by such differences. Clearly, we are not technically bound to follow each other in a line of precedents as authority, and yet just as clearly we must be careful not to confuse our judicial administration by unnecessary departure in judgment; and the statutory provision for certifying dissents has afforded relief against said departures in many instances, but this is not always available, as it is not here, in the present attitude of this case. But it would be intolerable to have differing rules of set-off in the same court, and in the same insolvent estate or bank; so if I were compelled to decide this case one way or the other, I should unquestionably yield my judgment to that of my brethren, and rule as they have ruled, for conformity's sake. But that case may go to the supreme court, while this cannot, and manifestly that would be unjust to this petitioner. Application has been made to me by letter to withhold judgment, if I should feel bound to rule as my brethren had ruled, and to permit petitioner to

dismiss voluntarily, so that it could seek the state courts, and through that avenue a proper construction of the acts of congress by the supreme court of the United States; but that is unnecessary, if not improper, and I shall dispose of the case by remanding it to the rules for rehearing and reargument before the regular judges, who may, in their discretion, either provide for a dissent of record permitting this case to go to the supreme court by that process, if the party desires, or they might hold up judgment here until the other case has been there decided on appeal, or do whatever to them may seem just and right in the premises. Let them decide it. So ordered.

YAZOO & M. V. R. Co. v. BOARD OF LEVEE COM'RS.

(Circuit Court, S. D. Mississippi. November 12, 1888.)

1. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—TAXATION—EXEMPTION.

Const. Miss. art. 12, §§ 18, 20, which provide that the property of all corporations for pecuniary profits shall be subject to taxation the same as the property of individuals, and that taxation shall be equal and uniform, apply to corporations wholly private, and do not prevent the grant of an exemption to a corporation of a *quasi* public character, which shall be irrepealable.

2. SAME.

The preamble of an act of the legislature creating a corporation declared the construction of a railroad through a certain part of the state to be a work of great public importance, and recited that the difficulties of construction had been such that no private company had been enabled to establish it. The act then created the corporation for the construction of the road, and "to make certain in advance of such investment, and as an inducement therefor, the taxes and burdens which" the state would impose thereon, granted an exemption from all taxes for a certain term of years. *Held*, that the exemption was irrepealable.

3. SAME—POLICE POWER—LEVEE TAXES.

The charter having exempted the road from all taxation by cities and towns, a levee tax, assessed by a levee district under authority of the legislature, is void, as violating the obligation of the contract. The levee tax is not an exercise of the police power of the state.

4. TAXATION—EXEMPTION—COMMENCEMENT OF PERIOD.

The charter providing that the company "shall be exempt from taxation for a term of twenty years from the completion of said road to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act," the exemption does not begin until the road is completed to the river.

In Equity. Bill for injunction.

Bill for injunction by the Yazoo & Mississippi Valley Railroad Company against the board of levee commissioners, to restrain the collection of certain taxes on plaintiff's property.

W. P. & J. B. Harris, for complainant.

Mr. Calhoun, Mr. Green, and The Attorney General, for defendants.

HILL, J. The questions now to be decided arise upon defendant's demurrer to complainant's bill. The bill, in substance, alleges that the

complainant corporation was created by an act of the legislature of the state of Mississippi, approved February 17, 1882. The preamble to said act, as explanatory of its purpose, and section 8 of the act, relied upon for the relief prayed for in the bill, are as follows:

"Whereas, the construction of railroads to, in, through, and along the Mississippi river basin, and the Yazoo and Sunflower river basins, penetrating these and other alluvial lands in this state west of the Chicago, St. Louis, and New Orleans Railroad, and connecting them by railroads and branches with other railroads, west, east, north, and south, is deemed and hereby declared to be a work of great public importance, and, in strict accordance with the true policy and interest of this state, should be encouraged by legislative sanction and liberality; and whereas, the physical difficulties of constructing and maintaining railroads to, across, along, or within either the Mississippi, Sunflower, Deer Creek, or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country."

"Sec. 8. Be it further enacted that, in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this state will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances, and all its property in this state necessary or incident to the full exercise of all the powers herein granted, not to include compresses and oil-mills, shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond 25 years from the date of the approval of this act; and, when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this state. All of said taxes to which the property of said company may be subject in this state, whether for county or state, shall be collected by the treasurer of this state, and paid into the state treasury, to be dealt with as the legislature may direct; but said company shall be exempt from taxation by cities and towns."

The bill further alleges that by an act of the legislature of this state, approved February 28, 1884, that the board of levee commissioners for the Yazoo and Mississippi delta was incorporated, which act, among other things, by the fourteenth section provides as follows:

"That, for the purpose of building and maintaining the levees, the property of all railroad companies and other corporations, of every kind, real and personal, within the levee district, shall be taxed like that of individuals, any exemption in the charter of such railroad companies notwithstanding; and said *ad valorem* tax of 13 mills and 9 mills is hereby levied and assessed on all property of such railroad companies, and the tax collectors of the counties, respectively, shall collect and pay said tax to the levee board."

—with other provisions, not necessary to be stated in this opinion. The bill further alleges that an act was passed by the legislature of this state, approved April 3, 1888, which provides that—

"Every railroad that has failed to pay taxes for any year, not being exempt by law or its charter from taxation, shall be assessed and pay *ad valorem* tax as hereinafter provided, unless within sixty days after the passage of this act it shall pay all taxes for which it is liable according to its charter, or the privilege tax for which it was liable as follows: A standard or broad gauge road,

for the years prior to 1884, \$80 per mile; for 1884, \$100 per mile, and for 1886 and 1887, \$125 per mile."

The bill further avers that the tax collectors within the levee district have proceeded to assess the taxes on complainant's railroad, in pursuance to the provisions of said act, for the years 1885, 1886, and 1887, and will enforce payment thereof unless restrained by this court. The bill avers that by the provisions of section 8 of the act of 1882 said railroad and all the property connected with it is exempt from this taxation, and will be for 20 years from the completion of said road to the Mississippi river, not, however, to exceed 25 years from the passage of said act.

The defendants interpose their demurrer to the allegations and prayer of the bill, and assign as causes of demurrer the following: (1) There is no ground alleged giving this court jurisdiction of the matters charged. (2) This court has no jurisdiction of the matters charged. (3) There is no equity on the face of the bill. (4) Complainants charter, as set forth in the bill, does not exempt from levee taxes, and, if it did, the contingency upon which the exemption is based has not occurred; that is, the completion of the railroad to the Mississippi river. (5) That if said charter on its face does exempt from levee taxes, it could not contract away the powers of subsequent legislatures to impose such taxes, which they have done, as shown by the bill. Such power would be in conflict with sections 13 and 20 of article 12 of the constitution of the state of Mississippi.¹ (6) That said sections of the constitution of this state were construed by the supreme court of the state before the complainant's charter was granted and accepted, and became a part of it. (7) That no question arises in this case upon the inviolability of contracts under the constitution of the United States, which has reference to valid contracts, not void contracts. (8) That the tax imposed is a local tax, made under the police power of the legislature.

The first question presented by the demurrer is as to the jurisdiction of this court to maintain this cause, both parties being citizens of the state, as shown by the bill. The solution of this question depends upon whether or not the exemption from taxation provided in the charter is a contract, within the meaning of the tenth section, article 1, of the constitution of the United States, which prohibits any state from passing any law impairing the obligations of contracts. If it is, then it is clear that the act of February 28, 1887, imposing the tax to raise money for the purpose of building and maintaining levees, is repugnant to this provision of the constitution of the United States; and that, if the exemption claimed by the bill is and was in force when the taxes sought to be enjoined were assessed and threatened to be enforced, such proceeding is in contravention of this clause of section 10 of article 1 of the constitution of the United States. The act of the legislature granting the exemp-

¹Which sections are as follows:

"Sec. 13. The property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals."

"Sec. 20. Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

tion must have been a valid act under the constitution and laws of the state, as this provision was not intended to protect illegal or void contracts.

That the legislature may pass laws exempting property from taxation for a limited time was decided by the supreme court of this state in the case of *Mississippi Mills v. Cook*, 56 Miss. 40; and by all the judges, that the thirteenth and twentieth sections of the twelfth article of the constitution of this state leaves it discretionary with the legislature to impose taxation on property belonging to corporations for pecuniary profits, or not. A majority of the court held that the exemption given by one legislature might be repealed by another, and the property subject to taxation at the will of the legislature. Judge CHALMERS, in a dissenting opinion, held otherwise, and that the legislature might grant an exemption from taxation, which formed a contract irrepealable by the legislature, which all the judges agreed might be done but for the thirteenth and twentieth sections of article 12 of the constitution of the state. The corporation in the case of *Mississippi Mills v. Cook* was a manufacturing corporation, in which the public had no special interest, and was created solely for the pecuniary profit of stockholders of the corporation. I am of opinion that a fair construction of these two sections of the constitution makes their provisions applicable to corporations in which the public has no special interest, such as banks, manufacturing companies, and other corporations, created solely for the profit of its stockholders or owners, and not to those of a *quasi* public character, necessary as arteries of commerce and the public convenience, the development of the resources of the state, and the enhancement of the value of the property of others, and consequently a proportionate relief from the burden of taxation of all the tax-payers of this state. Railroads are common carriers, and declared to be public highways, are made post roads, and owe various duties to the public not imposed on other corporations. For this conclusion, I must admit, I have no adjudicated authority upon which to rely, and only give it as my own conclusion, and as a reason for not feeling bound by the decision of the majority of the court in the case of *Mississippi Mills v. Cook*; otherwise I would feel bound by that construction given the constitution of the state. If I am correct in making this distinction between the corporations embraced in these sections of the constitution and those of a *quasi* public character, then, from the preamble and the provisions of the act incorporating the complainant corporation, there is no difficulty in determining that it belongs to the *quasi* public class; there is no difficulty in determining the understanding and purpose of the incorporators on the one side and the legislature, representing the sovereignty of the state, on the other. There was a large scope of country of the richest lands in the state that lay inaccessible to the markets and the balance of the world, and, with few exceptions, left as an unoccupied wilderness. To give to the owners of these lands an outlet to the world, and a market for the immense crops of cotton and other products of these rich lands, and for the immense forests of timber growing on them and necessary to be taken off the land to reduce it to cultivation, and to enhance the value of the lands, to in-

crease every species of property to be used in their development, thereby diminishing the burdens of taxation on the property of other tax-payers of the state in proportion to the increased taxes to be derived from the anticipated increase of the property to be realized from the improvements, as well as to create these new arteries of commerce and transportation for person and property, and to convert these rich lands, then a wilderness, into the most productive fields, settled up by a numerous and thrifty population, and the other benefits the public were expected to derive from the facilities these new railroads would afford. It could not be expected that these new railroads would earn much, if anything, by way of a return to those who would invest their money in the enterprise until the expected development of these new sources of wealth and commerce should be realized; hence this exemption from taxation was provided as an inducement for the investment. I therefore conclude that the exemption provided is a contract irrevocable under the constitution of the United States referred to.

It is insisted upon the part of the defendants that the eighth section of the charter does not embrace levee taxes, and, if it did mention them, that the levy of such taxes is an exercise of the police power of the state, which the legislature cannot contract away. I am unable to draw a distinction between a tax to build and maintain a levee and a tax levied by a town or city for the purpose of building bridges, or making other improvements for the benefit of the inhabitants of the town or city. And it is admitted by counsel for the defendants that the clause prohibiting towns and cities from imposing taxation on the company, its railroad, and other property connected with it, is a valid exemption. The charter provides an exemption from all taxation.

The most difficult point to be determined is as to the period of time at which the exemption commences, whether at the passage of the act or only from the time of the completion of the railroad or one of its branches to the Mississippi river. The act provides that the 20-years exemption shall extend for 20 years from the completion of the railroad to the Mississippi river, but not to extend beyond 25 years from the date of the approval of this act, after which time the property of the said railroad might be taxed at the same rate as other property in this state. It will be observed that the eighth section of the act under which the exemption is given fixes no point on the Mississippi river. The second section of the act provides that one of the lines, or a branch therefrom, shall reach the Mississippi river at or near a point opposite Arkansas City, if practicable, but this provision relates only to the practicability of reaching the Mississippi river at or nearly opposite Arkansas City. The completion of the railroad to any point on this river will entitle the complainant corporation to the exemption provided, but it must be completed to some point on this river to entitle it to the 20-years exemption. When that is done, the exemption will extend to all the railroads, and property connected with it, used in their construction and operation under the charter, including its stock. It is argued by the learned counsel for the complainant, with great earnestness and plausibility, that the

provision in the act that, after the exemption expires, the property may be taxed at the same rate imposed on other property in the state, is the exclusion of any taxation until that time, and that the exemption commenced with the approval of the act, not to extend beyond 25 years, and not longer than 20 years from the completion of the railroad to the Mississippi river. The only decision of the supreme court of the United States on this point to which I have been referred is the case of *Railroad Co. v. Demis*, 116 U. S. 665, 6 Sup. Ct. Rep. 625. In that case the exemption was for 10 years after the completion of the railroad within the state. Five of the judges held that the exemption commenced only from the completion of the road, while four of them held that it commenced from the passage of the act of incorporation. While this division in opinion would certainly very much weaken the force of a decision, if merely persuasive upon this court, yet, it being the judgment of the supreme court, it would not be safe to depart from it by a court bound by its decisions, as is this court. The learned counsel for the complainant argue that this case is not applicable to the case under consideration, and to sustain this position endeavor in this case to draw a distinction between the words "for ten years after" the completion of the road, and "twenty years from" the completion of the road. Though the distinction asked to be drawn is plausible, I am unable to adopt it. Had the language been "until twenty years after the road shall be completed to the Mississippi river, but not to continue more than twenty-five years after the approval of this act," there would have been no doubt about the exemption beginning with the approval of the act. It was doubtless understood, both by the legislature and the incorporators, that the road would be built to the Mississippi river as soon as practicable, and, if it was so built, that during its construction it and the property connected with it would have been exempt from taxation under the provision of section 608, Code 1880, which applies to all railroads during their construction. So I conclude that the exemption under the charter will not commence until the completion of the road to the Mississippi river, but that any portion of it not completed and not operated for profit is exempt under the provisions of the Code of 1880. It is pressed in argument by complainant's counsel that, if this be held to apply to this road, that it deprives it of the exemption granted other railroad companies by the same legislature, which gave 20 years' exemption from the passage of the acts chartering them. The answer to this argument is that it was not so provided in the charter, and that the failure to obtain the exemption provided for has arisen from the failure of the complainant to comply with its part of the contract in building the road to the Mississippi river, and hereby securing to the state and the public to be benefited the benefits constituting the consideration for the exemption. If the purpose is still to carry out the enterprise as was contemplated when the charter was granted, the exemption can be obtained in a reasonably short time by continuing the road to the Mississippi river, which, during its construction, will be exempt from taxation under the provisions of the Code. But the exemption provided in the charter did extend the exemption

for all the time necessary in the construction of the railroad or roads over and above that given the other roads or companies, as the exemption provided for them included the time of construction. This being a case that can be appealed to the supreme court, and being one that concerns the public, will be given an early hearing, when this decision can be reviewed. I deem it best for all parties to sustain the demurrer, and dismiss the case, so that an appeal can be taken at once.

AMES *et al.* v. AMES *et al.*

(Circuit Court, D. Minnesota. December 11, 1888.)

1. PARTNERSHIP—PARTNERSHIP PROPERTY.

At the formation of a partnership for carrying on the milling business the property in controversy was purchased, a small part of the price being paid in cash, and taken possession of, and used for the partnership business, and the balance of the price was paid out of the earnings of the mill, and a large amount of the profits expended in improvements thereon. There was no agreement between the partners by which the property was to become partnership property, and the title stood in the individual names of the partners, but in exact proportion to their respective interests in the partnership; and, upon the several readjustments and conveyances of interests in the partnership, deeds were given for proportionate interests in the property. *Held*, that the property was, as to creditors, partnership property, especially as under the laws of the state where the property was situated the proper mode of transferring title was to the individual partners.

2. SAME—FIRM AND INDIVIDUAL CREDITORS—SUPERIOR EQUITY.

One who has advanced money to enable one partner to purchase an interest of another, has no equity superior to that of the partnership creditors, though the advancement was made on the promise of the partner to secure him by mortgage, and at a time when there were no partnership debts.

In Equity. On final hearing on pleadings and proofs.

Bill by John T. Ames and others against Adelbert Ames and Benjamin F. Butler, to dissolve a partnership, and for an accounting, and for an injunction against attachment proceedings by Butler against the interest of Adelbert Ames in the partnership property.

Gordon E. Cole and Young & Lightner, for complainants.

M. R. Benton, for defendants.

BREWER, J. This case is submitted for final hearing on the pleadings and proofs. The single question for present determination is whether certain mill property is to be treated as partnership or the individual property of the three persons who formed the late partnership of "Jesse Ames' Sons." A brief statement of the general history of this mill property for the last quarter of a century will pave the way to a clear understanding of the question, as it is now presented, and the considerations which must necessarily affect and determine the answer thereto. In 1864, the property was first purchased by the Ames family. At that time a partnership was formed by the name of "Jesse Ames & Co.," for

the purpose of carrying on the milling business, and the milling property in question was purchased at the agreed price of \$25,000. Adelbert Ames put in \$2,000. Jesse Ames, his father, a farm at Cannon City, some cash, a thousand or two bushels of wheat, and a span of horses; leaving a balance remaining on mortgage, which was subsequently paid out of the earnings of the mill. John T. Ames, a son of Jesse, and brother of Adelbert, had no money to put into the business, but, as he testifies, was to have a salary and a portion of the earnings until he had acquired an interest. This partnership of Jesse Ames & Co. took possession of the mill property, and ran the mill, and out of the earnings paid the mortgage given to the original vendor. During this time Adelbert Ames was away in the army, and the business of the partnership was carried on by his father and brother. In 1867 there was a re-arrangement. Deeds were exchanged, by which a one-quarter undivided interest in the mill property was vested in Adelbert, one-eighth in John T., while Jesse Ames, the father, retained five-eighths; and a new firm was formed by the name of "Jesse Ames & Sons." Subsequently Jesse Ames conveyed a further one-sixteenth to John T. Ames. There was no partnership contract reduced to writing, and the interests of the partners in the partnership were the same as their interests in the mill property. The milling business was very prosperous. Large profits were made, and something like \$100,000 expended in improving this property. This continued until 1876, at which time the legal title to the mill property stood nine-sixteenths in Jesse Ames, three-sixteenths in John T. Ames, and four-sixteenths in Adelbert Ames. At that time a new arrangement was formed, by which one-half was conveyed by Jesse Ames to Adelbert Ames, giving him an undivided three-fourths interest; and one-sixteenth to John Hanley, who had been theretofore the foreman in the mill; and a new firm, by the style of "Jesse Ames' Sons," was organized. Adelbert Ames' purchase from his father in 1876 of the undivided half was for the sum of forty thousand dollars, of which twenty-five thousand dollars was loaned to Adelbert by Gen. Butler, and the other fifteen thousand borrowed on the credit of Gen. Butler's indorsement of Adelbert's paper. After this new partnership was formed, the milling business ceased to be as profitable as it had theretofore been. The firm began to run behind, until, in 1886, it was found impracticable to continue longer in business. In May, 1886, Gen. Butler commenced suit against Adelbert Ames to recover the \$25,000 loaned, less \$2,000 paid, and in that action attached his interest in the mill property. Thereupon the present complainants, the other partners of Adelbert, brought this action to dissolve the partnership, obtain an accounting, and also seeking to enjoin the further proceedings under that attachment of Gen. Butler, until the firm debts had been paid.

It is undisputed that the firm is insolvent, and that, even if the entire mill property be considered as partnership property, and sold for the satisfaction of the partnership debts, they will not all be paid; so that the contention of the present complainants is that Adelbert Ames' individual debt to Gen. Butler must be subordinated to the prior claims of

the partnership creditors; and that presents what, as I have stated, is the only question in this case,—whether the mill property was partnership or individual property. It is not pretended that there was any express contract between the partners by which this mill property was to become partnership property, nor can it be claimed that the mere fact that property is used by a partnership makes it partnership property. It is also true that from the first inception of the business, in 1864, and during the continuance of the three several partnerships, the title to the mill property stood in the individual names of the partners, and in exact proportion to their respective interests in the partnership. The contention of complainants is that there was an implied agreement between the partners that this mill property should be considered as partnership property, and that the course of business during the years of these several partnerships was such that creditors and others having dealings with the partnership had a right to assume that this mill property was partnership property, and extend credit to the partnership on the faith thereof. On the part of the defendants it is insisted that the mill property was individual property, as shown by the deeds, the legal title of the undivided interests being confessedly in the several partners; that there was neither an express nor implied agreement that it should be considered partnership property; that the title stood of record, and all parties were charged with notice of its exact position; and that defendant Butler, having advanced the money for the purchase by Adelbert Ames of the one-half interest conveyed to him in 1876, (that conveyance being made under a promise to execute a mortgage as security therefor,—a promise known to the other partners at the time of the purchase,—and a promise made at a time when there were no debts against the partnership, and therefore nothing to prevent one partner from incumbering his individual interest,) has a right in equity to insist that such interest shall be subjected to the payment of his individual debt in preference to any subsequently accruing partnership claims. It may be premised also, at the outset, that it is not easy to reconcile the various decisions rendered on the question whether property, the title to which stands in the names of individual partners, is to be considered in equity as partnership or individual property. I shall not attempt any review of the various cases cited by counsel. Some of them consider only the question, what rights will exist as to real estate standing in the name of individual partners, which in fact belongs to the partnership. Others discuss the question whether a parol agreement is sufficient to convert individual real estate into partnership property. Of course these cases throw no light upon the question before us; while others, which discuss the question as to what is necessary to show that real estate standing in the name of individual partners is to be treated as partnership property, rest their conclusion upon single or more facts not existing in this case, and which by those courts were deemed decisive of the question. These also furnish little help in the case at bar. There is truth in the observations of Judge FLANDRAU in the case of *Arnold v. Wainwright*, 6 Minn. 358, (Gil. 241,) as follows:

"The elementary writers do not furnish a very satisfactory solution of the question as to what character of agreement between the parties will work a conversion of lands into partnership stock. They agree that it may be accomplished by agreement, express or implied; and we think it is the necessary result of their views, as expressed in their text and the numerous cases cited by them, that the intention of the partners, to be ascertained from their acts or agreements, is to govern, and that no express agreement in writing is necessary."

And following the suggestions there made, it may be affirmed that no written agreement is necessary; that no parol express agreement, even, is necessary, for a court of equity to hold that real estate standing in the names of individual partners is partnership property, and it is enough if, from all the acts and conduct of the partners, the court can be satisfied that it was the thought and intent of the partners to treat it as partnership property. And that opens the door to the consideration of the facts in this case. While it is true that from the purchase in 1864 there were three partnerships, yet in all of them the Ames family had the sole or controlling interest, so that it would be fair to speak of this property during all these years as the Ames mill property. Now, while it is true that the absolute rights of the partners between themselves in this last partnership must be determined by the real agreement between the partners, irrespective of anything that took place in the prior partnerships, yet when, as conceded, there was no express agreement, the circumstances and relations of the prior partnerships very largely foreshadow and interpret the real intent and agreement of the present partners. Now, looking backward to the year 1864, it is evident that the property was bought for the business. Neither of the partners was in the milling business, or had any pecuniary interest in such business. They proposed to engage in such business, and bought this property therefor. The property was not purchased as an independent speculation, nor as an aid to a business already established, but it was purchased for the purpose of doing the milling business and employment therein. But a small cash payment was made, and the balance of the purchase money was paid out of the profits of the business. If you put out of sight the location of the legal title, and consider simply the other undisputed facts, that the Ames family purchased the mill property for the purpose of engaging in the milling business, paying largely therefor out of the profits of the business, the natural inference would be that the property belonged to the same partnership that conducted the business.

But it is said by counsel for defendants that the legal title was taken in the names of the individual partners; that the fact that the conveyances were so made indicates the intent to make the property individual, rather than partnership, property; and that, in the absence of an express agreement, in order to establish an implied agreement that this property, whose title was thus located in the individual partners, was to be partnership property, the facts shown must be such as to be necessarily inconsistent with the intent to leave the ownership where the title deeds put it. I cannot agree with counsel's view of the significance of the conveyances, and the location of the legal title. In the first place, the fact

that the legal title corresponded with the partnership interest, and was changed by conveyances as these interests changed, indicates that this property was all the while partnership property. Superadd to that the fact that in the transactions by which the partnership interests were changed and the title conveyed there never appear to have been any separate negotiations as to the business on the one hand and the real property on the other. There was never a transfer of a partnership interest without a corresponding and proportional conveyance of the real property, and there never was a trade for an interest in one independent of a transaction for a conveyance of a like interest in the other. This harmony of interests in the business and the ownership in the real estate, together with the singleness of the transactions by which the transfers of both were made, is very significant of the understanding and real agreement between the partners. More than that, unquestionably the true way to locate the legal title was in the names of the individual partners. A conveyance to a partnership, as such, while it would doubtless transfer the equitable, might not, at least, transfer the legal, title. In *Morrison v. Mendenhall*, 18 Minn. 232, (Gil. 212,) the court thus expresses itself:

"A conveyance of real estate, or of an interest therein, must run to some person, (a corporation being regarded in law as a person,) and a partnership, as such, not being a person, conveyances of real estate for the use and benefit of a partnership have usually and aptly been made to the individual partners jointly, as tenants in common. Colly. Partn. § 133 *et seq.* and notes; Pars. Partn. c. 41, § 2; *Dyer v. Clark*, 5 Metc. 562; *Howard v. Priest*, Id. 582. If, then, the mortgage in this case was taken for the use and benefit of the partnership, it was, in accordance with common usage, properly made to run to the individual partners as grantees."

And in *Tidd v. Rines*, 26 Minn. 201, 2 N. W. Rep. 497, may be found this language:

"As the legal title to real property can only be held by a person, or a corporate entity, which is deemed such in law, it follows that the conveyance in question vested no legal title or estate in the grantee therein named, because a partnership, as such, is not recognized in law as a person."

As, therefore, under the laws of Minnesota, a conveyance to the partnership was not the proper mode of transferring title, it would be strange if the conveyance to individual partners carried with it that significance and potency which counsel for defendants claim. On the contrary, it seems to me the rule is as heretofore indicated, that, in the absence of express agreement, no one matter is conclusive upon the question of intention; and that, from all the facts, the court is to deduce and determine the real intent of the partners.

I have already referred to the significance of the original purchase by the members of the Ames family; that it was a purchase for the purpose of commencing the business,—a business never before engaged in by the partners, and with that intent alone; that every change in partnership interest was accompanied by a corresponding change in the legal title; that no separate negotiations were had for the transfer of the interest in the partnership and the conveyance of the title, but the latter seems always to be accepted as a necessary result of the former. Beyond these

matters must also be noticed the large improvements, costing over \$100,000, made upon the property, and paid for out of the business. It is true, defendant claims that this appropriation of partnership funds to the improvement of the property is to be considered as a mere matter of dividends, and that it is entirely consistent with the idea of individual ownership. While it may be consistent with that idea, yet nothing was said about a dividend, and apparently a mere accumulation of the profits of the partnership business was expended in making the property more serviceable for partnership purposes, so that the more natural thought is that the firm was using its partnership profits to improve its partnership property. Again, when the books of the present partnership were opened, the following entry was made therein in reference to the mill property:

"NORTHFIELD FLOURING MILLS.

"Jesse Ames' Sons, to Mill property in Northfield, Minnesota, and improvements the old and new mills, \$1.00."

Thus it appears that the real property was entered upon the books of the firm as a part of the assets; and that this entry was known to the defendant Adelbert Ames, is, I think, very satisfactorily shown, and, while I do not place so much reliance as counsel for complainant upon the significance of this book-entry, yet it is in harmony with the purpose evidenced by the transactions heretofore noticed. Indeed, such an entry seems inconsistent with the idea of individual ownership of the real estate. As such it is testimony worthy of consideration. Beyond that, though of minor significance, are the insurance policies and tax receipts. I say, "minor significance," because, while some of them indicate partnership ownership of the property, they are not uniform in their language, and some, at least, are consistent with individual ownership. Furthermore, it is obvious that the property was known as the "Ames Mill Property," and that persons dealt with the firm and trusted it on the strength of its supposed ownership of the property. Of course, it may be said that all the parties are bound by what the record shows as to the legal title, but still, with the law of Minnesota such as it is in respect to conveyances to partnerships, the significance of this dealing and reliance upon the part of third parties is no trivial element. Furthermore, suits for damages for flowage, and proceedings in court, while perhaps consistent with individual ownership, are at least suggestive of, and point towards, partnership ownership. I refer to these matters only in a general way.

The testimony is voluminous, and it would be a waste of time and paper to detail all the facts and circumstances. The significant ones I have indicated, and in my mind they leave little doubt that from the inception of the purchase, in 1864, to the commencement of this suit it was the understanding of the partners that this real estate was part and parcel of the partnership property.

The other question remains, whether Gen. Butler has a right in equity to insist upon a preference in the matter of his claim by reason of the

fact of his advancing the money to pay for the purchase of the half interest conveyed in 1876 by Jesse Ames to Adelbert Ames. At first blush it appears plausible that, having put \$25,000 in on the promise of a mortgage, at a time when there were no partnership debts, he has an equity superior to that of partnership creditors; but a little reflection will make it clear that this claim is without foundation. It is not a case of a third party putting money into the partnership upon an agreement for mortgage security. Gen. Butler's money added nothing to the resources of the partnership. It was simply money used between one partner and another, to effect a change of interest. As between the firm and its creditors it meant nothing. Whether Jesse Ames or Adelbert Ames was partner was to them immaterial. They took nothing by the change in interest, hence their equities remain the same as though there had been no transfer from one partner to the other. Their rights and equities are the same, their claim upon the partnership property the same, whether one partner gives or sells a portion of his interest to another partner. I think the supposed equity does not exist. This disposes of this case, and a decree will be entered for complainants, as prayed for.

CHESMAN *et al.* v. SHREVE *et al.*

(Circuit Court, D. Colorado. December 13, 1888.)

1. MINES AND MINING—TRESPASSERS.

Parties who attempt to enter, beneath the surface, within the side lines of the lands of another, and to mine and take ore therefrom, are *prima facie* trespassers.

2. SAME—COURTS—FEDERAL JURISDICTION.

Where such entry is claimed to be made under the mining laws of the United States, and the right to enter turns upon the construction to be given to such laws, the case is within the jurisdiction of the United States circuit court.

3. INJUNCTION—PRELIMINARY—DISPUTED LEGAL TITLE—CONFLICTING AFFIDAVITS.

Where the affidavits are conflicting, a preliminary injunction will be issued against trespassers, leaving the question of the title to the property to be settled by a suit at law.

In Equity. On bill for injunction.

Application for injunction by Walter S. Cheesman and others against James A. Shreve and others to prevent trespass upon mining lands.

C. J. Hughes, Jr., for complainants.

B. F. Montgomery, for defendants.

BREWER, J. These defendants are entering beneath the surface, within the side lines of ground patented to complainants, and seeking to mine and take ore therefrom. *Prima facie* they are trespassers. They justify this entrance under authority of the laws of the United States, and especially section 2322 of the Revised Statutes, which give to the

owner of a vein, lode, or ledge, the top or apex of which lies within the surface lines of his own location, the right to follow that vein downward, outside of the side lines of his location, and into territory whose surface belongs to another. Involved in their claim is the question whether there is such a vein as is provided for in that section; a question as to the right of entrance, as affected by priority of location and the dip of the vein. These questions are presented, and, whatever may be the true answers thereto, it is obvious, from past judicial expressions, that they cannot be considered as mere sham, or pretended, but as real, substantial questions. Hence, as questions arising under the laws of the United States, they present a case cognizable by the court. *Mining Co. v. Larimer Co.*, 8 Fed. Rep. 724; *Starin v. New York*, 115 U. S. 248, 6 Sup. Ct. Rep. 28. As the defendants are entering within the side lines of complainant's property, *prima facie* they are trespassers; and where the affidavits, upon an application for a preliminary injunction, are conflicting, the rule is to preserve the possession as against such *prima facie* trespassers by a preliminary injunction, leaving the question of title to the property to be established by a suit at law. Temporary injunction will issue upon the giving of a bond in the sum of \$25,000, conditioned according to law.

SWIFT v. MEYERS *et al.*

(Circuit Court, D. Oregon. December 24, 1888.)

1. MORTGAGES—SUIT TO ENFORCE LIEN—SUMMONS—NOTICE.

A suit to enforce the lien of a mortgage is not one to recover money or damages only, and therefore the notice inserted in the summons must be according to the direction in subdivision 2, § 53, Comp. 1887.

2. SAME—JUDGMENT—OF STATE COURT—COLLATERAL ATTACK IN FEDERAL COURT.

The judgment of a state court may be collaterally questioned or attacked in a national court sitting in the same state, for a want of jurisdiction over the subject-matter or of notice to the defendant, the same as if it was a judgment of a court of another state.

3. SAME—SERVICE OF PROCESS—CONSTRUCTIVE SERVICE—PRESUMPTION.

A suit to enforce the lien of a mortgage by the sale of the property is in the nature of a proceeding *in rem*, and in case the mortgagor or his successor in interest is a non-resident, or not found, so that he cannot be personally served with process, in the state, the court may decree a sale of the property on such substituted or constructive service of process on the mortgagor as the legislature may provide; but in such case there is no presumption in favor of the jurisdiction of the court, and, unless the record shows a compliance in all essential particulars with the statute authorizing such service, its decree is null and void.

4. SAME.

A statute of Oregon (Comp. 1887, § 53) provides that if a defendant in a suit cannot be found, service of the summons may be made by delivering a copy of the same "to some person of the family, * * * at the dwelling-house or usual place of abode of the defendant." In a suit to enforce the lien of a mortgage on property in Linn county, the return of the sheriff showed that the defendant could not be found, and that a copy of the summons was delivered to a "member" of the family, "at his usual place of abode in said [Linn]

county," on which service the court gave a decree by default for the sale of the property under which the defendants claim. *Held*, that the service was invalid, and the decree of sale thereon null and void, because the return did not show that the substituted service of the summons was made at the defendant's usual place of abode in the state, in whatever county it might be, but only at his usual place of abode in Linn county.

5. SAME—RECORD—COLLATERAL ATTACK.

Semble, that the record of a court cannot be collaterally impeached or contradicted except by a suit in equity, brought for the purpose of setting aside a judgment, on the ground that in fact the court never acquired jurisdiction to give the same.

(*Syllabus by the Court.*)

At Law. Action to recover possession of real property.

W. Scott Beebe, for plaintiff.

Albert H. Tanner and *Charles E. Wolverton*, for defendants.

DEADY, J. This action is brought by the plaintiff, a citizen of California, against the defendants, citizens of Oregon, to recover 377.77 acres of land situate in Linn county, Or., exceeding in value \$6,000.

The case was tried by the court, without the intervention of a jury, upon the amended complaint, answer, and reply thereto, and a stipulation as to the facts.

From these it appears that on and prior to October 16, 1879, Philip Grigsby was the owner of the premises in question, subject to a mortgage thereon, given to the state commissioners for the management of the school fund, to secure the payment of \$4,500, with interest, theretofore borrowed by Grigsby from said commissioners; that on said date a suit theretofore brought by said commissioners against Grigsby to enforce the lien of said mortgage was pending in the state circuit court for said county, in which a summons had been issued, directed to said Grigsby, requiring him "to appear and answer the complaint" therein within the time specified, and notifying him that if he failed so to appear and answer "the plaintiff will apply to the court for the relief demanded" in the complaint; that said summons was returned by the sheriff of said county with the following certificate or proof of service annexed thereto: "I hereby certify that I have served the annexed summons in Linn county, Oregon, on the 16th day of October, 1879, on the therein named defendant, Philip Grigsby, he not being found, by leaving a copy thereof, * * * together with a copy of the complaint, * * * with Mary Backus, a member of the family, over the age of 14 years, at his usual place of abode in said county;" that thereafter said circuit court gave a decree in said case by default in favor of the plaintiffs therein, on which the interest of Grigsby in the premises was sold on execution, and the proceeds applied on the demand of the plaintiffs, and in discharge of said lien; that said sale was duly confirmed, and a conveyance of the premises made in pursuance thereof to the purchaser, J. W. Meyers, under whom the defendants claim; and that the plaintiff, on April 26, 1888, received a conveyance from Grigsby of all his interest in the premises.

The stipulation concludes that, if the "summons" is valid, and the "return" is sufficient to show due service of the same on Grigsby, the defendants are entitled to judgment in the action, but, if not, the plaintiff is entitled to judgment.

It is contended by the plaintiff that the decree of the circuit court of Linn county, under which the defendants claim, is void and of no effect, because the court had no jurisdiction in the premises.

The grounds of this contention are: (1) The summons was invalid, because it did not contain a notice that the plaintiff would, if the defendant failed to answer the complaint, take judgment for a sum specified therein, but only that in such case they would apply to the court for the relief demanded in the complaint; and (2) the return of the sheriff does not show a valid service of the summons, because (a) it appears therefrom that it was "left" with Mary Backus, and not "delivered" to her; (b) it does not appear whether Mary Backus was a member of her own family or of the defendant's; and (c) it does not appear that the summons was served at the "usual place of abode" of the defendant in the state, but only "in Linn county."

The statute (Comp. 1887, § 53) provides "that there shall be inserted in the summons, a notice in substance as follows: (1) In any action for the recovery of money or damages only, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint; (2) in other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded therein."

By section 55 (Comp. 1887) it is further provided that "the summons shall be served by delivering a copy thereof, together with a copy of the complaint, * * * as follows:" (Here follow five subdivisions, the first four of which relate to the service on corporations and persons under guardianship.) The fifth one provides: "In all other cases to the defendant personally, or, if he be not found, to some person of the family, above the age of 14 years, at the dwelling-house or usual place of abode of the defendant."

These provisions concerning a summons and its service in an action at law, are equally applicable to a summons and its service in a suit in equity, to enforce the lien of a mortgage. Comp. 1887, § 389.

The suit against Grigsby was not, in my judgment, a suit to recover money only; primarily it was brought to ascertain and enforce a lien on the real property in question, and obtain a judicial sale of the same, and the application of the proceeds thereof in payment of the debt the mortgage was given to secure. Comp. 1887, § 414.

It is true that in case a mortgagor has given a personal obligation for the debt, the law authorizes the court to "decree a recovery of the amount of such debt against" him, as well as to decree a sale of the property to satisfy the same. But the decree *in personam* for the recovery of the money is not the "only," nor even the principal, object of the suit. At least it is merely a conditional decree, and cannot be enforced until the property adjudged to be sold is disposed of; and then only in case the prop-

ceeds of such sale are not sufficient to satisfy the decree. Comp. 1887, § 417.

The notice in the summons was properly given under the second subdivision of section 53; and a copy of the complaint having been served at the same time, the defendant was fully informed of the nature of the decree that might be taken against him in case he failed to answer.

The last objection to the validity of the service will be considered first.

It does not appear that a copy of the summons was delivered "to some person of the family * * * at the dwelling-house or usual place of abode" of the defendant. What does appear is this: A copy of the summons was "left" with "a member of the family over the age of 14 years, at his [the defendant's] usual place of abode in said [Linn] county."

A suit to enforce the lien of a mortgage is a local one, and can only be brought in the county where the land lies. Comp. 1887, § 387. But the defendant may be served with the summons in any county of the state in which he may be found. Id. §§ 52, 54.

There is no presumption that Grigsby was a resident of Linn county because the suit to enforce a lien on real property belonging to him therein was brought there. It could not have been brought elsewhere. For aught that appears he may have resided in any other county in the state. And if "found" anywhere therein, whether commorant or itinerant, he could have been served by delivering to him personally, a copy of the summons. But if not so "found," then he could only be served by the delivery of a copy of the summons "to a person of the family"—the family of which he constituted a part, whether as head or member—at his dwelling-house or usual place of abode."

It is self-evident that a defendant can have but one unqualified "usual place of abode" in the state at the same time. If he has other places of abode therein, as he may have, they are his unusual places of abode. A defendant may be served personally anywhere in the state that he may be "found," but, if served constructively, by the mere delivery of a copy of the summons for him to the person designated by the statute, it must be done at his "usual place of abode" in the state, in whatever county that may be. And if he has no such place of abode, and cannot be found, he must be served by publication. His usual place of abode in a particular county is not necessarily his usual place of abode in the state. A person may reside eleven months in the year in Multnomah county, and one month in the year near the beach in Clatsop county. He may have a fixed and well-known residence in each county. But can there be any question in which county his usual place of abode is, within the meaning of the statute regulating the service of a summons? Certainly not. It is in Multnomah county. Now, suppose a suit was commenced against this person in Clatsop county, to divest him of some interest in real property therein; the sheriff might leave a copy of the summons at his residence in Clatsop county with his housekeeper, or with "some person of the family" with whom he always resides when in the county, and then truly return that, the defendant not being found, he had served the summons by leaving a copy thereof with such person "at his usual

place of abode in Clatsop county;" and do this, notwithstanding he and the plaintiff might both well know that the defendant had not been in the county for nearly 11 months, and was then, and had been for years, a permanent resident of Multnomah county, in which was his usual place of abode in the state.

In *Brown v. Langlois*, 70 Mo. 226, it was held under a similar statute that service of a summons by leaving a copy "at the usual place of abode" of the defendant, "when in the city of Cape Girardeau," was invalid; and that a judgment by default thereon was a nullity.

In *Allen v. Manufacturing Co.*, 72 Mo. 326, service of process by leaving the same "at the Hardin House, the usual place of abode of the" defendant, "prior to the time he left the state," was held bad, because it did not show that the writ was left at a place which was the abode of the defendant at the time of service.

In *Bank v. Suman*, 79 Mo. 527, a service by leaving process at the "last usual place of abode" of the defendant was held invalid, because, *non constat*, that his "last" place of abode was his present one, and the return could have been true, and the defendant "reside in another county or jurisdiction."

In *Dawson v. Bank*, 3 Ark. 505, and *Parks v. Weems*, 9 Ark. 439, it was held that service of a summons at the residence of the defendant by delivering a copy to a person present there, whom it did not appear from the return was "a member of the family," is bad, and will not support a judgment by default.

In *Sanborn v. Stickney*, 69 Me. 343, it was held that a return on a writ that it was served on the defendant by leaving a copy of the summons for him "at his last and usual place of abode in Kennebec county" did not show that the summons was left at the defendant's "place of last and usual abode," as by statute required. Upon this service there was a judgment by default, and afterwards on this judgment there was an action brought in the same state, and the invalidity of the service was relied on as a defense. The court said:

"The point taken in the defense is that 'his last and usual place of abode in Kennebec county' would not be his 'place of last and usual abode' in the state. We concur in that interpretation of the officer's return. * * * All the officer certified may be true and no service be made. The officer would not be liable for making a false return. But he made an indefinite, equivocal, and insufficient return. It must be certain that a defendant has been legally notified before judgment can properly go against him."

In *Ames v. Winsor*, 19 Pick. 247, the return was to the effect that the summons had been left for the defendant "at his last and usual place of abode" known to the officer serving it, in the city of Boston. The statute required the summons to be delivered to the party, or left at his "dwelling-house or place of last and usual abode." It was held that the service was insufficient.

In *Settlemier v. Sullivan*, 97 U. S. 444, it was held that the service of a summons under a similar statute (Or. St. 1855, p. 86, § 29) by delivering a copy thereof to the wife of the defendant at the usual place of

abode, when the return did not show that the defendant could not be found, was invalid, and the judgment by default taken thereon null and void.

In delivering the opinion of the court, Mr. Justice FIELD said: "The inability of the officer to find the defendant was not a fact to be inferred, but a fact to be affirmatively stated in his return." To the same effect is the ruling in *Trullenger v. Todd*, 5 Or. 39.

In *Earle v. McVeigh*, 91 U. U. 503, it was held that where during the absence of a person and his family a statute authorized the notice of a suit against him to be posted upon the front door of his "usual place of abode," that a notice so posted seven months after the house had been vacated by the defendant and his family, was not posted on his "usual place of abode," and a judgment founded thereon was absolutely void. The court says:

"By the expression 'the usual place of abode' the law does not mean the last place of abode; for a party may change his place of abode every month in the year. Instead of that, it is only on the door of his then present residence where the notice may be posted, and constitute a compliance with the legal requirement."

In these cases, the question of the validity of the service sometimes arose on a direct proceeding, and in others collaterally, but in all alike it was held that, the same being insufficient, the court acquired no jurisdiction thereby, and its judgment thereon was null and void.

In none of them, however, but *Earle v. McVeigh*, was the record concerning the service contradicted by extraneous evidence; and in that case the proceeding was a suit in equity to set aside the judgment. In all the rest, it was determined on the face of the record, that the service was invalid. In my judgment, where it is sought to contradict the record concerning any jurisdictional matter, it should only be done by a suit in equity, on proper allegation and proof, in which the court, in granting the relief prayed for, may make such conditions in favor of an innocent purchaser, who invested his money on the faith of a record showing jurisdiction in the court, as may be possible and proper.

But a purchaser at a sale on execution issued on judgment or decree taken by default, where the record does not show jurisdiction in the court over the subject, and notice to the defendant, has no equity in the premises as against the true owner. He is the victim of his own folly or negligence.

After a court has acquired jurisdiction by a proper service of process on the defendant, any error in its proceeding cannot be questioned collaterally; but until jurisdiction is acquired, its judgment may be questioned and held for naught in a collateral as well as a direct proceeding.

The only authority cited in favor of the sufficiency of the service in question is *Healey v. Butler*, 66 Wis. 9, 27 N. W. Rep. 822, in which a similar service of a summons was held good. The return stated that the summons was served on the defendant in Clark county at his last and usual place of abode therein. The court said the words "last and" were superfluous, and then arbitrarily construed the return, as if it

read: "Served the summons at the defendant's 'usual place of abode,' which place of abode was then in Clark county."

Admitting the insufficiency of the return, counsel for the defendants insist that the judgment of the circuit court of Linn county thereon is valid in the courts of this state, and cannot be questioned therein collaterally; and that the judgment of a court of this state, when called in question or attacked in the circuit court of the United States for this district, must be regarded as a domestic one.

I cannot assent to either of these propositions. As was said by Mr. Justice FIELD in *Galpin v. Page*, 3 Sawy. 107:

"Whilst the courts of the United States are not foreign courts in their relation to the state courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give them."

And what faith and credit must be given to the judgment of a state court in the courts of another state may be seen in *Christmas v. Russell*, 5 Wall. 305, where it is said such a judgment is neither foreign nor domestic, in every sense, in said courts, but it is "open to inquiry as to the jurisdiction of the court and notice to the defendant;" citing *D'Arcy v. Ketchum*, 11 How. 165; *Webster v. Reid*, Id. 437.

Elliott v. Peirsol, 1 Pet. 328, was ejection brought in the circuit court of the United States for Kentucky. The title of the defendants depended on the validity of an order of a county court of that state, concerning the privy examination of a *feme covert*, who was a party to a deed on which the defendants relied. The court instructed the jury that the order of the county court was void for want of jurisdiction over the subject. On error to the supreme court the ruling was affirmed. The court, TRIMBLE, J., said:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void. * * * The jurisdiction of any court exercising authority over a subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

In *Thompson v. Whitman*, 18 Wall. 467, the supreme court, in referring to the opinion of the court in *Christmas v. Russell*, *supra*, in which it is said that the judgment of a state court is "open to inquiry as to the jurisdiction of the court and notice to the defendant," said: "In a number of cases, in which was questioned the jurisdiction of a court, whether of the same or another state, over the general subject-matter in which the particular case adjudicated was embraced, this court has maintained the same general language;" citing particularly *Elliott v. Peirsol*, *supra*.

Galpin v. Page, 18 Wall. 350, was a case in which the jurisdiction of a state court was questioned in an action in a national court, sitting in the same state. 3 Sawy. 93. The court held that the presumption

which the law implies in support of the judgment of a court of general jurisdiction, is confined to facts concerning which the record is silent, and limited to the case of persons within their territorial jurisdiction in a proceeding according to the course of the common law.

In *Pennoyer v. Neff*, 95 U. S. 732, Mr Justice FIELD, speaking of judgments *in personam* in state courts where the defendants had not been personally served with process, or voluntarily appeared, said:

"The courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them."

This seems to be decisive of the question.

In none of these cases, nor any other to which my attention has been attracted, is it said or even suggested that the judgment of a state court cannot be questioned or attacked collaterally, either for want of jurisdiction of the subject-matter or notice of the proceeding to the defendant in a national court sitting in the same state.

The case of *Owens v. Gotzian*, 4 Dill. 436, is an apparent, and may be a partial, exception to this statement.

In an action in the United States circuit court for the district of Minnesota, a judgment of a court of the state was given in evidence to defeat the same. The plaintiff then offered to prove that the summons in that case was served by a silent partner of the plaintiffs therein, contrary to the statute, which forbid "a party to the action" to make such service, claiming that this fact made the service invalid, and the judgment thereon void.

The court (NELSON, J.) assumed on the authority of *Thomson v. Lee*, 22 Iowa, 206, that the judgment of the state court should be regarded as a domestic judgment in that tribunal, but admits that even then "it may be shown void on its face if the court rendering it had no jurisdiction of the defendant's person;" and added: "It is equally true that except for errors affecting the jurisdiction of the court its validity cannot be questioned."

But this is all that is sought to be done in this case, or that is claimed can be done, even if the decree of the state court is not considered a domestic one.

The court also held that the alleged defect in the service of the summons was at most only an irregularity, which did not affect the jurisdiction of the court; and finally, that as the alleged silent partner was not named in the proceedings, he was not "a party to the action" within the meaning of the statute, and therefore the service was not only sufficient, but regular.

Assuming, however, that the service, as shown by the record in this case, is invalid, as in my judgment it is, the validity of this decree, according to the ruling in *Odell v. Campbell*, 9 Or. 298, may be questioned, even in the state courts.

The opinion in this case, by Mr. Chief Justice LORD, is a clear and able exposition of the law on the subject of acquiring jurisdiction by substituted or constructive service of process. The case was an action to recover real property, and the defendant claimed title under a sale on an execution issued on a judgment against the plaintiff's grantor prior to the conveyance to the latter. The property was attached, and an attempt was made to serve a summons on the defendant as a non-resident by publication. The order of publication omitted to direct that a copy of the summons and complaint be mailed to the defendant at his place of residence, nor did it state any reason for such omission, as that such residence was unknown to the plaintiff, and could not with reasonable diligence be ascertained by him. The service was held invalid, and the judgment void, for the reason that the court never acquired jurisdiction of the person of the defendant; and that in such a proceeding there is no presumption in favor of the jurisdiction, but the record must show a compliance with the statute in every essential particular. And this rule has been applied by the courts of the state to a judgment of a national court sitting in this state.

In *Victor v. Davis*, 11 Or. 447, 5 Pac. Rep. 750, a decree of this court was questioned collaterally, and held for naught, on the alleged ground that the proceeding to acquire jurisdiction of an absent defendant was invalid, on the authority of *Odell v. Campbell*, 9 Or. 298.

The suit in which the decree in question was given, may be considered as *in personam* and *in rem*. So far as it was sought to enforce the lien of the mortgage on the property included therein, it was in the nature of a suit *in rem*, (*Pennoyer v. Neff*, *supra*, 733;) but so far as it was sought to obtain a money judgment against Grigsby it was *in personam*. As to the proceeding *in rem*, it was in the power of the state to provide a substituted service of the summons, in case the defendant could not be found, by delivering it to some person of the family, at his usual place of abode or otherwise; but as to the judgment *in personam*, nothing short of personal service or a voluntary appearance could authorize that.

In proceeding to enforce the lien of the mortgage by the sale of the property on a substituted service of the summons, the court was not proceeding according to the course of the common law, and there is no presumption in favor of its jurisdiction, or the regularity of the proceedings on which it depends. *Odell v. Campbell*, 9 Or. 298.

In conclusion, it does not appear from the record that Linn county was Grigsby's "usual place of abode" in the state at the date of the service of the summons on Mary Backus for him, and there is no presumption that it was, and therefore it does not appear that the service or notice required by the statute was had or given, or that the circuit court of Linn county ever acquired jurisdiction to order a sale of the property.

It is not necessary to consider the other objections to the service, nor whether the plaintiff could in this action contradict the return of the sheriff, so as to show that Grigsby, at the date of the service on Mary Backus, had no place of abode in Linn county, or even in the state. The question was argued and submitted upon the understanding that, if the

court found the return sufficient, the plaintiff would then, if allowed, offer evidence to contradict it, as suggested. As I have said, my opinion is that the return cannot be contradicted, except in a suit in equity, brought for the purpose of setting aside the judgment thereon.

There must be a finding of fact and law for the plaintiff.

YOUNG *v.* DE PUTRON. SAME *v.* LEIGHTON *et al.* SAME *v.* LINCOLN
DRIVING PARK ASS'N.

(Circuit Court, D. Nebraska. December 17, 1888.)

1. EXECUTION—SALE—RIGHTS OF PURCHASER.

In Nebraska, the title of a purchaser at execution sale is not complete until confirmation of the sale by the court, and where the confirmation, after being entered, is at the same term set aside, before a transfer of the property by the purchaser, his vendees acquire no title.

2. PRINCIPAL AND AGENT—POWER OF ATTORNEY—EXECUTION—TRIAL—JUDGMENT ON FINDINGS.

In entering judgment upon special findings of a jury, where it appears that an attorney in fact four years after his appointment had fraudulently conveyed his principal's land, worth \$70,000, for \$1,000, it will be assumed, under a finding that the power of attorney was executed to enable the appointee "to make conveyances to purchasers when sales were made by" persons named, who had contracted to plat and sell the land, "and to facilitate their operations under their contract," that the facts stated in the finding appeared upon the face of the power of attorney, and, the sale not having been made by the persons named, no title passed to the fraudulent grantee which could be recognized even at law.

3. TAXATION—TAX TITLE—DEED—SEAL.

In Nebraska, tax deeds not sealed by the county treasurer with his official seal are void, and no title is acquired thereunder where the jury have found that the possession during the statutory period was not "open, notorious, exclusive, and adverse," but "mixed."

At Law. Motion for judgment upon special findings of fact.

R. S. Hall and *J. R. Webster*, for plaintiffs.

Lamb, Ricketts & Wilson and *Harwood, Ames & Kelly*, for defendants.

BREWER, J. Complainant's chain of title is brief, direct, and clear, as follows: A patent from the United States, December 16, 1862, to Jane Y. Irwin; a deed, August 9, 1867, from her to William P. Young; a reconveyance, February 5, 1874, from Young to Irwin; a deed, June 11, 1884, to complainant. As against this chain of title defendants present three claims: First, a judicial sale. On May 19, 1877, a judgment was rendered in the district court of Lancaster county against Jane Y. Irwin. Execution was issued, and sale made October 2, 1877, to E. J. Curson. October 10th an order of confirmation was entered, which, at the same term, and on November 3d, was set aside. Curson took this order setting aside the confirmation to the supreme court for review, but it was affirmed. *Sessions v. Irwin*, 8 Neb. 5. After the order of confir-

mation had been set aside, Curson made a deed, and from that springs one of the titles upon which defendants rely. It is the settled law of Nebraska that the title of a purchaser at an execution sale depends not alone upon his bid or payment of the purchase money, but upon the confirmation of the sale; also that one purchasing at an execution sale submits himself to the jurisdiction of the court as to matters affecting that sale, and that a court has power during the term to vacate or modify its own orders, or to rescind decrees. *Phillips v. Dawley*, 1 Neb. 320; *Bank v. Green*, 10 Neb. 134, 4 N. W. Rep. 942; *Volland v. Wilcox*, 17 Neb. 50, 22 N. W. Rep. 71; *Gregory v. Tingley*, 18 Neb. 322, 25 N. W. Rep. 88. It follows from these facts and decisions that the sale, though temporarily confirmed, was finally set aside, and that no rights of a third party accrued during the time that the sale was apparently confirmed. Hence this chain of title presented by defendants must fail.

A second chain of title is under a conveyance made by an attorney in fact. On the 31st day of March, 1874, Jane Y. Irwin entered into a contract with Scott, Boyd & La Master, for the platting and sale of the land. They entered upon the land soon thereafter, and surveyed and platted it. On the 24th of August, 1875, Jane Y. Irwin executed a power of attorney to William T. Donavan, to enable him to make conveyances to purchasers when sales were made by Scott, Boyd & La Master, and to facilitate their operations under their contract of March, 1874. On the 25th day of October, 1879, a deed was executed by Donavan, as attorney in fact, for the land to one John P. Lantz, who on the same day conveyed it to Samuel W. Little. At the time of these conveyances the land was worth \$70,000, and the conveyances were made for \$1,000. Within a month thereafter a revocation of the power of attorney given to Donavan was placed on record, and the conveyances by the attorneys in fact to Lantz, and by Lantz to Little, were made with the intention of defrauding Jane Y. Irwin; and the revocation of the power of attorney was known to the subsequent purchasers, as well as all the facts stated therein, prior to their purchases. Obviously the plaintiff's land cannot be taken away by any such transactions as these. When one holding a power of attorney, which has been lying dormant for over four years, conspires with a third party to make a conveyance in the name of his principal of land worth \$70,000 for \$1,000, and immediately a revocation of that power of attorney is placed upon the record, clearly the first purchaser acquires no rights, and subsequent purchasers, taking with knowledge, are in no better condition. But it is earnestly insisted by defendants that these conveyances transferred the legal title, and that whatever rights plaintiff may have can be established only in a court of equity, and that, upon the facts as found, judgment must go for defendants. They also insist that on a motion for judgment upon special findings inquiry is limited to the facts stated in the findings, and that the court may not examine the testimony for further facts; and upon this say that the power of attorney is not disclosed in the findings, nor the revocation thereof; hence the court has no information as to the terms, limitations, or language of either of these instruments. It may be that

the plaintiff's remedy is in a court of equity, and in view of the fact that the defendants have paid the taxes for so many years it is obvious that full protection to the rights of all the parties can be most successfully secured in a court of equity. It may be also that upon this motion I am limited narrowly to a consideration of the facts stated in the findings. Assuming that to be true, it appears from the fourth finding that the power of attorney to Donovan was made "to enable him to make conveyances to purchasers when sales were made by Scott, Boyd & La Master, and to facilitate their operations under their contract of March 31, 1874." It is not clear from this finding whether the jury mean to affirm that this purpose was expressed on the face of the power of attorney, or only that that was the purpose of the parties in executing the instrument. As the defendants are building up their title, and are insisting upon a strict adherence to the facts stated in the findings, it seems to me that I am justified in assuming that this finding shows that such a purpose was expressed on the face of the power of attorney. It is not shown by any finding that Scott, Boyd & La Master ever made the sale, or had anything to do with the sale to Lantz. Nor is it shown that the conveyance upon its face purported to be in consummation of a sale made by those gentlemen. For aught that appears, the power of attorney and the deed taken together may have disclosed both the purpose for which the power of attorney was executed—which of course operated as a limitation on the power—and a breach of trust in the conveyance. It is true that the meagerness of these findings leaves the matter in considerable doubt; but in view of the grievous wrong attempted to be consummated by these transactions, as shown by the findings of the jury, I am constrained to hold against the defendants on this chain of title also, even in this law action.

The remaining chain of title is under certain tax deeds. There were two of these—one for the taxes of the year 1867, and dated on June 12, 1871; and one for those of 1868, dated December 15, 1871. There was no assessment of the land in controversy in the year 1867, nor was the same placed upon the tax-list of that year. Neither deed was sealed by the county treasurer with his official seal, nor did the county treasurer have an official seal. Under the decisions of the supreme court of Nebraska such tax deeds are void. *Sutton v. Stone*, 4 Neb. 323; *Reed v. Merriam*, 15 Neb. 325, 18 N. W. Rep. 137; *Hendrix v. Boggs*, 15 Neb. 472, 20 N. W. Rep. 28; *Sullivan v. Merriam*, 16 Neb. 160, 20 N. W. Rep. 118; *Seaman v. Thompson*, 16 Neb. 548, 20 N. W. Rep. 857; *Shelley v. Towle*, 16 Neb. 195, 20 N. W. Rep. 251; *Baldwin v. Merriam*, 16 Neb. 200, 20 N. W. Rep. 250. Nor were these deeds coupled with an exclusive and actual adverse possession for 10 years. The language of all the separate findings upon a matter of possession affirms only a mixed possession. The jury having in the original verdict, prepared by counsel and handed to them for their consideration, stricken out such adjectives as "actual, undisputed, exclusive, open, notorious, and adverse," and inserted in lieu thereof the word "mixed," plainly, as I think, indicate thereby their finding that the possession was always a matter of

dispute. Under these circumstances, the deeds being void on their face, and not coupled with 10 years' open, notorious, exclusive, and adverse possession, this defense also must fail. These being the only questions, judgment will be entered for plaintiff. And the case of *Rowena Young v. Harriet Leighton et al.*, and the case of *Rowena Young v. The Lincoln Driving Park Association*, are like this, and the same judgment must be entered.

FRADLEY v. HYLAND.

(Circuit Court, S. D. New York. December 1, 1888.)

1. PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL—SETTLEMENT BETWEEN PRINCIPAL AND AGENT.

Where an agent, authorized by a principal to purchase supplies for the use of the principal, and instructed to purchase only for cash, purchases in his own name, upon credit, of a seller who supposes the agent to be buying for himself only, and the principal pays or settles with the agent for the supplies in good faith, supposing that the agent had purchased them for cash or upon his personal credit, he is not liable over again to the seller for the price of the supplies.

2. SAME.

The rule that a seller who deals with the agent of an undisclosed principal can, upon discovering the principal, resort to the latter for payment, unless by his conduct he has led the principal in the meanwhile to pay or settle with the agent, does not apply to a case in which the agent bought contrary to his instructions, and the seller gave credit to the agent supposing him to be the only principal, and the principal has in the meantime paid the agent.

(Syllabus by the Court.)

In Admiralty. On appeal from district court.

Libel by one Fradley against Hyland for supplies furnished one Gibson, respondent's agent in charge of a canal-boat. Decree for libellant as to the first cause of action, and respondent appeals.

Josiah A. Hyland, for appellant.

Peter S. Carter, for appellee.

WALLACE, J. The libel sets forth two causes of action for supplies purchased by one Gibson. The district court decreed in favor of the libellant upon the first cause of action, and dismissed the libel as to the other. The respondent in the court below is the appellant here, but the libellant, although he has not appealed from the part of the decree by which the libel as to the second cause of action was dismissed, cites the case of *Irvine v. The Hesper*, 122 U. S. 256, 7 Sup. Ct. Rep. 1177, and insists that he is entitled to urge that this court should decree in his favor as to that cause of action. The facts which appear in evidence are these: During the period in which the supplies were purchased, one Gibson, who was the owner, and was managing certain canal-boats of his own, was employed by the appellant, to manage certain canal-boats for the latter. Gibson was to obtain employment for the boats, and return the net

earnings monthly to appellant, after paying for all repairs and supplies, and deducting his own commissions. His instructions were not to obtain supplies upon credit, but, if not in funds from the earnings, to call upon the appellant. Monthly settlements of account took place between Gibson and the appellant, in which Gibson was allowed all items for supplies paid or contracted for by him against the earnings of the boats, and a considerable fund was always left in his hands by the appellant. Gibson ceased to act as appellant's agent September 1, 1886. The supplies were sold to him prior to that time. The libellant supposed that Gibson was the owner of all the boats he was managing, and dealt with him as such, selling him supplies for all indiscriminately, charging the price to him, and taking his notes from time to time, or those of one Isham, his clerk. The claim to recover the part of these supplies used on appellant's boats is the first cause of action set forth in the libel. One Kelly had also sold supplies to Gibson for the same boats, supposing that Gibson was the owner, and had received Gibson's notes, or notes of Gibson's clerk, for the amount. After these notes had matured, Gibson asked the libellant to pay them for him to Kelly, and the libellant did so, receiving new notes from Gibson for the amount. There was no assignment to libellant of Kelly's original demand against Gibson. The claim for the supplies thus sold by Kelly to Gibson is the second cause of action set forth in the libel. After Gibson ceased to act as agent for appellant, the libellant discovered that some of the supplies had been purchased for the appellant's boats, and, being unable to collect his demands of Gibson, made claim against the appellant therefor. Until then the appellant did not know of the transactions between Gibson and the libellant, or between Gibson and Kelly. The moneys left by appellant in Gibson's hands were at all times more than the amount of the libellant's demands, and Gibson was indebted to the appellant in more than that amount when he left the appellant's employ, and when this libel was filed.

As to the first cause of action no question is made by the appellant that it is not of admiralty cognizance, but he insists that he is not liable as a principal for the supplies sold to his agent by the libellant, under the circumstances of the case. The general rule is familiar that, when goods are bought by an agent, who does not at the time disclose that he is acting as agent, the seller, although he has relied solely upon the agent's credit, may, upon discovering the principal, resort to the latter for payment. But the rule which allows the seller to have recourse against an undisclosed principal is subject to the qualification stated by Lord MANSFIELD in *Railton v. Hodgson*, 4 Taunt. 576, and by TENTERDEN, C. J., and BAYLEY, J., in *Thomson v. Davenport*, 9 Barn. & C. 78. As stated by Mr. Justice BAYLEY, it is "that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to

the action brought by the seller, where he has looked to the responsibility of the agent." The principal must respond to and may avail himself of a contract made with another by an undisclosed agent. When he seeks to enforce a bargain or purchase made by his agent the rule of law is that, if the agent contracted as for himself, the principal can only claim subject to all equities of the seller against the agent. In the language of PARKE, B.: "He must take the contract subject to all equities, in the same way as if the agent were the sole principal," (*Beckham v. Drake*, 9 Mees. & W. 98,) and accordingly subject to any right of set-off on the part of the seller, (*Borries v. Bank*, 29 L. T. N. S. 689.) Thus the rights of the principal to enforce, and his liability upon, a contract of sale or purchase made by his agent, without disclosing the fact of the agency, are precisely co-extensive, as regards the other contracting party, if the limitation of his liability is accurately stated in the earlier cases. The qualification of the principal's liability to respond to his agent's contract, as stated in the earlier authorities mentioned, was narrowed by the interpretation adopted in *Heald v. Kenworthy*, 10 Exch. 739, to the effect that the principal is not discharged from full responsibility unless he has been led by the conduct of the seller to make payment to or settle with the agent; and the doctrine of this case has been reiterated in many subsequent cases, both in England and in this country, where the agent did not contract as for himself, but as a broker, or otherwise as representing an undisclosed principal. One of the more recent English cases of this class is *Davison v. Donaldson*, 9 Q. B. Div. 623. But, as is shown in *Armstrong v. Stokes*, L. R. 7 Q. B. 599, the version of *Heald v. Kenworthy*, while a correct interpretation of the rule of the principal's liability, when applied to cases in which the seller deals with the agent relying upon the existence of an undisclosed principal, is not to be applied in those in which the seller has given credit solely to the agent, supposing him to be the principal. This case decides that the principal is not liable when the seller has dealt with the agent supposing him to be the principal, if he has in good faith paid the agent at a time when the seller still gave credit to the agent, and knew of no one else. See, also, *Irvine v. Watson*, 5 Q. B. Div. 102. Under such circumstances it is immaterial that the principal has not been misled by the seller's conduct or laches into paying or settling with his agent. It is enough to absolve him from liability that he has in good faith paid or settled with his agent. In that case the court was dealing with a contract made by an agent which was within the scope of the authority conferred on him, but which was nevertheless made by the agent as though he were acting for himself as principal. In the present case Gibson had no authority at all to make a purchase upon the credit of the appellant. But as it appears that appellant, in the monthly settlements of account with Gibson, allowed him out of the earnings charges for supplies for which the latter had not actually paid, he must be deemed to have authorized Gibson to purchase supplies for him upon Gibson's own credit. Under the circumstances, if Gibson had purchased supplies, purporting to act as an agent of appellant in doing so, appellant, by consenting to their being used for his benefit, and by allowing

the price in his settlements with Gibson, would have been liable to those who sold to him upon the theory of ratification. But, as Gibson did not assume to act as agent in making the purchases, there is no basis for applying the doctrine of ratification.

Very different considerations govern the case in which an agent who assumes to represent an undisclosed principal buys of a seller upon credit, and one in which the agent assumes to be acting for himself, and the seller deals with him, and gives him exclusive credit, supposing him to be the only principal. In the first, if the agent has authority, express or implied, to buy upon credit for the principal, or ostensible authority to do so, upon which the seller relies, then, by the familiar rules of law, the contract is the contract of the principal, and is none the less so because the name of the principal does not happen to have been disclosed. The principal is bound by the acts of his agent within the scope of his real or apparent authority; and the seller understands that, even though he may hold the agent personally responsible, he may also resort to the undisclosed principal. But in the other, as the seller does not rely upon any ostensible authority of the one with whom he contracts to represent a third person, he can only resort to the third person as principal, and charge him as such, when the purchase is made by one having lawful authority to bind the third person. It is immaterial, in such a case, whether the contract is made by an agent who is employed, in a continuous employment or in a single transaction, by a principal, or whether he is one who may be deemed a general, instead of a special agent. "When the agency is not held out by the principal by any acts or declarations or implications to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent beyond what he has apparently authorized, because he has not misled the confidence of the other party who has dealt with the agent." Story, Ag. § 133. It is therefore difficult to understand how, as an original proposition, it could be reasonably maintained that there is any liability on the part of one who has employed another to manage his interests in a business, or series of transactions, in which, as an incident, purchases of goods are to be made, has given him instructions not to purchase on credit, and has supplied him with funds to purchase for cash, to a seller who has sold to the person employed upon credit, and dealt with him as the only principal. *Taft v. Baker*, 100 Mass. 68. Of course he would be liable, and the instructions not to buy on credit would go for nothing, if he did not supply the agent with funds to pay for the necessary goods, because in that case the agent would have implied authority to buy them on credit. So, also, in a case which may be supposed, where a principal knows, or ought to know, that the agent is buying on credit in his own name, yet the principal takes all the income of the business without making any provision for payment to those who have trusted the agent, the principal would

be liable, because in such a case his conduct would be inconsistent with good faith, and he ought not to be permitted to avail himself of the benefits without incurring full responsibility for the agent's acts. But it is probably too late to consider the questions thus suggested upon principle; and it may be accepted as law that the seller, under the circumstances of a case like the present, upon discovery of the principal, can resort to and recover of him, if he has not *bona fide* paid the agent in the mean time, or has not made such a change in the state of the account between the agent and himself that he would suffer loss if he should be compelled to pay the seller. Story, Ag. § 291, 1 Pars. Cont. 63; *Fish v. Wood*, 4. E. D. Smith, 327; *Thomas v. Atkinson*, 38 Ind. 248; *Clealand v. Walker*, 11 Ala. 1058; *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449; *Laing v. Butler*, 37 Hun, 144. In the case last cited the court used this language:

"Where the purchase has been made by the agent upon credit authorized by the principal, but without disclosing his name, and payment is subsequently made by the principal to the agent in good faith before the agency is disclosed to the seller, then the principal would not be liable."

According to these authorities, if it should be conceded that the facts in the present case warrant the inference that the appellant gave Gibson authority to buy either upon his own credit or upon the credit of the appellant, the libellant cannot recover. It certainly is not material that the appellant did not pay Gibson, or make any settlement with him, on account of the libellant's demands specifically. It is enough that he did settle with Gibson for, and allowed him to retain in his hands sufficient moneys to pay, all outstanding liabilities contracted by him for the appellant's benefit, including the demands of the libellant. At the time of the last settlement the appellant had paid the libellant's demands and all outstanding liabilities contracted by Gibson as between Gibson and himself, and this was before the libellant knew any principal in the purchases other than Gibson himself.

As respects the second cause of action, the case may be briefly disposed of without considering the question whether the libellant can be heard to urge that the decree from which he has not appealed ought to be reversed. The transaction was merely a loan from libellant to Gibson. Whether the appellant is liable as upon a loan made by his agent or not, his obligation is in no sense a maritime one, and cannot be enforced in a court of admiralty. The libellant did not, by paying the notes to Kelly, and receiving Gibson's notes for the amount, succeed to any rights which Kelly may have had to enforce a claim for the supplies. The libel is dismissed, with the costs of this court and of the district court.

McGUIRE v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, D. Minnesota. January 2, 1889.)

RAILROAD COMPANIES—INJURY TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE—CHILDREN.

Plaintiff, a boy 10 years old, bright and intelligent for his age, crossed a railroad track as soon as a train had passed, and stepped onto another track, where he was struck by a train coming from an opposite direction, at an unlawful rate of speed, and without giving any warning. *Held*, that the court would not rule that plaintiff was negligent as a matter of law, and that the question was properly submitted to the jury under instructions that only such vigilance was required of plaintiff as could reasonably be expected of a child of his age and capacity.¹

At Law. On defendant's motion for new trial.

This suit was brought to recover damages for a personal injury to plaintiff, John McGuire, a boy nearly 10 years old, resulting from the negligence of the defendant; and the jury rendered a verdict for the plaintiff. Plaintiff was about to cross the defendant's railway tracks near the corner of Eleventh avenue and Fourth street in the city of Minneapolis, in this district, and on reaching the tracks on Eleventh avenue he stopped for a passenger train to go by, and as the train passed he stepped before the last car on and over that track onto another, upon which a freight train was coming in an opposite direction, and was immediately confronted and struck by the engine. Subsequently, in his endeavors to escape, he was thrown from a pile of boards under the wheels of the passenger train. The evidence tended to show that the freight train was moving at a rate of speed prohibited by law, and that no warning by ringing a bell or otherwise was given. The defense of contributory negligence was interposed by defendant. The court decided that the plaintiff, as the evidence showed, was active, bright, and intelligent, and had the faculties requisite for the perception of danger.

Flandrau, Squires & Cutcheon, for the motion.

Forrest & Van Cleve, contra.

NELSON, J., (after stating the facts substantially as above.) A correct decision of this motion depends upon whether or not the boy was negligent as a matter of law in going upon the tracks and attempting to cross as he did. If an adult had been injured under the same circumstances, instead of a child about 10 years of age, I should have little hesitation in granting the motion. I feel satisfied, however, that this case was a proper one for the jury upon the question of contributory negligence, and I do not think that the court erred in refusing to instruct them that the act of the boy in attempting to cross the tracks was negligence as a matter of law. The caution required of the boy was according to his

¹In regard to contributory negligence, attributed to children, in actions for negligent injuries, see *Twist v. Railroad Co.*, (Minn.) 39 N. W. Rep. 402, and note; *Railroad Co. v. Young*, (Ga.) 7 S. E. Rep. 912; *Railway Co. v. Whipple*, (Kan.) 18 Pac. Rep. 730, and note.

age and capacity, to be determined by the facts and circumstances developed on the trial. While I held that the boy was capable of exercising some degree of care, still he was not subjected to the same rules of conduct as an adult. I instructed the jury that it was incumbent upon the boy to exercise vigilance for his safety, yet only such care was required of him as could reasonably be expected of a child of his age and capacity. I put it to the jury to determine whether he did exercise such care, and the verdict did not sustain the defense of contributory negligence. It is a close case, and not free from doubt. If I am wrong, the remedy of the defendant is clear. Motion for new trial denied.

UNITED STATES v. BARBER.

(District Court, D. Nebraska. November Term, 1888.)

1. POST-OFFICE—OFFENSES AGAINST POSTAL LAWS—ACT CONG. SEPT. 26, 1888.

Act Cong. 26th September, 1888, amending section 2 of the act of 18th June, 1888, relating to non-mailable matter, changes all former penalties provided for that offense.

2. SAME.

This last law has no saving clause relative to offenses arising under the said second section, and offenses committed prior to the 26th of September, 1888, cannot be punished under the present law. The portion of said section which fixed the punishment for the offenses therein enumerated has been repealed by implication.

(Syllabus by the Court.)

On the Court's Motion in Arrest of Judgment.

W. L. Barber was tried and convicted under the act of congress of June 18, 1888, for depositing in the post-office non-mailable matter.

George E. Pritchett, for the United States.

Mr. Munn, for defendant.

DUNDY, J. On the 18th day of June, 1888, congress passed an act, entitled "An act relating to postal crimes, and amendatory of the statutes therein mentioned," which seems to have gone further than congress has ever before ventured in that direction. New offenses have been created by that act, and new penalties have been prescribed for old offenses. The latter part of section 2 of said act is all that seems necessary to consider in this connection. That is as follows:

"And all matter otherwise mailable by law upon the envelope or outside cover or wrapper of which, or postal-card upon which, indecent, lewd, lascivious, obscene, libelous, scurrilous, or threatening delineations, epithets, terms, or language, or reflecting injuriously upon the character or conduct of another, may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office, nor by any letter-carrier; and any person who shall knowingly deposit or cause to be deposited for mailing or delivery anything declared by this section to be

non-mailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of, the same, shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than one hundred dollars nor more than five thousand, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court."

This is the law as it existed between the 18th of June and 26th of September, 1888. The offense with which this defendant stands charged was committed while this law was in full force. He was indicted on the 19th day of November, 1888. The indictment contains four counts, and charges the defendant with depositing in the mails at Omaha city, to be conveyed by post, many postal-cards, addressed to one A. O. Stone, in the state of Pennsylvania, which cards, it is alleged, were so deposited in violation of law, because the writing on the same reflected injuriously upon the character of the said Stone. One of the cards, which is a fair sample of the whole, is as follows:

"SIR: Your account is long time past due. It has been running since 1875. God will not bless you until you do something to correct your nefarious wrongs.

W. L. BARBER.

"\$1,020.00 & interest since 1875. Owe no man anything."

This is the last of the series of postal-cards described in the indictment, and was written and deposited in the mail at Omaha city on the 19th of September last past. The defendant was tried and convicted on his own confession, shortly after the indictment was found by the grand jury. At that time we had not received the laws of the United States passed at the last session of congress, but the district attorney had before him the said act of 18th June, 1888, sent out in the shape of a circular by the post-master general, and under that act the indictment was found. But on the 26th of September last another act of congress was passed, amending the said act of 18th June, respecting the penalty incurred under the last-named act. That law, or the part thereof material to consider in the present case, is as follows:

"That all matter otherwise mailable by law, upon the envelope, outside cover, or wrapper of which, or any postal-card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display, and obviously intended to reflect injuriously upon the character or conduct of any, may be written or printed, or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails, nor be delivered from any post-office, nor by any letter-carrier, and shall be withdrawn from the mails under such regulations as the postmaster general shall prescribe. And any person who shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of, the same, shall for each and every offense, upon conviction thereof, be fined not more than \$5,000, or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

The only material difference in the two laws consists in the character and extent of the punishment that follows a conviction. The present law provides for a fine not to exceed \$5,000, or imprisonment not to exceed five years, or both, at the discretion of the court. In the law of 18th June the punishment might have been made much more severe. It is quite easy to discover that congress intended the last act to take the place of the act of 18th June, because the same were passed at the same session; and the difference in the two acts consists almost exclusively in the character of the punishment provided for the same offense in both acts. It is said that repeals by implication are not to be favored. But here the intention to repeal is too obvious to be unheeded; and to hold otherwise, it seems to me, would be doing violence to language and principle as well. There is no saving clause in the repealing act, so far as it relates to the new class of offenses, for which the defendant is indicted. Without such a saving clause it will not be claimed that a person can be indicted, convicted, and lawfully punished, under a law that has ceased to exist, though it would have been otherwise in this case had the defendant been convicted prior to the 26th of September, 1888. If we should now undertake to punish the defendant on the charges contained in the indictment, it would be under a law that ceased to exist on the 26th of September last, or under the law of the last date, which, in this case would be *ex post facto* in its operation. We cannot, where the liberty of the citizen is involved, undertake to exercise any doubtful and uncertain authority; and where the law is new, and imperfectly understood as in this case, there is no inclination to go as far even as courts might in some cases feel perfectly justified in going. This question is raised on my own motion, but, as it involves the right to punish, I conclude the defendant must have the benefit arising from the repeal of the law under which he was indicted, notwithstanding he has not demanded it. The judgment will therefore be arrested, and the defendant discharged.

POLSDORFER *et al.* v. ST. LOUIS WOODEN-WARE WORKS.¹

(Circuit Court, E. D. Missouri, E. D. May 22, 1888.)

PATENTS FOR INVENTIONS—INFRINGEMENT—WASH-BOARDS.

A patent for a metallic rubbing-plate for wash-boards, having transverse rows of convex, spiral corrugations, alternately right and left handed, is not infringed by a plate having equidistant spear-head shaped corrugations, of which the lower ridges are higher than the upper ridges, and the upper arms are deeper than the lower arms, the form only, and not the idea, of a metal surface broken into protuberances, being new.

In Equity.

¹Publication delayed by inability to obtain copy of opinion at time of delivery.

On final hearing of a bill by John H., Franklin, and Henry Polsdorfer against the St. Louis Wooden-Ware Works, to restrain the infringement of a patent.

Thomas B. Hall, for complainants.

Dexter Tiffany and *Leo Rassieur*, for defendant.

BREWER, J. This case is submitted on final hearing, and the question is between patents for improvements in wash-boards. In view of the many devices which have been manufactured and patented for wash-boards, it is obvious that neither party can be regarded as a pioneer in this field of invention. In the case of *Duff v. Pump Co.*, 107 U. S. 639, 2 Sup. Ct. Rep. 487, the supreme court, commenting upon another patent, earlier than either of those in controversy, for improvement in wash-boards, uses this language:

"The case is one where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee. In the field of wash-boards made of sheet metal, with the surface broken into protuberances formed of the body of the metal, so as to make a rasping surface, and to strengthen the metal by its form, and to provide channels for the water to run off, Todd was not a pioneer. He merely devised a new form to accomplish these results. *Railway Co. v. Sayles*, 97 U. S. 554. The defendant adopts another form. Under such circumstances the Todd patent cannot be extended so as to embrace the defendant's form. The latter is not a mere colorable departure from the form of Todd, but is a substantial departure. Those views are in accordance with those heretofore announced by this court in *Merrill v. Yeomans*, 94 U. S. 568; *Bridge Co. v. Iron Co.*, 95 U. S. 274, and *Burns v. Meyer*, 100 U. S. 671."

That which was true in reference to these earlier patents becomes more true with every additional change made by parties in the surface of wash-boards. Indeed, as the idea of parallel or irregular protuberances on the surface of a wash-board is old and familiar, it would seem that no mere change in the form of such protuberances could be considered as the product of the inventive skill. The number of changes in form which can be made is limitless, varying with the fancy or judgment of the maker, and to ascribe any such change to the exercise of inventive skill, that skill which is necessary to sustain a patent, strikes me as almost absurd. Be that as it may, in giving to any patentee the full protection to his patent, it must be limited most narrowly to the mere form, and any change in form, however trifling, does away with the idea of infringement. The claim of complainants' patent is as follows:

"What I claim as new, and desire to secure by letters patent, is the metallic rubbing-plate, B, having transverse rows of spiral corrugations, *a*, the direction of the spirals of the rows being alternately right and left handed, substantially as specified."

These corrugations are specified, as fully shown by reference to the drawings, and are described as being "arranged parallel to each other, in positions oblique to the length of the rows." "They are angular in cross-section, slightly S-shaped, and their crests or profiles are regularly convex," and are shown by the drawings to run from valley to valley of

the board. "The corrugations in each row, taken together, present the appearance of a screw, the threads of which are represented by the said corrugations. The spirals or twists of the rows of corrugations are alternately right and left handed; that is, if the top row is right-handed, the row next to it is left-handed, this alternation being continued to the bottom. The object of this is to prevent the article being rubbed from being carried against the side rail of the frame and injuring the knuckles of the operator." While defendant's patent describes its invention as follows:

"(1) In a wash-board, the metallic rubbing-plate, D, secured to the back-board, C, and provided with the equidistant transverse rows of equidistant spear-head shaped corrugations, of which the lower ridges, F, are higher than the upper ridges, e, and the spear-head shaped depressions situated between said corrugations, and having their upper arms, E, considerably deeper than their lower arms, f, so that the former will act as soap-pockets, and the latter as escape-channels for the soap-water, when the board is in use, substantially as specified."

Looking at the two boards as they were presented, there is obviously a difference in form. I was much interested in the argument of complainants' counsel, and the efforts he made by photographs and models to show how closely alike were the two forms, and how slight the differences between them, as well as how easily one could be changed into the other. If I could look upon complainants as a pioneer in this field of invention, and entitled to the broad protection of pioneers, I might be inclined to sustain the allegation of infringement; but, considering the state of the art, and following the rule which I think applies so irresistibly in this line of invention, I am satisfied that defendant's wash-board is of a form different from that of complainants', and therefore must find against any infringement. Defendant is entitled to a decree dismissing the bill.

PROVIDENCE WASHINGTON INS. CO. v. WAGER.

(*Circuit Court, N. D. New York. December 20, 1888.*)

ADMIRALTY—APPEAL—BOND.

Rev. St. U. S. § 631, allowing an appeal to the circuit court from all final decrees of the district court in equity and admiralty, except prize cases, where the matter in dispute exceeds \$50, and requiring the circuit court to receive, hear, and determine such appeal, does not oblige the court to determine an appeal unless security is given. Such security is required by section 1000, prescribing that every judge "signing a citation on any writ of error" shall take good and sufficient surety that the "plaintiff in error or the appellant shall prosecute his writ or appeal to effect," as appears also by section 1001, dispensing with security on "writ of error, appeal, or other process in law, admiralty, or equity," brought up by the United States.

In Admiralty. Appeal from district court.

Hyland & Zabriskie, for appellant.

E. D. McCarthy, for appellee.

WALLACE, J. The question is presented in this case whether upon an appeal to the circuit court from a decree of the district court in admiralty it is necessary for the appellant to give security to prosecute his appeal to effect in order to perfect his appeal. It is insisted for the appellant that by section 631, Rev. St. U. S., his appeal is to be allowed by the circuit court, and the court is required to determine it whether security is given or not; and that security is no longer necessary except when a writ of error is brought to review judgments at law. The sections of the Revised Statutes which bear upon the question are 631, 633, 997, and 1000. Section 631 allows an appeal to the circuit court from all final decrees of the district court in causes of equity and admiralty, except prize causes, where the matter in dispute exceeds the value of \$50, and declares that "such circuit court is required to receive, hear, and determine such appeal." Section 633 allows final judgments of a district court in civil actions, where the matter in dispute exceeds the value of \$50, to be re-examined and reversed or affirmed in a circuit court "upon a writ of error." Section 997 prescribes that there shall be annexed to and returned with "any writ of error" for the removal of a cause "a citation to the adverse party." Section 1000 prescribes that every judge "signing a citation on any writ of error" shall take good and sufficient surety that the "plaintiff in error or the appellant shall prosecute his writ or appeal to effect." Another section which throws some light upon the meaning of section 1000 is section 1001, which provides that whenever "a writ of error, appeal, or other process in law, admiralty, or equity" is brought up to a circuit court by the United States, or by direction of any department of the government, no security shall be required, "either to prosecute said suit or to answer in damages or costs." Upon a first reading it would seem that the "citation" of section 1000 is the citation of section 997, and that section 1000 relates only to reviews of judgments at law upon writ of error, authorized by section 636. The remedy, and the only remedy, for the review by another court of judgments in cases at common law is a writ of error, while an appeal is the remedy, and the only one, for the review of decrees in equity and admiralty; and when the section requires security to be taken upon "signing a citation on any writ of error," it uses language which appropriately refers only to taking security upon the review of judgments at law. But if this language is intended to apply only to reviews by writ of error, no meaning can be attributed to the language that follows, and which requires the security to be that the "appellant shall prosecute his writ or appeal to effect," because there is no such party as an appellant to a writ of error, and no such proceeding upon it as an appeal. Some effect must be given to this language, and effect can be given to it if the words "signing a citation on any writ of error" are used by the revisers as though they are equivalent to allowing an appeal. Such an interpretation is also suggested by the provisions of section 1001. That section is superfluous, and wholly nugatory, unless section 1000 requires security to be taken on appeals in admiralty and equity from all parties appellant, including the United States. The meaning of the revisers as gathered from the lan-

guage of section 1000 and manifested by the terms of section 1001 is certainly equivocal, and sufficiently so to permit a resort to the original sources of the legislation in aid of a correct interpretation. If the contention of the appellant is correct, not only is no security required of an appellant to prosecute his appeal to effect in equity cases or in admiralty cases, but there is no longer any provision of law in such cases requiring the appellant to give security to obtain a *supersedeas*; so that the Revised Statutes have made a radical change in the practice which has existed ever since the judiciary act of 1789. Certainly there is no reason why security should be required of a party who seeks to review a judgment at law, and be dispensed with in favor of the party who seeks to review a decree in equity or admiralty; and it is hardly conceivable that it was the intention of the Revised Statutes to make such a serious innovation upon the pre-existing practice as would result if this has been done.

Formerly appeals in admiralty as well as in equity, according to the view of the supreme court, were to be accompanied with a citation to the adverse party, and the appellant was required to give security to prosecute his appeal to effect, and further security to obtain a *supersedeas*. In the case of *The San Pedro*, 2 Wheat. 132, the court pointed out the distinction between the office of a writ of error and an appeal in the review of judgments and decrees, and held that causes of admiralty and maritime jurisdiction, or in equity, could not be removed for review by writ of error, and that the appropriate mode of reviewing such causes was by appeal. The court were of the opinion that the provisions of the judiciary act of 1789 were defective in not recognizing this distinction, and that the defect was intended to be remedied by the provisions of the act of March 3, 1803, and held that, construing the two acts together, the effect of the legislation was to leave the writ of error in force as the remedy to review judgments in cases at law, and to leave the remedy by appeal confined to admiralty and equity cases. The court also held that the provisions of the judiciary act as to the citation and the security to be given upon a review also remained in force, and were applicable to appeals in admiralty. From the time of this decision until the enactment of the Revised Statutes there was no change in the practice by statute which affects the meaning of section 1000; and according to the well-settled practice of the courts the giving of security was considered essential to the perfecting of an appeal in equity and admiralty. In a case which arose after the enactment of the Revised Statutes it was assumed by the supreme court that an appeal was not perfected until the giving of security. *The S. S. Osborne*, 105 U. S. 450. That congress understood that all suitors prosecuting appeals in the circuit court in equity and admiralty causes were obliged to give security for costs to perfect an appeal appears by the act of July 27, 1868. That act was supplementary to an act of February 21, 1863. The act of 1863 dispensed with security in cases brought up to the supreme court upon appeal in admiralty or equity causes by the United States, or by direction of any of the departments of the government; and the act of 1868 (section 2) extends the provisions of the act of 1863 to appeals in equity

and admiralty brought up to the circuit court. Unless all suitors, including the United States, were previously required to give security upon bringing an appeal to the circuit court in equity or admiralty causes, this act was superfluous. Inasmuch as the only statute which required this to be done was one which by its language required the judge "signing a citation on writ of error" to take such security, the act of 1868 is a significant legislative interpretation of the meaning of those words. The revisers doubtless used the words in the sense which had been attributed to them by judicial and legislative construction, and, to make their meaning more unequivocal, coupled with them language not in the original statute, denoting that appellants and appeals were within the scope of the provision. Consequently it is a fair interpretation of section 1000 to conclude that when it speaks of signing a citation upon a writ of error, and requires the judge signing it to take security that the "appellant shall prosecute his writ or appeal to effect," it means that the judge who allows an appeal or a writ of error shall take such security. This interpretation gives effect to all the language of the section, embodies in the section the pre-existing law, and denotes why it was deemed necessary to relieve the United States by section 1001 from giving such security. The appellant will be permitted to file a bond or give security within 20 days *nunc pro tunc*. *Davidson v. Lanier*, 4 Wall. 454; *O'Reilly v. Edrington*, 96 U. S. 726.

LA SCALA *et al.* v. BOUGHTON.

(District Court, E. D. New York. November 23, 1888.)

SHIPPING—CHARTER-PARTY—CONSIGNMENT OF VESSEL—LIABILITY OF MASTER.

A memorandum indorsed on a charter-party, and signed by the master at a port in the course of the voyage, whereby he agrees to consign the vessel, on arrival at the destination, to a certain firm, if a contract at all, is one between the master and the charterers, and the firm, not being privy to it, can maintain no action against the master for loss of commissions occasioned by his refusal to make the consignment.

In Admiralty.

Libel by Diego La Scala, Filippo Modica, and Pietro Tassi, against D. Boughton, master of the steamer *Straithairly*, he being impleaded with others, for damages for refusal to consign the vessel to libelants.

Charles Stewart Davison, for libelants.

E. B. Convers, for respondent.

BENEDICT, J. The charter-party in evidence in this case, made at London between Pietro Tassi and the owners of the steamer *Straithairly*, contained no provision for the address of the steamer at New York. When the steamer arrived at Leghorn, from London, the following indorsement was made upon the charter-party: "The steamer will be ad-

dressed to Messrs. La Scala & Modica, in New York, whose orders I will follow in New York as to wharfage, discharge," etc. This was signed, "D. BOUGHTON, Master." In one branch of this case against the charterers, based upon this memorandum, it was held [*The Serapis*, 36 Fed. Rep. 707] that the memorandum created no liability on the part of the ship-owner to consign his vessel to Messrs. La Scala and Modica, because when the owners, as the charter-party shows, had expressly declined to make a contract for the consignment of the vessel in New York, it was beyond the master's authority to do so at the port of Leghorn, when the steamer was there in the course of prosecuting the voyage. The branch of the case now under consideration is against the master alone. Here, the libelants La Scala and Modica seek to hold the master personally liable, by reason of the memorandum referred to, for the damages sustained by them by reason of his refusal to consign the vessel to them upon her arrival in New York. The question now to be considered, therefore, is whether the memorandum referred to, signed by the master in Leghorn, gives La Scala and Modica a legal and equitable claim against the master personally for the loss of such commissions as they might have earned in case the vessel had been consigned to them in New York. Upon this question my opinion is that the memorandum in question does not give the libelants any legal or equitable claim against the master personally. The memorandum indorsed upon the charter, if it be a contract at all, was a contract between the ship-master and the charterers of the ship. The libelants were in no way parties thereto. Between the libelants and the master there was, therefore, no privity of contract; neither was there any obligation or duty on the part of the charterers to consign their ship to the libelants in New York, which can be taken to be a substitute for that privity necessary to create a cause of action. The libelants are in law mere strangers. They cannot intervene or claim by action the benefit of a contract made between the charterers and the master under the circumstances stated. The libel as against the master must also be dismissed.

UNITED STATES v. GREENMAN.

(District Court, D. Connecticut. December 15, 1888.)

PILOTS—VIOLATION OF NAVIGATION RULES—STATUTES—REPEAL.

Rev. St. U. S. § 4412, empowering the board of supervising inspectors to establish such regulations to be observed by steam-vessels, to which chapter 1, tit. 52 relates, in passing each other in the waters of the United States, as it shall from time to time deem necessary, is not repealed by act Cong. March 3, 1885, adopting the revised international regulations to prevent collision at sea, and a pilot violating a rule established by such board is liable to the penalty therefor imposed by section 4413.

On Demurrer.

George G. Sill, U. S. Dist. Atty., for the United States.

Hadlai A. Hull, for defendant.

SHIPMAN, J. This is a demurrer to an information for a misdemeanor under section 4413 of the Revised Statutes. I am of opinion that section 4412 of the Revised Statutes is not repealed by the second section of the act of March 3, 1885, entitled "An act to adopt the revised international regulations to prevent collisions at sea," but that the board of supervising inspectors still has power to establish such regulations to be observed by the steam-vessels, to which chapter 1, tit. 52, relates, and which are passing each other in the waters of the United States, as the board shall from time to time deem necessary for safety, such regulations to be in conformity with the existing laws of the United States. Article 20 of the international regulations, and rule 22 of the rules contained in section 4233 of the Revised Statutes declare the general duty of vessels which overtake each other, and are substantially alike. By virtue of section 4412 the board of supervising inspectors established rule 8, which specifies the particular duty of the pilot of a steamer overtaking and endeavoring to pass another steamer. This rule is still in existence, and for a willful refusal, in coast waters of the United States, to observe it, the offender is liable to a penalty by virtue of section 4413 of the Revised Statutes. The demurrer is not sustained.

FILLI v. DELAWARE, L. & W. R. Co.

(Circuit Court, S. D. New York. November 26, 1888.)

COURTS—FEDERAL JURISDICTION—CORPORATIONS—CITIZENSHIP.

Act U. S. March 3, 1887, providing that an action shall be brought in no other district than that of which defendant is an inhabitant, authorizes an action against a railroad corporation only in the state by whose laws it was created, though the greater part of its railway and its principal office are in another state, where its annual elections are held, and most of its officers and stockholders reside, and of which most of its directors are citizens.

At Law. On motion to set aside service of summons.

Plaintiff, Anthony Filli, an alien, brought suit against defendant, the Delaware, Lackawanna & Western Railroad Company, a Pennsylvania corporation, in the Southern district of New York. Defendant moved to set aside service of process on the ground that under the act of March 3, 1887, the action could not be brought in a district other than that of which defendant was an inhabitant. Upon the motion, plaintiff read an affidavit showing that the greater part of defendant's railroad is located in the state of New York; that its principal office is in the city of New York; that its annual elections of directors are held in the principal office; its books and records kept, and its stock transferred there; that its principal officers have their offices there; and that of its fourteen directors, eleven are citizens and residents of New York state, and only one is a citizen and resident of Pennsylvania.

Rogers, Locke & Milburn, (Charles MacVeagh, of counsel,) for defendant.

The court cannot take jurisdiction, unless the facts constituting such jurisdiction are affirmatively shown. *Bors v. Preston*, 111 U. S. 255, 4 Sup. Ct. Rep. 407; *Robertson v. Cease*, 97 U. S. 646; *Bank v. Reed*, 8 Reporter, 7. The court cannot take jurisdiction, unless the record shows affirmatively that the defendant corporation is an inhabitant of the Southern district of New York. Act March 3, 1887; *Short v. Railroad Co.*, 34 Fed. Rep. 225; *Tiffany v. Wilce*, Id. 230; *Loomis v. Gas Co.*, 33 Fed. Rep. 353; *Vinal v. Construction Co.*, 34 Fed. Rep. 228; *Swayne v. Insurance Co.*, 35 Fed. Rep. 1; *Railroad Co. v. Railroad Co.*, 33 Fed. Rep. 385; *Denton v. International Co.*, 36 Fed. Rep. 3; *Halstead v. Manning*, 34 Fed. Rep. 565. The record shows that the defendant is an inhabitant of the state of Pennsylvania. *Railroad Co. v. Harris*, 12 Wall. 65; *Railway Co. v. Whitton*, 13 Wall. 285; *Ex parte Schollenberger*, 96 U. S. 377; *Railroad Co. v. Koontz*, 104 U. S. 11; *Muller v. Dows*, 94 U. S. 444; *Steam-Ship Co. v. Tugman*, 106 U. S. 120, 1 Sup. Ct. Rep. 58; *Fales v. Railway Co.*, 32 Fed. Rep. 673. The objection to jurisdiction is properly taken by motion to set aside the service, and dismiss the complaint. *Manufacturing Co. v. Pope Manuf'g Co.*, 34 Fed. Rep. 818; *Denton v. International Co.*, 36 Fed. Rep. 1.

William P. Toler, (George C. Holt, of counsel,) for complainant.

A corporation can be an inhabitant of a state which did not create it. *Bank v. Deveau*, 5 Cranch, 61; *Bank v. Slocomb*, 14 Pet. 60; *Railroad Co. v. Wheeler*, 1 Black, 286; *Muller v. Dows*, 94 U. S. 444; *Steam-Ship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. Rep. 58; *Insurance Co. v. French*, 18 How. 404; *Express Co. v. Kountze*, 8 Wall. 342; *Manufacturing Co. v. Pope Manuf'g Co.*, 34 Fed. Rep. 818; *Denton v. International Co.*, 36 Fed. Rep. 1; *Gibbs v. 37 F. no. 2—5*

v. *Insurance Co.*, 63 N. Y. 114; 2 Mor. Priv. Corp. (2d Ed.) § 958, note. Defendant is an inhabitant of the Southern district of New York. *Miller-Magee Co. v. Carpenter*, 34 Fed. Rep. 483; *Hardenberg v. Ray*, 83 Fed. Rep. 812; *Halstead v. Manning*, 34 Fed. Rep. 565; *Cooley v. McArthur*, 35 Fed. Rep. 372; *Gracie v. Palmer*, 8 Wheat. 699. The defendant has waived its right to claim exemption from suit in this district. Cases cited, and also *Pennoyer v. Neff*, 95 U. S. 722; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354.

LACOMBE, J., (*after stating the facts as above.*) The fact of citizenship in any particular state is asserted of a corporation solely by a legal fiction. A suit by or against it is regarded as a suit by or against the stockholders; and it is conclusively presumed (frequently contrary to the fact) that all the stockholders are citizens of the state which by its laws created the corporation. *Railroad Co. v. Harris*, 12 Wall. 65; *Railway Co. v. Whitton*, 13 Wall. 285; *Muller v. Dows*, 94 U. S. 444; *Steam-Ship Co. v. Tugman*, 106 U. S. 120, 1 Sup. Ct. Rep. 58; *Bank v. Earle*, 13 Pet. 519. Analogy would indicate that the place of its inhabitancy is to be ascertained in the same way as its citizenship, and such is the expressed opinion of the only supreme court decisions bearing on the point. *Ex parte Schollenberger*, 96 U. S. 377; *Railroad Co. v. Kootz*, 104 U. S. 11. The circuit court cases cited by the plaintiff in support of his contention do no more than hold that, although a corporation be a citizen and inhabitant of one state, it may, for the purpose of serving process, be found elsewhere. Some of them apparently intimate that a corporation may be an inhabitant of a state other than that which created it, but the weight of authority is the other way; and in *Fales v. Railway Co.*, 32 Fed. Rep. 673, it is expressly held that under the act of 1837 the same construction must hold good as under previous acts, viz., that corporations are to be deemed citizens and residents of the state under whose laws they are created. If the plaintiff in the case at bar were a citizen of this state, and a resident of this district, he could no doubt effect service on the defendant here, where its principal office is located, although it is a citizen of Pennsylvania, and so much of its railroad as is located in this state lies within the Northern district. Such, however, is not the case. To sustain any action in this district, plaintiff must show that the defendant's legal habitation is here. This he cannot do unless the rule for ascertaining the citizenship and residence of corporations laid down by the supreme court in the cases cited is departed from. The motion is granted.

BURDON CENT. SUGAR REF. CO. v. LEVERICH.

(Circuit Court, E. D. Louisiana. November 15, 1888.)

INJUNCTION—AGAINST BREACH OF CONTRACT—ADEQUATE REMEDY AT LAW.

The breach of a contract by which defendant agreed to have her whole crop of sugar for two years refined at plaintiff's refinery may be adequately compensated by damages at law, and equity will not enjoin a violation of the agreement.

In Equity. On motion for injunction *pendente lite*.

Bill by the Burdon Central Sugar Refining Company against Anne F. Leverich to restrain the violation of a contract by which defendant agreed to have all the sugar produced on her plantation in the years 1887 and 1888 refined by plaintiffs.

A. Goldthwaite, for complainant.

Rouse & Grant, for defendant.

PARDEE, J. If the equity jurisdiction clearly appeared in this case there would still be serious difficulty in granting the injunction pending the suit, and perhaps on final decree. From the nature of the case an injunction prohibiting the defendant from violating the contract by selling or refining her crop elsewhere than in complainant's refinery is practically a decree for the specific performance of the contract,—for the present year at least, as the crop is now being gathered, and must be taken care of or totally lost. The effect of the injunction *pendente* then is to decide the case on the bill and affidavits, and leave the defendants to be heard afterwards. And besides this, there is grave doubt in my mind as to whether the suit heretofore instituted by the defendant against the plaintiff for damages and for a rescission of the contract on account of alleged breaches is not an insuperable objection to a decree for specific performance pending such suit. It would present a curious look if, while one party is asserting at law a suit for damages for the violation of a contract, the other party is enforcing the contract by an injunction in the nature of a decree for a specific performance. "If in any case the parties have so dealt with each other in relation to the subject-matter of a contract that the object of one party is defeated, while the other party is at liberty to do as he pleases in relation to that very object; or if in fact the character and condition of the property to which the contract is attached have been so altered that the terms and restrictions of it are no longer applicable to the existing state of things,—in such cases courts of equity will not grant any relief, but will leave the parties to their remedy at law." 2 Story, Eq. Jur. § 750. In a case in Virginia, where an action of covenant was brought on articles of agreement for the conveyance of an interest in an estate, the defendant was not allowed to bring a bill to enjoin the proceedings and for a specific performance. *Long v. Colston*, 1 Hen. & M. 110. If the present bill asked also for an injunction to stay the suit at law, the case would be exactly like the *Vir-*

ginia case just cited. However these matters may be,—and I have referred to them because argued,—it seems to me that there is no equity jurisdiction in the present case, because the complainant has a plain and adequate remedy at law. There is no doubt that the damages resulting to complainant from a breach of or total disregard of the contract on the part of defendant can be fully compensated in money, and from the nature of the contract and the conceded circumstances of the case, the amount of such damages can be accurately proved and determined. It is contended that because the contract is a continuing one, and covers the crops of 1887 and 1888, and therefore the damages for the breach cannot be ascertained before the crop of 1888 shall be made and refined, that therefore the remedy at law is incomplete, and that it is not sufficient that the remedy at law will after a time be complete and adequate; it should be complete and adequate now. The answer to this is that the complainant ought not to be allowed to recover for damages before the damages are suffered, and that the remedy is adequate as long as it is commensurate with the injury. In the case of *Fothergill v. Rowland*, L. R. 17 Eq. 132, which was a case exactly in point, it was said by the master of the rolls:

“To say you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years, is to limit the power of ascertaining damage in a way which would astonish gentlemen who practice on the other side of Westminster Hall. There is never considered to be any difficulty in ascertaining such a thing.”

The contract in question is a Louisiana contract, and the rule of damages resulting from the inexecution of obligations as found in article 1934 of the Revised Civil Code is broad enough to protect the complainant. As to where there is an adequate remedy at law, see *Thompson v. Allen Co.*, 115 U. S. 550-554, 6 Sup. Ct. Rep. 140, and *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. Rep. 249, and cases there cited. The motion for an injunction *pendente* is refused.

UNITED STATES *v.* MISSOURI, K. & T. RY. CO. *et al.*

(Circuit Court, D. Kansas. October 31, 1888.)

1. PUBLIC LANDS—LAND GRANTS—RESERVATIONS.

On bill to set aside the patent to even-numbered sections of land granted to defendant railway company, the objection that these sections were not the subject of grant because of the New York Indian reservation under the treaty of 1838 (7 St. U. S. 550) will not be considered; the supreme court, in a former suit against the same company, (118 U. S. 682, 7 Sup. Ct. Rep. 66) having held that the odd-numbered sections of the same grant were not affected by that reservation.

2. SAME—CONSTRUCTION OF GRANT.

Act Cong. March 3, 1863, granting land in aid of the L. L. & G. road, and act July 26, 1866, having been construed by the supreme court as *in pari materia*,

and enacted with the sole object of building one road, that construction will be followed by the circuit court, and the later act treated as supplementary, rather than independent.

8. SAME—CANCELLATION OF PATENT—MISTAKE OF LAND-OFFICERS.

The officers of the land department having in 1873 issued patents to defendant railway company for the sections involved, on the theory that the requirements of the grant as to location and construction of the road had been essentially complied with, and such action of those officers having been acquiesced in ever since, and the lands in large part sold by the patentee, the court, on bill to set aside the patents, will not hold that those officers erred, unless a very clear case is presented.

4. SAME—COURTS—FEDERAL JURISDICTION.

Persons claiming particular tracts of these lands by virtue of prior homestead or pre-emption settlements, can under the state practice obtain, by action at law, full protection of their rights without the interference of the United States.

In Equity. Bill to set aside land patents. On demurrer to bill.

W. C. Perry, John Martin, and Wm. Lawrence, for plaintiff.

Hutchings & Keplinger and Williams & Dillon, for defendants.

BREWER, J. This is a bill filed by the government to set aside the patent to certain even-numbered sections of land patented to the Missouri, Kansas & Texas Railway Company. The patentee and certain grantees from it of various sections are made parties defendant. All of them joined in a demurrer to the bill, and the questions are now presented on such demurrer. Some years since the government filed a similar bill to set aside patents to the same patentee for odd-numbered sections. That case, on final hearing, was submitted to me, and decided in favor of the government. 25 Fed. Rep. 243. On an appeal to the supreme court the judgment of the circuit court was reversed, and the case remanded, with instructions to dismiss the bill. 118 U. S. 682, 7 Sup. Ct. Rep. 66. The opinion filed in that case by the supreme court is earnestly criticised by the learned counsel for plaintiff, and several pages of their brief are devoted to this criticism. Although such opinion was different from my own, and resulted in the reversal of my judgment, it does not become me to criticise it in the least. On the other hand, it is my duty, as a judge of a subordinate court, to loyally accept it in all its parts as a correct interpretation of the law. If it be true, as counsel say, that there be errors of fact and of law in it, that court, when its attention is called to the matter, will undoubtedly make the correction; meantime it is my duty to follow it, both in letter and spirit. I premise this, because, in my judgment, it avoids the necessity of discussing some of the questions discussed with great elaboration by counsel. I may also add that in view of the magnitude of the interests involved there is a certainty that this case will be taken to the supreme court for review, hence extended discussion on my part of the questions is unnecessary.

It is insisted, in the first place, that these lands were not the subject of grant because of the New York Indian reservation, created by the treaty of 1838. 7 St. U. S. 550. With respect to that question, it is enough to say that if the even-numbered sections were not subject to grant, neither

were the odd-numbered sections; and in the case in 118 U. S. 682, 7 Sup. Ct. Rep. 66, the sixth proposition made by counsel, as appears from their brief, was the same as is now suggested, and, while that question was not in terms discussed by that court, it closes its opinion with these words: "There are other grounds urged for granting the relief sought by the bill, but they are not sufficient to justify such a decree, nor are they important enough to require further discussion here." In view of that expression of opinion from the supreme court, it is unnecessary, if not improper, for me to enter into any discussion of the matter.

The second proposition is that the act of March 3, 1863, making the grant in aid of the Leavenworth, Lawrence & Fort Gibson road, expressly reserved these sections to the United States; and the act of July 26, 1866, does not repeal the former reservation, but recognizes and re-enacts the same reservation, and also that the act of 1866 is not applicable to these lands. It seems to be conceded by the supreme court, in the opinion referred to, that if these acts are to be treated as distinct grants to independent roads, an argument kindred to this would have great force; but the judgment of that court was that the acts of 1863, 1864, and 1866 were to be taken and construed as *in pari materia*, and with the sole object of building one road. Putting that construction upon these various statutes, and regarding them in the same light in which the supreme court seems to have regarded them, the later acts must be treated as rather supplementary than independent, and construing them in that way, the antagonism springing from their reservations disappears. If the later act merely extends or supplements the earlier acts, then they cannot be construed as independent grants, nor as antagonistic. In that view, the effect which has been given to these reserving clauses in other cases ceases to have operating force here, and this proposition must also be overruled.

Again, it is insisted that the road was not built on the line of the definite location, but deflects in some instances therefrom, and near the city of Humboldt to the distance of two miles and a half, and has been since that time operated on the line as built. Hence, by reason of its first failure to construct, and its subsequent failure to operate and maintain on the line of definite location, it is insisted that the grant never became operative, and the officers of the land department exceeded their powers in issuing patents, and that there is a breach of a condition subsequent. It must be noticed that this question does not arise upon an application of the road for patents for these lands, for they were issued in 1873. The department officers then accepted the road as constructed so nearly upon the line as to comply with the conditions of the grant. Fourteen years thereafter, after the land thus patented has been largely, if not entirely, sold by the patentee, this bill is filed. It is obvious that the question presents itself under very different aspects now from what it would then. The executive officers of the government have certain duties of supervision in reference to the execution of grants made by congress, and when they have acted, and their action has been unchallenged for a long series of years, and rights of property have been built up on the faith of their action, a very clear case should be presented before the titles thus resting

for years upon that action are disturbed. In the case from the supreme court, *supra*, it observes:

"And lastly, while we are not disposed to hold the action of the officers of the land department of the government as absolutely conclusive upon such a subject as this, we see no reason why their deliberate action, with careful attention, and all the means of ascertaining what was right, should be set aside in this case."

Again, in the *Maxwell Land Grant Case*, 121 U.S. 381, 7 Sup. Ct. Rep. 1015, the supreme court makes these comments:

"We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated, and fully sustained by proof."

These observations of the supreme court admonish me that a patent once issued from the general government is not lightly to be disturbed, and that the perfect title supposed to be conveyed thereby must always be upheld, unless it be manifest that there has been in its issue a clear departure from the authority granted. If this be true in respect to a recent patent, much more is it true in reference to a patent so old as this. Parties place faith, and should place faith, in the action of the government, and rely upon the title which its patent conveys; and when, as appears in this case, many parties have purchased in perfect reliance upon the title of the patent, and many years have passed with it unchallenged, common fairness requires that the title thus apparently conveyed should be sustained, unless it be very clear that there was a want of authority to issue it. Now, generally, I may observe in this case that the construction of the various acts is not clear. The elaborate briefs prepared by counsel on each side indicate that the matter of construction is a doubtful one. When the officers charged with the primary execution of the duty of construction have discharged that duty, and placed a certain construction upon those acts, and issued patents in accordance therewith, and that construction has been accepted unchallenged for a long series of years, then the court may well hesitate before it says that that construction was improper, and the patent issued without authority. These general considerations are also an excuse for not entering upon a more careful and elaborate discussion of the various questions presented by counsel.

One single matter, however, requires notice, and that is the claim that the patentee received more lands than it was entitled to under this grant; that the lands in controversy were the last selected and patented, and therefore the ones whose title may properly be challenged. In respect to this it may be observed that, even if more lands were patented than the company was entitled to, a grave question arises, and is discussed by counsel, whether the title should fail to those last selected or to those most remote from the granted limits. I do not, however, deem it necessary to enter into a discussion of this question, and for this reason: It is a well-known fact that this road for many miles runs through the Osage Indian lands, and that by the decision of the supreme court of the United States none of these lands passed under this or any other grant to railroad companies. Now, the act of 1866, in making the grant, provides:

"But in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the secretary of the interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated," etc. 14 U. S. St. at Large, 289.

Now, if the right of selection extended to the quantity of lands sufficient to make up the losses caused by the existence of the Osage Indian reservation, then I do not understand that the company has received its full grant of lands; and that such is a true construction of this grant seems to be settled by the decision of the supreme court in the case of *Railroad Co. v. Barney*, 113 U. S. 618, 5 Sup. Ct. Rep. 606. So far as any claim made in reference to particular tracts upon which a homestead or pre-emption settlement was made before any rights of the railroad company attached is concerned, it is enough to say that equity does not interfere when there is a full and adequate remedy at law, and that these parties can, under the settled practice of Kansas, obtain full protection of their individual rights without the interference of the United States as plaintiff. Furthermore, it may be observed that under the ruling in *U. S. v. Tin Co.*, 125 U. S. 273, 8 Sup. Ct. Rep. 850, it is questionable whether the government can maintain a bill to set aside a patent in order simply to protect the rights of an individual claimant. I deem it unnecessary to add more, for reasons heretofore stated. I have not entered into as full a discussion as the importance of the questions would ordinarily demand, but for the reasons indicated I think that the demurrer to the bill should be sustained, and the bill dismissed; and it is so ordered.

MCADAMS *et al.* v. BOYER *et al.*

(Circuit Court, S. D. New York. October 15, 1888.)

CORPORATIONS—MEMBERS AND STOCKHOLDERS—EVIDENCE—SUFFICIENCY—FICTITIOUS CORPORATION.

On a libel for the amount due under a charter-party from an alleged corporation, it appeared that the respondents served, who were engaged in the lighterage business, had taken a lease in their own names, from the proprietor of a disinfecting apparatus, of an office for the representative of the alleged corporation, and charged the money expended therefor, and also expenses for stationery to be used in connection with the office, partly to the corporation and partly to its representative. One of the libelants testified that respondents admitted that they were connected with the corporation, but this respondents denied, and testified that they took the lease relying on the agents' representations that they would increase their lighterage business by procuring transportation of the disinfecting apparatus. *Held*, that the finding of the district court that they were not members of the corporation would not be disturbed.

In Admiralty. On appeal from district court.

Libel by John McAdams and others, of the firm of John McAdams & Sons, against Frank W. Boyer, Charles H. Boyer, and others to recover the amount due under a charter-party, whereby the steam-boat Florence was chartered by libelants to the Eastern Dispatch Transportation Company, in the name of John H. Martin. Libelants claimed that respondents were identified in interest with the corporation, and introduced evidence of entries in the books of respondents Boyer, charging money partly to Martin, and partly to the corporation which he represented. They showed also that respondents Boyer leased an office for Martin in their own names, and furnished him stationery. Respondents were engaged in the lighterage business, and explained these transactions by showing that Martin made representations to them that by renting an office for him from one Pollock, who was the proprietor of a disinfecting apparatus, they would be able to supply him with lighters for the transportation of its appliances, and that by reason of these representations they took the lease for the office and furnished the stationery. One of the libelants testified that respondents Boyer admitted to them that they were interested in the corporation, and this was denied by respondents. In the district court Judge BROWN delivered the opinion, as follows:

"Only the defendants Boyer were served with process, and the defense is that they were not members of the company.

"The evidence shows that the incorporation was intended to be formed under the laws of New Jersey under the name of The Eastern Dispatch Transportation Company.

"Not long before the execution of this charter a certificate thereof stating the incorporation was filed in the county clerk's office, but no such certificate was filed in the office of the department of state, as was required by law, to complete the incorporation of the company. The defendants Boyer are not named in the certificate filed in the county clerk's office. The other defendants were named, including Martin.

"If the Boyers were interested in the company, taking part as intended proprietors in its business, and intended to be interested in any profits that might accrue from it, they would doubtless be held liable in this action.

"The evidence on the libelants' part consists mainly of some circumstances showing dealings between Martin and the Boyers, which, it is claimed, are sufficient to show a proprietary interest in the latter. These circumstances, however, are comparatively trifling.

"The entire management of the business of the company was in the hands of Martin, who, through fair promises, and holding out to the Boyers expectations of very important increase in their lighterage business, in negotiations wholly independent of the dispatch company, induced them to become security for his office, which, through the landlord's urgency, was done by their taking a lease of office room in their own names for his benefit. This, with other circumstances in the loan of some moneys, was doubtless calculated to create a strong suspicion at least of their interest with him in the transportation business, which, upon full consideration of the facts, I am satisfied did not exist. All the circumstances relied on by the libelants do not lead beyond suspicion or surmise.

"The particular features of the case give no support to the theory that the Boyers had any pecuniary interest in the transportation company, or that it was designed to be carried on for their benefit. Martin turned out to be a visionary and unstable character, upon whom no dependence whatever could be placed, and he disappeared before suit.

"The libelants made no inquiry regarding Martin before the execution of the charter-party, nor till after default in payment.

"There is no element of misrepresentation or estoppel to the case. The evidence is, in my judgment, insufficient to hold the Boyers in this action, and the libel must therefore be dismissed, but without costs."

Whereupon libelants appeal.

George B. Adams, for appellants.

Chas. E. Crowell, for appellees.

LACOMBE, J. If the entries in the books of the firm of Boyer Bros. were before the court without explanation, they would seem to show that the "Eastern Dispatch Transportation Company"—concededly a myth—was in fact the firm itself. The respondents, however, have given a plausible explanation of these entries. Such explanation is not inconsistent with the theory of the defense, and will harmonize with the respondents' personal testimony. Between the Boyers and the libelant, who was called as a witness, there is a direct conflict of testimony. The entries in the books will not suffice as a crucial test of the relative veracity of these opposing witnesses, for the reason above stated. Upon the case as it stands, therefore, I am inclined to follow the district judge, who saw both witnesses, and believed the testimony of the respondents, rather than that of the libelant. The additional testimony taken in this court has not materially changed the case. The decree of the district court is affirmed, with costs.

NINTH NAT. BANK v. KNOX COUNTY.

(Circuit Court, E. D. Missouri, N. D. September 11, 1888.)

1. RAILROAD COMPANIES—MUNICIPAL AID—RECITAL IN BOND—ESTOPPEL.

A recital in a county bond, as follows: "This bond being issued under and pursuant to orders of the county court * * * for subscription to the stock of the Mo. & Miss. R. R. Co., as authorized by an act * * * entitled 'An act to incorporate the Mo. & Miss. R. R. Company, approved Feb. 20, 1865,'" does not estop the bondholder from showing that the bond was in fact issued under a general law, especially as the records of the county court showed that before the bonds were issued a vote was taken according to the general law; that the bond register and published statement of the county debt declared that the bonds had been issued under the general law; and that taxes to pay interest had been levied in violation of the special law, and according to the general law for a period of seven years.

2. SAME.

Such recital was not made as the basis of a contract about to be entered into, but was merely a general recital, not intended as a definite statement of matters of fact, on the faith of which the parties had contracted.

3. SAME—POWER OF COURT—SEVERAL LAWS—INSTRUCTIONS.

In an action on the bond, the jury were requested first to find whether the county court intended to act under the special law or the general law. An election had been held according to the general law, but, as the evidence showed that there had been some discussion before the county judge as to the legality of that election, and doubts excited as to the validity of a subscription under it, the jury were instructed to find that the bonds were issued under the general law, if the court in fact relied on both laws to support the subscription; that it was competent for the court to rely and act on both laws; and that it might invoke the aid of any law, supposed to confer power on the court to make the subscription. *Held*, that the instruction was not misleading.

4. SAME—ELECTIONS—VALIDITY OF ORDER.

An order submitting to the voters of a county a proposition to subscribe stock in aid of a railroad under the general railroad law of Missouri, need not specify the name of the corporation, where the proposition describes the proposed route of the road with the requisite certainty.

At Law. On motion for new trial.

Action by the Ninth National Bank of New York on certain bonds and coupons issued by Knox county, Mo. The recital referred to in the opinion was as follows:

"This bond being issued under and pursuant to orders of the county court * * * for subscription to the stock of the Mo. & Miss. R. R. Co., as authorized by an act * * * entitled 'An act to incorporate the Mo. & Miss. R. R. Company, approved Feb. 20, 1865.'"

The rate of taxation to pay the bonds, if issued under the special act, was one-twentieth of 1 per cent. annually, not sufficient to pay the annual interest; but, if issued under the general law, pursuant to a popular vote, the rate of taxation to pay the bonds was unlimited. On the trial the jury were instructed by THAYER, J., as follows:

"The controversy, so far as you are concerned, arises over the question whether the bonds in suit were issued in pursuance of a power conferred on the county by the thirteenth section of charter of the Missouri & Mississippi R. R. Co., or by virtue of the seventeenth section of the general railroad law

of the state, which was in force on May 13, 1867, the day the county court ordered the issuance of the bonds. I will read you the two sections last referred to. Section 13 of the railroad charter is as follows: 'It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed 1-20 of 1 per cent. upon the assessed value of the taxable property for each year.' Section 17 of the general railroad law is in the following language: 'It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town to take stock for such county, city, or town in, or loan the credit thereof to, any railroad company duly organized under this or any other law of the state, provided that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent to such subscription.' You will observe, gentlemen, that here are two different statutes, under either one of which, or under both, the county court of Knox county might lawfully issue bonds in aid of the building of a railroad through the county. Acting under one statute, the county court could issue bonds of its own motion, without a popular vote; acting under the other, a vote of the people was necessary to validate the issue.

"Now, the main question which you must determine in this case is whether the county court of Knox county issued the bonds in suit pursuant to the power conferred on it by section 13 of the railroad charter, and without any reference to a popular vote, or whether the court issued the bonds in obedience to a popular vote, and because more than two-thirds of those voting on the proposition favored an issuance of bonds. If the evidence in this case satisfies you that in issuing the bonds now sued on the county court of Knox county intended to and did act solely in pursuance of the power conferred on it by the thirteenth section of the railroad charter, which I have read to you, and without reference to any authority conferred by a vote of the people, then you will answer the first question submitted to you in the affirmative, and you will answer the second question in the negative, and you may, in that event, answer the third and fourth interrogatories according as you find the fact to be. The questions submitted to you are as follows: '*First*. Were the bonds sued upon in this case issued by the county court of Knox county solely in pursuance of power conferred by the thirteenth section of the Missouri & Mississippi Railroad charter? '*Second*. In issuing the bonds sued upon, did the county court of Knox county intend to issue the same pursuant to power conferred by section 17 of the general railroad law in force on May 13, 1867, and in accordance with a vote of the people of Knox county, authorizing such issue? '*Third*. Was an election held in Knox county, Mo., previous to the issue of the bonds in suit, to authorize a subscription of one hundred thousand dollars to the stock of a railroad corporation running on the line of the Missouri & Mississippi Railroad, as projected? '*Fourth*. Did two-thirds of the persons voting at such election vote in favor of such subscription, and the issuance of bonds to pay for the same?' On the other hand, if you find that the proposition embraced in the two orders of the county court of Knox county of date February 6, 1867, and March 4, 1867, was submitted to the voters of the county at an election held for that purpose; that more than two-thirds of all those voting at such election voted in favor of the proposition; and if you find that the county court subscribed to stock in the Missouri & Mississippi Railroad Company, and issued the bonds in suit in pursuance of power conferred by such vote; and that the projected route of said railroad was on either line or route mentioned in said orders,—then you will answer question No. 1 in the negative, and questions Nos. 2, 3, and 4 in the affirmative. In this connection I will further add, gentlemen, that if you find from the evidence that in

issuing the bonds in suit the county court acted both in pursuance of power conferred by the railroad charter in question, and also in reliance upon a popular vote previously taken, whereat more than two-thirds of those voting favored a subscription, and the issuance of bonds to pay for the same, then in that event you will answer the first question in the negative, and the second, third, and fourth questions in the affirmative. It was competent for the county court to rely and act on both the power conferred by the railroad charter, and upon power derived from the general railroad law, and a popular vote taken in pursuance of the same. Such action on the part of the county judges would not be inconsistent. They might well invoke the aid of any and all laws that were supposed to confer power on the county court to make the subscription in question, or that might confer such power; and if they did so act with reference to and relying upon both said laws, then, although the judges may have had doubts of the validity of the election, the issue of bonds was not made solely under the railroad charter, and you should answer the first question in the negative, and the second, third, and fourth questions in the affirmative, provided it also appears that an election was held as before stated, and that more than two-thirds of those voting thereat favored the subscription.

"In the course of the trial something has been said respecting the form and validity of the two orders of the county court of Knox county of date February 6 and March 4, 1867, which have been read in evidence, and which provided for the submission of a certain proposition to the voters of Knox county. With reference to the orders in question I will say that they are good and sufficient in law, although no particular railroad corporation is mentioned in such orders. If a proposition such as is contained in those orders was submitted to a vote of the people at an election called for that purpose, and more than two-thirds of all the persons voting at the election voted in favor of the proposition, then such vote was sufficient in law to authorize the county court to subscribe for stock in the Missouri & Mississippi Railroad, and to issue the bonds of the county in payment therefor, provided the route of the Missouri & Mississippi Railroad passed through Knox county on either line indicated in said order; that is to say, gentlemen, it was competent for the people of the county to give the county court a general power to subscribe to the stock of any railroad that might construct a railroad through the county on either one of several prescribed routes. It was not necessary that the name of the corporation in which it was proposed to subscribe stock should be specified in the proposition submitted to the voters, and the fact that it was not specified does not impair the validity of the orders, and it does not impair the validity of any action which the county court may have taken on the faith of an election held under the same."

The jury answered the first question in the negative, and the second, third, and fourth questions in the affirmative, and returned a general verdict for the plaintiff.

Motion for a new trial filed.

John B. Henderson, for plaintiff.

James Carr, for defendant.

THAYER, J. The motion for a new trial is based on three grounds: (1) That the jury was misdirected; (2) that illegal testimony was admitted; (3) that the verdict was against the weight of testimony. The last proposition requires no extended notice. If the testimony on which the verdict rests was admissible, the court is satisfied with the findings of the jury. Whether illegal testimony was admitted depends, in my judgment, upon the effect that ought to be given to the recital contained

in the bonds on which the suit is founded. If the recital is in effect a declaration that the bonds were issued under power derived solely from the thirteenth section of the charter of the Missouri & Mississippi Railroad Company, and the recital is conclusive against the plaintiff, then unquestionably very much of the testimony, both for the plaintiff and defendant, was incompetent; but if the recital does not amount to an estoppel against the plaintiff, then all of the evidence to which an exception was taken, in my opinion, was competent. The inquiry under the pleadings being as to which of two laws the county court had acted under in issuing bonds, if the recital is not conclusive on that issue, it was, in my opinion, proper to admit in evidence the entry appearing on the bond register of the county, and also the official statements of the county debt published by authority of law. *Vide* section 30, art. 4, Wag. St. 1872, pp. 414, 415. It was also proper to permit the plaintiff to show under which of the two laws authorizing an issue of bonds the county court had proceeded in the matter of levying taxes to meet the interest on the bonded debt in question from the year 1868 to 1875. All of this testimony had a direct bearing on the issue, and, moreover, it was evidence against the county, made by its own officers in the discharge of duties imposed on them by law.

Recurring, then, to the question above stated, as to the effect of the recital in the bonds, it will suffice to say that, after an attentive consideration of the subject, I adhere to the opinion expressed at the trial, that the recital is not conclusive, and does not create an estoppel, at least against the plaintiff. My conclusion is based mainly on the following grounds:

First. The case may be distinguished from that class of cases in which it has been held that recitals in municipal bonds are conclusive against the municipality, in suits by innocent purchasers, if they recite the existence of facts on which the power to issue bonds depends, and the recitals are made by officers of the municipality who are authorized to determine and certify as to the existence of such facts. *Town of Coloma v. Eaves*, 92 U. S. 484; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; *Marcy v. Oswego*, 92 U. S. 638; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *Commissioners v. Bolles*, 94 U. S. 104; *Commissioners v. Clark*, *Id.* 287; *County of Warren v. Marcy*, 97 U. S. 104; *Pana v. Bowler*, 107 U. S. 539, 2 Sup. Ct. Rep. 704. The rule announced in these cases has for its object the protection of innocent purchasers of municipal bonds, who have bought on the faith of representations contained therein that certain antecedent steps, necessary to render the securities valid, have been taken. These cases enforce the doctrine that a person who has made representations as to material facts will not be allowed to dispute the facts represented, in a suit by a party who has acted on the representation. But in the case under consideration the recital related merely to the law under which the bonds sued upon had been issued; there being two laws, (one special and one general,) from either of which the requisite power might be derived. While the recital fairly implied that the county court had acted under the special law, yet there was no specific statement to that

effect, and the recital was not necessarily inconsistent with the view that it had acted under the general law. Furthermore, the records of the county court showed that before the bonds were issued a popular vote had been taken, as the general law required; the bond register and published statements of the county debt declared that the bonds had been issued under the general law; and taxes to pay interest on the same, for a period of years, had been levied in violation of the provisions of the special law, and in accordance with the general law. These were facts shown by the county records, to which purchasers of the bonds had access, and, moreover, they contradicted whatever inference arose from the recital contained in the bonds. In the respects thus noted, the case differs from those above cited, and, in my judgment, is not controlled by the principle that underlies those decisions.

Second. The recital in question was not made as an introduction to, or as the basis of, a contract about to be entered into. It was a general recital in the body of the bond, and was not intended as a definite statement of matters of fact, with reference to and on the faith of which the parties had contracted. The recital, therefore, cannot be looked upon as in effect an agreement between the county and the bondholder to admit the facts recited, and as being for that reason conclusive. This, I think, is apparent from the form of the recital, and the relation it bears to the bond. Bigelow, Estop. (4th Ed.) pp. 358, 365-369, and cases cited; *Bowman v. Taylor*, 2 Adol. & E. 278.

Third. Furthermore, several decisions of the supreme court of the United States warrant the conclusion that a recital in a municipal bond, merely as to the act under which it was issued, is not conclusive against the bondholder. In the cases of *Commissioners v. January*, 94 U. S. 202, and *Anderson Co. v. Beal*, 113 U. S. 239, 5 Sup. Ct. Rep. 433, the bonds in each case contained a recital that they were issued under laws which in point of fact had been repealed before the bonds were issued. Nevertheless the bonds were supported, and a recovery thereon was allowed, because it appeared that they had been issued in substantial conformity with other laws that were in force when the securities were put in circulation. In the cases of *Crow v. Oxford*, 119 U. S. 215, 7 Sup. Ct. Rep. 180, and *Gilson v. Dayton*, 123 U. S. 59, 8 Sup. Ct. Rep. 66, the bonds involved contained recitals to the effect that they were issued under laws which, as it transpired, were not in force when the bonds were executed. An attempt was made by the bondholders to sustain the issue under laws that were in force, but the attempt failed;—the court holding that, inasmuch as the plaintiffs relied on laws not referred to in the bonds themselves, they were not aided by the recitals, and that it was incumbent on them to show substantial compliance with the provisions of the laws so invoked, which they had failed to do. In none of these cases was it intimated that a recital contained in a bond as to the act under which it was issued operates as an estoppel against the bondholder, and precludes him from contradicting the fact recited. On the contrary, the decisions in each instance proceed on the assumption that recitals of that nature are open to explanation, and that the truth may be shown by any com-

petent evidence, notwithstanding the recital. I so ruled at the trial, and still adhere to that view.

The last and most important question for consideration is whether the jury was misdirected. The special issues framed and submitted required the jury to determine whether the county court, in subscribing for stock in the Missouri & Mississippi Railroad Company, and in issuing bonds therefor, intended to exercise a power conferred on the court by the charter of the railroad company, and that power only, or to exercise the power conferred by a popular vote at an election held under the general railroad law. The county court had an undoubted right to act either under the special law, without a popular vote, or to act under the general law, by the terms of which an election was necessary. In point of fact an election had been held, by order of the county court, prior to the subscription, and the requisite majority had voted in favor of the subscription, as the records of the court showed. It will be seen, therefore, that the jury had to determine which of the two powers the county court intended to exercise at the time the subscription was made. The question at issue was one of intention. Now, it is undeniable that there was some oral testimony in the case tending to show that after the special election was held, and prior to the subscription, a discussion took place in the presence of the county judges as to the legality of the special election, and that doubts were excited, in the minds of some persons at least, as to the validity of a subscription made in obedience to the vote cast at such election. In view of this testimony and other facts in the case, it was possible, if not probable, that the jury might conclude that the county court was influenced in its action by both the general and the special law; that in point of fact it eventually acted on the theory that it would obey the public will expressed at the election; and that if for any reason the election should be held to be invalid, the subscription could at least be supported under the special law. It seemed to be necessary, therefore, in view of this phase of the testimony, to give the jury some directions applicable thereto to enable them to answer the special issues. The court accordingly directed the jury to find that the bonds were issued under the general law if it appeared that the county court relied on both the general and special law to support the subscription, and had been influenced in its action by the provisions of both laws. This direction was supplemented by the general statement that "it was competent for the county court to rely and act upon both laws," and that "it might well invoke the aid of any law that was supposed to confer power on the court to make the subscription." Under the circumstances, however, the latter statements could only have been understood as meaning that it was possible that the county court had been influenced in its action by both laws, and that the county judges might rightfully have been influenced by the consideration that power to make the subscription without a popular vote was conferred by the special law, and would support the subscription, even if the election held under the general law proved to be invalid. So far as I can see, there was nothing in the charge calculated to produce the impression on the mind of the jury that it was

immaterial whether the bonds had been issued under the general or special law. No such view was advanced by the court. On the contrary, the charge was carefully framed so as to require the jury to determine whether the subscription had been made solely in dependence upon the special law, or in obedience to a popular vote; and that part of the charge which is objected to was only intended to govern the action of the jurors in the event of their finding that the county judges had acted in reliance on both the general and special law, in the sense that the subscription would not have been made but for the existence of both laws. If the charge was erroneous, the error, in my opinion, consisted wholly in that part which authorized a finding that the bonds were issued in obedience to a popular vote, and under the general law, if the county court relied in part on the power so conferred, and intended to exercise it. That direction really implied that the county court after the election "might invoke the aid of both laws to support the subscription;" and that, if it did rely on both laws, that fact did not impair the right of the bondholder to insist that the subscription was made under the general law, inasmuch as the election held to authorize the subscription was a valid election. Such thought as I have been able to give to the subject since the trial does not satisfy me that the direction so given was erroneous. As the county court at the time the subscription was made in fact had power by virtue of an antecedent popular vote to make the subscription under the general railroad law, I think it is questionable whether any inquiry at this time as to intentions of the county court is permissible, in view of the action of county authorities for a period of years in treating the bonds as issued under the general law, and in publishing that fact to the world in the manner before indicated. But be this as it may, it appears to me that if there was an actual intent to invoke as far as it would extend, or to any extent, the power conferred by a popular vote at an election lawfully held, the bonds may be rightfully said to have been issued under the general law, notwithstanding the fact that the existence of the special law may also have had some influence on the court's action.

In conclusion I will add that the view which the court took, and expressed in its charge, of the validity of the order of the county court under which the election to authorize the subscription was held, is supported by the following decisions: *Commissioners v. Thayer*, 94 U. S. 631; *Block v. Commissioners*, 99 U. S. 698. In each case it was held, under a law very similar to the law which prevailed in this state when the election in question was called, that an order submitting to the voters of a county a proposition to subscribe stock in aid of a railroad, need not specify the name of the corporation if the proposition describes the proposed route of the road with the requisite certainty. As this case was submitted to the jury with directions as to the questions of law involved that in my judgment were substantially correct, I shall overrule the motion for a new trial. It is so ordered.

MORRISON *et al.* v. MILLER *et al.*¹

(Circuit Court, S. D. New York. June 20, 1888.)

1. CUSTOMS DUTIES—VALUATION—SILK SPOT AND DOTTED NETS.

Silk spot nets and dotted nets are dutiable at 60 per cent. *ad valorem*, and not at 50 per cent. *ad valorem*, under section 8 of the act of June 30, 1864.

2. SAME—STATUTES—CONSTRUCTION—COMMERCIAL MEANING.

In order to determine the commercial meaning of a term in tariff acts, it is not the meaning used in transactions between the retail dealer on the one side and the individual purchaser at retail on the other that is to be considered; but the meaning used between parties who are, on both sides of the transaction, engaged in that particular occupation as the business of their lives.

(Syllabus by the Court.)

At Law.

Action by George A. Morrison and others against Charles E. Miller and others, as executors of Chester A. Arthur, collector of customs, to recover customs paid. The plaintiffs, Morrison, Herrmann & Co., imported into the port of New York in August, September, and October, 1873, certain nets made of silk and of silk and cotton; the silk in the latter being the component material of chief value. They were classified for duty at 60 per cent. *ad valorem*, under the enumerating clause of section 8 of the act of June 30, 1864. The plaintiffs, on the other hand, claimed that the rate they should properly bear was but 50 per centum *ad valorem*, under the last clause of the same section, imposing that rate upon "all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for;" and brought the action to recover the difference between 50 and 60 per cent. All further facts appear in the charge.

Edward Hartley and Benjamin Barker, Jr., for plaintiffs.

Stephen A. Walker, U. S. Atty., and Macgrane Coxe, Asst. U. S. Atty., for defendants.

LACOMBE, J., (*charging jury*.) These goods in suit are covered concededly by one or the other of two clauses in the tariff act. The one clause contains an enumeration of a great many articles, made of silk, as follows: "Silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watch-chains, webbing, braids, fringes, galloons, tassels, cords, and trimmings: sixty per centum *ad valorem*." The other is: "Manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for: fifty per centum *ad valorem*." First, as you will perceive, congress enumerated with considerable exhaustiveness articles known to it and known to be made of silk, and affixed to them a duty of 60 per cent.; and then they enacted a clause covering any silk article not pro-

¹Publication delayed by failure to obtain copy of opinion at time of delivery.

vided for in the first clause, and to that second class they affixed a duty of 50 per cent. In order to recover, the plaintiff must satisfy you by a fair preponderance of proof that the articles here are not included at all in the enumeration of the first clause, which I have read,—that they are not either veils, laces, or webbing. The question, then, to be determined in the first place is as to the sense in which congress has used this language. We all, in common speech and in common writing, repeatedly use words to express things. If we were challenged as to what they meant, or if some one who heard what was said, or read what was written, wanted to know what was meant, we would appeal at once to our general knowledge of the received use of the word in the English language, and, if such general knowledge were not sufficient to answer the purpose, we would turn to a standard dictionary to find out what the word meant. Let us first apply this rule to the word “laces.” “Lace” is defined by Webster as being “a fabric of fine threads of linen, silk, or cotton, interwoven in a net, and often ornamented with figures; a delicate tissue of thread.” Now, it is plain upon all the evidence, and even without the evidence upon an inspection of the goods, that they are covered by that term; and, were it not for another rule of interpretation which the courts apply to tariff acts, there would be no question at all for you here. This other rule, however, may be thus stated: Inasmuch as the tariff acts deal with imports, and are concerned with matters of trade and commerce; and inasmuch as merchants and importers quite frequently distort the original meanings of words, either by expanding them, or by restricting them, so that in the trade they mean not precisely what they do in common speech, it is assumed that congress, when dealing with trade, uses the technical words of trade with the same meaning that the trade uses them. The plaintiffs, in order to take themselves out of the operation of this first clause, containing the long enumeration of articles, undertake to show that by an application of this principle these nets in controversy are taken out of the enumeration, and are no longer to be covered by the word “laces.” They have introduced a great deal of testimony, which is not disputed at all by the other side. The witnesses for plaintiff and defendant alike agree that these goods are universally known as “nets,” as “spot nets,” and as “dotted net.” That, however, is not all that the plaintiff must do. To illustrate: Wheat is a grain; and no amount of testimony that winter wheat was never bought and sold in trade by any other name than “winter wheat,”—that that was the only name that was used with regard to it, and that it was never known as grain in trade,—would take it out from a classification of “grains,” unless it was also shown that the word “grain” had been distorted from its natural meaning, and was used by the trade in a restricted meaning, covering cereals other than wheat. So here, in order to take this class of goods, which, under the definition in the dictionary, is covered by the word “laces,” out of that class of goods, he must satisfy you by a preponderance of proof that the word “laces” or “silk laces” (which are the precise words used here) at the time of the passage of this act had, in trade and commerce in this country, a particular technical trade meaning, and that that particular

trade meaning excluded nets. Unless he has satisfied you of that, he is not entitled to recover. I shall not undertake to recite what the evidence is upon that subject. You have heard it, and are entirely competent, and it is your peculiar function, to weigh the testimony and evidence of the respective witnesses; and I have no doubt that exactly what they have said is as present to your mind as it is upon the notes which I have here. The question, then, which you have to decide is simply this: Had the words "silk laces" a definite trade meaning, different from its meaning in the ordinary uses of the English language as spoken here when congress passed these acts? If you arrive at the conclusion that it had, then, as so used, did it exclude "nets?" If you answer both those questions in the affirmative, your verdict must be for the plaintiff. If you cannot or do not answer both of those questions in the affirmative, then your verdict must be for the defendant.

I have had several requests to charge passed to me by the plaintiff. The first three I decline to charge, other than as parts of them are already charged. The fourth is this:

"That the opinion of witnesses as to whether or not laces or nets are the same commercial article, must be confined to the business of buying and selling and dealing with them as articles of commerce, and considerations derived from sources unconnected with the business of buying and selling, or trade, are of no value in determining that question."

I so charge you. That is to say, when we want to find out what the meaning of a word is generally, we appeal to our own knowledge of the English language, or, if we find that that fails us, we go to the dictionary; but if we want to find a specific trade meaning, we obtain that trade meaning from testimony of those who are in the trade, and from the knowledge that they have acquired by buying, selling, and dealing.

Mr. Coxe. I ask your honor to charge the jury that in so considering trade terms they shall consider the terms as used by importers and large dealers, and not as used by the retail dealers on the one hand and the individual purchasers at retail on the other.

The Court. It is not the small retail trade—where the tradesmen on the one side meets on the other with the individual buyer, who knows nothing about the trade at large—that you are to consider; it is trade as conducted between parties who are, on both sides of the transaction, engaged in that particular occupation as the business of their lives.

The jury then retired, and subsequently rendered a verdict for the defendant.

WEILBACHER *et al.* v. MERRITT, Collector of Customs.

(Circuit Court, S. D. New York. October 29, 1888.)

1. CUSTOMS DUTIES—CLASSIFICATION—GLUCOSE AND GRAPE SUGAR.

Glucose and grape sugar are not dutiable as "burnt starch or gum substitute," as provided for in Rev. St. U. S. § 2504, Schedule M, but are properly assessed as non-enumerated manufactures, under section 2516.

2. SAME—ACTION TO RECOVER EXCESS—PROVINCE OF JURY.

The question whether a particular importation, on which a duty has been imposed, is properly included in a particular name of a substance as employed in the tariff laws, is for the jury, and not the court.

3. SAME—MEANING OF TERMS.

The definition of the terms "gum substitute, or burnt starch," as used in the tariff law, (Rev. St. U. S. § 2504,) is for the jury, where there is evidence of a trade usage of one of the terms; the word "or" in the statute possibly having been used to refer one phrase to the other for explanation.

4. SAME.

The terms "gum substitute" and "burnt starch" are to receive the meaning given them in ordinary commercial operations, unless a trade meaning different from that in ordinary use is established by a preponderance of evidence.

5. SAME—SIMILITUDE CLAUSE.

Rev. St. U. S. § 2499, imposing a tariff on articles not theretofore enumerated, "which bear a similitude, either in material, quality, texture, or the use to which they may be applied," to any enumerated article, does not require that the resemblance should be in all of the four particulars mentioned; but the similitude must be a substantial one, importing not merely adaptability to sale as a substitute, but referring rather to the employment of the article, or its effect in producing results.

6. SAME—PRESUMPTION—ACTS OF COLLECTOR.

The presumption is that the collector of customs acted rightly in imposing a duty on imports, and the burden is on one contesting the validity of the duty, to show that it was not properly imposed under the tariff laws.

At Law. Action to recover back alleged excessive duties.

The plaintiffs, Paul Weilbacher and another, in the years 1880 and 1881 imported into the port of New York certain importations of glucose and of grape sugar. These goods were classified for duty by the defendant, Edwin A. Merritt, collector of customs, at 20 per cent. *ad valorem*, as non-enumerated manufactures, under section 2516 of the Revised Statutes. The plaintiffs, however, claimed that the proper rate was but 10 per cent. *ad valorem*, on the grounds: *First*, that the importations were actually burnt starch and gum substitute, and therefore dutiable at the latter rate, which is imposed upon burnt starch or gum substitute by Schedule M, § 2504, Rev. St.; or, *second*, that they bore such a similitude in the material, quality, texture, and use with burnt starch or gum substitute that by the operation of section 2499 of the Revised Statutes they were properly dutiable at the rate borne by burnt starch or gum substitute. This action was brought to recover the difference between 20 and 10 per cent. The plaintiffs adduced testimony tending to show that both glucose and grape sugar, on the one hand, and the gum substitute or burnt starch of commerce, were starch products, and were produced by the application of heat to starch; that chemically they were alike; that dextrine, which is gum substitute, as it appears chemically

in glucose, is of use in brewing; and that, further, the term "burnt starch" as used in the tariff act, was not a commercial term, and that therefore the articles in question, being starch acted upon by heat, were actually burnt starch, or were so like it in material and quality as to be dutiable at the same rate with it by similitude. The defendant adduced testimony tending to show that although "burnt starch" was not a generally used term in the trade and commerce of this country, still it was used, and whenever used it was used to designate "gum substitute," which was also interchangeably known as "dextrine," or "British gum;" that maltose is a variety of sugar; and that in the manufacture of glucose chemically, dextrine appears first, then maltose, and then chemical glucose, which is called "dextrose;" that, so far as chemical formulas are concerned, dextrine differs as much from glucose as glucose differs from cane sugar; that glucose and tapioca have the same formula, and dextrine and cotton the same formula; that glucose is easily fermentable, and dextrine will not ferment at all; that glucose reduces Fehling's copper solution at once, and the dextrine will not reduce it at all; that glucose is crystallizable, and dextrine is not; that non-converted starch is found in dextrine, and is never found in glucose; that the main use of glucose, or grape sugar, is as a ferment in beer, and in the manufacture of confectionery, and for its saccharine qualities, whereas the dextrine of commerce (that is, gum substitute, or burnt starch) is always used as an adhesive, in the manufacture of mucilage, such as we use on postage stamps and envelopes, and for fastening colors in calicoes and wall-papers, and as a size, and for surgical dressing; that in all the uses to which glucose or grape sugar were put, dextrine was not used, and *vice versa*; that glucose, or grape sugar, is edible, and dextrine is not; that in the manufacture of commercial dextrine, or gum substitute, the object was to produce an article with as little glucose in it as possible, and conversely; that in the manufacture of commercial glucose, or grape sugar, the object was to obtain a material with as little dextrine in it as possible.

Stephen G. Clarke and Edwin G. Smith, for plaintiffs.

Stephen A. Walker, U. S. Atty., and Macgrane Coze, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*charging jury.*) This case has taken some time to present, but as I shall not undertake to review the evidence, and as the law of the case lies in a narrow compass, I need detain you but little longer. In these tariff cases it is a fact for the jury to decide whether the imported article is or is not within the designation in the tariff act, and a dutiable article; it is not a question of law for the court. *Lawrence v. Allen*, 7 How. 797. Except, therefore, to instruct you as to what the statutes provide touching importations like these in suit, I shall leave the case for you to determine, under the testimony. The tariff acts, as you know, are long and complicated documents. With more or less careful phraseology they undertake to cover every article upon which the framers intend that duties shall be levied. They enumerate very many articles, using their specific names. In other cases they refer to classes or groups

of articles by some general clause or phrase covering a great many varieties. Again, lest notwithstanding the use of all these enumerations they should allow something to slip, they provide various catch-all clauses, intended to hold whatever residuum may be left. One of these catch-all clauses is this, (section 2516 of the Revised Statutes:)

"There shall be levied, collected, and paid * * * on all articles manufactured in whole or in part, not herein [that means, in the tariff act] enumerated or provided for, a duty of twenty per centum *ad valorem*."

It was under this clause that the collector imposed the duty in this case. As a public officer discharging public functions, it is, of course, to be presumed that he acted rightly, and the burden, therefore, is upon the plaintiffs to satisfy you either that these importations are enumerated, or are provided for in this tariff act otherwise than in this catch-all clause. That is the burden which they assume. The importations in this case are, as you have seen, some of them in a solid, and others in a liquid, form. They are called in the invoices, "Crystal Syrup," or "Trauben Zucker." They have been called by the witnesses, and in the arguments of counsel, "Grape Sugar," or "Glucose." Now, in the tariff act there is no provision at all with regard to glucose, or grape sugar, or trauben zucker, or crystal syrup, but the plaintiffs say that their importations are nevertheless enumerated in the statute, and they refer to a clause in Schedule M, which is this: "Gum substitute, or burnt starch, ten per centum *ad valorem*." Of course, if these importations are gum substitute, or burnt starch, that ends the case, and the plaintiffs are entitled to a verdict; or if one of them is and one is not, they would be entitled to a verdict for the proportionate amount, whichever the case might be. Now, it is for you to say, under the evidence, whether these importations, or any of them, are in fact gum substitute, or burnt starch; and to assist you in reaching that conclusion the plaintiffs' evidence has been introduced, and testimony given as to the materials of which they are composed, and their methods of manufacture, and you have tasted and handled them yourselves. Before classing these particular importations, however, it becomes necessary to ascertain what is the meaning of the words "gum substitute," or "burnt starch," in that section of the tariff act. To aid in defining these words the evidence has in part been introduced. Where words used in a statute are not technical, either as having a special sense by commercial usage, or as having a scientific meaning different from their popular meaning, *i. e.*, when they are words of common speech, their interpretation is for the court. *Marvel v. Merritt*, 116 U. S. 11, 6 Sup. Ct. Rep. 207. The ordinary meaning of the words "burnt starch" is starch which has been burned; the ordinary meaning of the words "gum substitute" is a substitute for gum. Evidence touching trade usage of one or the other of these terms has been introduced here, and for that reason, and because the use of the conjunction "or" in the statute may, under the rule suggested by the supreme court in the case of *Arthur v. Cumming*, 91 U. S. 362, be taken to indicate an intention of congress to refer to the one phrase in explanation of the other, I shall leave the whole question as to the determination of the definition, as well as the deter-

mination as to the articles, to you. Words in English speech and writing—in fact, in any speech and writing—are used in different ways; sometimes loosely, and sometimes with great discrimination; sometimes in a broad sense, and sometimes in a very restricted sense. They are used technically, colloquially, and scientifically. As to their use in these statutes we have a rule repeatedly and very clearly laid down by the supreme court, and I shall read to you from some of the decisions of that tribunal a statement of that rule, which is the one you are to follow in defining the words “gum substitute,” or “burnt starch,” as you find them in this statute.

The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and local transactions, and when the legislature adopts such language to define and promulgate their action, the just conclusion must be that they not only themselves comprehend the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom it is delivered, and for whom it is designed to constitute a rule of conduct, namely, the community at large. *Maillard v. Lawrence*, 16 How. 251; *Arthur v. Morrison*, 96 U. S. 108. In cases like this, moreover,—that means in tariff cases,—the law recognizes the authority of those engaged in commerce, and adopts necessarily and as conclusive the meaning which they have given to words and phrases employed in their daily business. *Recknagel v. Murphy*, 102 U. S. 197. The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. Whether a particular article was designated by one name or another in the country of its origin, or whether it were a simple or a mixed substance, was of no importance, in the view of the legislature. It applies its attention to the description of articles as they derive their appellations in our own market, in our domestic as well as our foreign traffic, and attempts no other classification than that derived from the actual business of human life. Laws imposing duties on importations are intended for practical use and application by men engaged in commerce. * * * And the language adopted by the legislature, particularly in the denomination of articles, should be construed according to the commercial understanding of the terms used. *Elliott v. Swartwout*, 10 Pet. 147. Or, as elsewhere expressed: The denomination of merchandise subject to the payment of duties is to be understood in a commercial sense, although it may not be scientifically correct. All laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense. *U. S. v. Casks of Sugar*, 8 Pet. 277. It is under this rule that you are, in the first place, to define the phrase in the tariff act,—“gum substitute, or burnt starch.” In the absence of any evidence to the contrary, it will of course be assumed that any particular word or phrase is used in commerce with the same meaning as in the ordinary language of the community at large, and if it is claimed to have a trade meaning different from the general understanding, the party claiming that such difference exists must establish his claim by a fair

preponderance of proof. Bearing these rules in mind, you are to determine, in the first place, what did congress mean by the words, "gum substitute, or burnt starch?" and, secondly, are these importations in fact gum substitute, or burnt starch, within the meaning of those words, as used by congress in this tariff act? Should you reach the conclusion that they are burnt starch, or gum substitute, your verdict will be for the plaintiffs. Should the plaintiffs, however, fail to convince you that these importations are in fact gum substitute, or burnt starch, as the words are used here, they still claim to recover under another clause of the tariff act, which is this:

Sec. 2499. "There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude either in material, quality, texture, or the use to which it may be applied to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned."

This clause does not require that the resemblance should be in all four of the particulars mentioned,—material, quality, texture, and use; and as it may sometimes happen, of course, that an article may resemble in one particular one enumerated article, and in another particular another enumerated article, the following clause is added in the section:

"And if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied, collected, and paid on such non-enumerated article, the same rate of duty as is chargeable on the article which it resembles paying the highest duty."

That is the similitude clause. Now, the similitude referred to in the statute must be a substantial similitude, importing, not merely an adaptability to sale as a substitute for the article to which it is sought to be assimilated, but referring rather to its employment, or its effect in producing results. Nor is it enough if an imported article bears more resemblance to one enumerated article than to another, because it might, notwithstanding that circumstance, bear no substantial resemblance to either. *Murphy v. Arnsen*, 96 U. S. 131. Now, the plaintiffs claim that their importations most resemble gum substitute, or burnt starch; or, rather, they claim that their importations substantially resemble—that they bear a substantial similitude to—gum substitute, or burnt starch, and that they resemble those articles, or that article, more than they do any other article. The defendants, on the contrary, contend that they resemble particularly no one article. They say that, as to any supposed resemblance to gum substitute or burnt starch, they do not resemble that any more than they do sugar. You have heard the testimony, which has at great length described the material, quality, texture, and use of gum substitute, of burnt starch, of sugar, and of all these importations. If from that evidence you find that the importations bear a substantial resemblance to gum substitute, or burnt starch, and resemble that article more than sugar, the plaintiffs are entitled to recover the full amount of their claim, or in proportion for the solids and

liquids; if you should find any difference between them. If you should find, however, that they bear a substantial resemblance to sugar, and that they resemble sugar more than they do burnt starch, or gum substitute, then the defendant is entitled to your verdict, because the plaintiffs have failed to show that they most resemble an enumerated article which is assessed at a lower rate of duty than the collector exacted on these importations; and in fact, under his protest, he could not prove a resemblance to anything other than gum substitute, or burnt starch. If you arrive at the conclusion that these importations bear a substantial resemblance to gum substitute, or burnt starch, and that they also bear a substantial resemblance to sugar, and that they equally resemble both of those substances, then again your verdict must be for the defendant, because of a failure to prove that it most resembled the article paying the lowest duty. Of course, if you arrive at the conclusion that it does not bear a substantial similitude to either of the articles, in that case your verdict also must be for the defendant.

Now, then, to recapitulate: In the first place, if you are satisfied that those importations are in fact burnt starch, or gum substitute, as the words are used in this act of congress, determining their meaning in this act according to the rules which I read to you from the supreme court decisions, then your verdict must be for the plaintiffs. If you are not satisfied that they are in fact burnt starch, or gum substitute, within the meaning of the tariff act, then, if you are satisfied that these importations bear a substantial similitude to gum substitute, or burnt starch, and resemble that substance more than they do sugar, then your verdict must be for the plaintiffs. Should you be satisfied, however, from the evidence, that they bear a substantial resemblance to sugar, and resemble sugar more than they do burnt starch, or gum substitute, or equally as much as they do gum substitute, or burnt starch, then your verdict must be for the defendant; and if you are satisfied that they bear a substantial resemblance to neither, then your verdict must be for the defendant.

Verdict for defendant.

STUART v. THORMAN et al.

(Circuit Court, D. Maryland. November 21, 1888.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—ANTICIPATION.

Complainant's patent was for a composite pavement, formed with depressions in which the pressure of the foot produced a partial vacuum, and prevented slipping. It was especially intended for sidewalks. *Held*, that a patent for a concrete street pavement, formed by passing a corrugated roller over it before it had become cold so as to make indentations to catch the shod feet of horses, was not an anticipation of complainant's patent, and, it having been adjudicated in complainant's favor in a former case, a preliminary injunction should be granted, where the affidavits and specimens exhibited show that defendants' patent is an infringement.

In Equity. On motion for preliminary injunction.

Bill by Peter Stuart against John H. Thorman and one Brumshagen, partners in trade under the firm name of John H. Thorman & Co., to enjoin the infringement of patent No. 269,480, granted to said Peter Stuart, of Glasgow, Scotland, 19th December, 1882, for composite pavements. The claim of the patent is as follows:

"A composite pavement, formed with circular, square, or analogous depressions of equal or nearly equal diameter in each direction, and with even or level margin on the pavement surface, to adapt them to operate in the manner described."

The specification describes the mode of operation as follows:

"My improvement is especially, though not exclusively, intended for application to sidewalks, and it consists in the formation in the surface of pavements of depressions of such a character that in stepping thereon the pressure of the feet will expel the air, causing a partial vacuum, which, supplementing the effect of the roughened surface, will operate to afford an additional hold to the feet, and prevent slipping. This beneficial effect is greater when the pavement is wet, at which time pavements as ordinarily constructed with smooth or grooved surfaces are more than usually slippery."

Price & Stewart, for complainants.

Wm. Pinkney Whyte, for defendant.

MORRIS, J. The complainant exhibits his patent, together with the record of the case of *Vulcanite Paving Co. v. American Artificial Stone Pavement Co.*,¹ in the circuit court of the United States for the Eastern district of Pennsylvania, in which, by the judgment of Judges McKENNAN and BUTLER, his patent was adjudicated and sustained. The same defenses were made in that case as in this, and were considered and passed upon by the court. All the anticipating patents now set up in defendant's answer were set up then, except No. 90,825, dated June 1, 1869, granted to Dolch & Duempleman. I am satisfied that this is not an anticipation of the invention claimed by complainant. The specification of the Dolch & Duempleman patent states:

"The smooth surface of all concrete pavements is very objectionable on account of the liability of horses slipping thereon. To obviate this difficulty, we pass over the pavement, before it becomes perfectly cool, a corrugated roller, or a roller having a series of flanges or projections around its circumference, which indents the surface, leaving it in the condition of the Nicholson or any other well-paved road."

This was simply a method of producing lines of depression or indentations in a composition road-bed, such as would catch the shod feet of horses, and prevent them from slipping. It would not accomplish what the complainant sets out to accomplish, and complainant's invention would be almost entirely useless in preventing horses from slipping, which was the object which Dolch & Duempleman had in view. Complainant's invention is especially intended for sidewalks, and consists in the formation in the surface of a smooth pavement of depressions of such a character

¹Reported in 34 Fed. Rep. 320.

that in stepping on them the pressure of the foot on a number of them at once will expel the air, and, by causing a vacuum, afford by suction an additional hold to the sole of the shoe, to prevent slipping. This result it is claimed is more effectively attained when the pavement is wet, and ordinarily would be more slippery, because then the suction is more complete. It is perfectly plain that continuous corrugated lines, or large depressions, such as would assist the foothold of shod horses, would have no such effect.

The case in the Eastern district of Pennsylvania having been, as appears from the record and the briefs of the very able counsel who took part in its presentation, thoroughly contested, the complainant is entitled now to the benefit of that adjudication in his favor. The affidavits filed in support of this motion for a preliminary injunction, and the specimens of the pavement put down by the defendant, exhibited in court, leave no doubt in my mind as to the infringement. The complainant, therefore, under all the rules of practice governing such applications, is entitled to the granting of a preliminary injunction as prayed.

BRINKERHOFF v. ALOE.

(Circuit Court, E. D. Missouri, E. D. December 24, 1888.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—RECTAL SPECULA.

The first claim of the patent granted to A. W. Brinkerhoff, March 2, 1880, on rectal specula, is for a slide extending the entire length of the tube. *Held* anticipated by the older art.

2. SAME—NOVELTY—MATERIAL.

Where an element of a claim does not depend for its novelty in the material of which it is made, it will be anticipated by a like element, in a like instrument, of different material.

3. SAME.

The slide employed in the Brinkerhoff instrument, and covered broadly by the first claim of the patent, is made of metal. The patent makes no mention of any novelty existing in the material of which the slide is composed. *Held*, that the claim is anticipated by a glass slide in a similar instrument.

4. SAME—INVENTION.

Aspeculum consisting of a tube with a slide and a closed end was old. *Held*, that adding an incline to the closed end to prevent the impaction of pile tumors did not involve invention.

5. SAME.

The third claim of the Brinkerhoff patent covers a speculum composed of a tube with a closed end and a slide, and having an incline at the closed end. *Held* void for want of invention.

6. SAME—AGGREGATION.

A claim consisting of a number of elements, which do not co-act to produce a new and useful result, is a mere aggregation, and not a patentable combination.

7. SAME.

Where several old elements are so combined as to produce a better instrument than was formerly in use, but each of the old elements does only what it formerly did in the instrument from which it was borrowed, and in the old way, *held*, that the combination is not a patentable one.

8. SAME.

The second claim of the Brinkerhoff patent covers a slotted tube having an incline and a slide. *Held*, that the incline acted precisely as it did when placed in the forward end of a slotted tube not provided with a slide, and that therefore the claim covered an aggregation only, and was void.

In Equity.

Lee, Brown & Lee, for complainant.

Geo. H. Knight and A. Binswanger, for defendant.

THAYER, J. This is a bill to restrain the infringement of letters patent No. 224,991, granted to Alexander W. Brinkerhoff under date of March 2, 1880, for an improvement in "rectal specula." The patentee, in his specification, thus describes his invention:

"My speculum is made of metal, and plated in the usual manner, to secure a bright interior and smooth surface. In shape it is conical, and has one side slotted through its entire length of chamber. Into such slot is closely fitted a movable slide, having upon its rear end a handle for actuating it. On the side of the tube opposite the slide is another handle, by which to hold the tube when in use. Around the large end of the tube is a flange or lip, * * * and in the forward end of the chamber is an incline, made necessary in specula having closed ends, * * * to prevent the impaction of pile tumors, enlarged glands, or surplus membrane in the end of the chamber, and thereby enable the operator to withdraw the instrument with safety and ease."

Of the nature of his invention the patentee says:

"My invention consists in the use of a slide extending through the length of one side of the tube, and an incline inside of the forward or small end of the chamber, extending from the bottom of the chamber upward and forward to the under side of the slide when in place, to prevent injury to the membrane while withdrawing the instrument," etc.

The claims made in the specification are as follows:

"(1) A slide in the side of a speculum, extending through its whole length, and used substantially as herein described. (2) The incline in the front end of the chamber, in combination with the tube, slot, and slide, substantially as and for the purposes herein set forth. (3) In cylindrical tubular specula having a slotted side and closed end to prevent the entrance of *feces*, the incline in the front end of the chamber, extending upward from the bottom and forward to under side of slide, substantially as described, and for the purposes herein set forth."

1. It is clear that the first claim of this patent covering "a slide in the side of a speculum extending through its whole length," cannot be sustained. Indeed, it is not seriously contended by complainant's counsel that the device covered by that claim is novel. I shall not go into the details of the evidence, therefore, on this branch of the case, but will content myself with the general statement that the testimony of Dr. Warren B. Outen, Dr. Charles Bernays, and Dr. Charles E. Michel, as well as the testimony of William Grady and Herman Speckler, satisfies me that rectal speculums closed at one end, having a slot in the side extending the full length of the chamber, and fitted with a slide, had been used by the medical fraternity in this country, before the date of the alleged invention. While it is true that defendant has not produced any of the spec-

ula that were so in use, and has only produced a model of one made in his own shop since this suit was filed, known as the "Reed Speculum," yet I consider this fact not sufficient in itself to overcome the positive statements of intelligent and entirely disinterested witnesses, who had occasion to know the fact whereof they speak, that specula with slotted sides fitted with slides were in use, and to some extent were on sale, in this country prior to the date of the alleged invention in July, 1878. The Reed instrument, and possibly all the instruments of which the witnesses above named have spoken, had glass slides, instead of metal; but that fact is not important, as the material of which the slide is composed is not claimed as an essential feature of the device. But, even if the foregoing view is erroneous, I am furthermore of the opinion that the first claim of the patent was anticipated by "Segala's Tri-Valve Vaginal Speculum," which was produced on the hearing, and was shown to have been in use in this country since 1860; also by the "catheter" which was produced on the trial, and shown to have been on sale in this country since 1874. The use for which both of the instruments last referred to were designed, are analogous to that in which complainant employs his instrument. Both instruments are tubular, each has a slot in the side extending the full length of the chamber fitted with a metal slide, which is intended to be wholly or partially withdrawn (the same as the slide in the rectal speculum) when the operator has occasion to examine or treat the particular organs for the treatment of which these instruments were constructed. In view of the slides shown in Segala's vaginal speculum, and in the catheter, and the use made of the same, it must be held that there is nothing novel in the slide in complainant's patent. He has, in this particular matter, merely appropriated a device long known and used in surgical instruments fitted for the examination of certain interior membranes or cavities of the body, for the improvement of another instrument adapted to the treatment of other interior membranes. Hilton's rectal speculum, an instrument said to have been in use in England as early as 1870, also clearly anticipates the first claim of complainant's patent, and probably the second and third claims. If Hilton's speculum, as contended, was described in a printed publication in England as early as 1876, that fact also invalidates the first claim of the patent under consideration, and most likely the second and third claims. The original printed publication relied upon, said to have been published in London as early as 1876, was not produced at the hearing before the master, but in lieu thereof a volume entitled "Rest & Pain," published in New York in 1879, which purports to be a reprint of the earlier English publication, was produced. Some testimony was offered to the effect that application had been made to the English publishers, and to other book-sellers in London and in this country, for a copy of the original publication, and that they reported the work to be out of print. All of the testimony, however, tending to show that a book entitled "Rest & Pain" was published in London in 1876, and that the work reprinted in this country in 1879 is an accurate copy thereof, is of the nature of hearsay; and as objection was duly taken to the testimony when

it was produced before the master, and was insisted upon at the trial, the objection must be sustained, no matter how persuasive the inference may be that there was a foreign publication which described Hilton's speculum. The latter instrument is accordingly ignored as an anticipation of complainant's invention.

2. The third claim of the patent is a claim for the "incline" in cylindrical tubular specula having a slotted side and closed end. The particular device attempted to be covered by this claim was anticipated, in my opinion, by a rectal speculum produced by Dr. Mudd, and shown to the satisfaction of the court to have been purchased at an instrument store, and to have been in use in this country before the date of complainant's invention. The instrument in question is tubular. It is conical in form, has a slotted side, a closed end, and, what is of more importance, an incline at the closed end, extending from the bottom of the chamber upward and forward to the end of the slot. It is true that the angle made by the incline with the axis of the tube in the latter instrument approaches more nearly to a right angle than the incline in complainant's speculum, nevertheless there is a pronounced "incline;" and moreover, Dr. Mudd testifies that one purpose of the "incline" is to protect the mucous membrane from injury when the speculum is withdrawn. It should be further observed that complainant's specification does not make the angle at which the incline is set in his speculum an essential feature of the device. As described in his specification, the utility of the incline consists in preventing the "impaction of pile tumors," etc., and in enabling the operator to withdraw the instrument without injury to the membranes. This is precisely the function of the incline in the speculum produced by Dr. Mudd, and apparently it was set at an angle which effectually accomplished that purpose. At all events, no complaint appears to have been made against that speculum on the ground that the incline failed to accomplish the purpose had in view. The Squire's speculum also shows an incline in the forward or closed end, in all respects like that in complainant's instrument; but the testimony in the case leaves it somewhat doubtful whether the "incline" in Squire's speculum was placed therein shortly before or shortly after complainant claims to have invented it. For that reason the patent is not affected by the evidence offered by defendant in relation to the Squire's instrument.

3. In view of what has been said it appears that plaintiff's right to relief depends on the second claim for the "incline, * * * in combination with the tube, slot, and slide." This claim is attacked on two grounds: *First*, that the combination, as a whole, was anticipated by Dr. Hodgen when he caused an incline in the form of a mirror to be set permanently in the forward end of the old "Reed Speculum," about the year 1876; and, *second*, that the combination is devoid of invention and patentable novelty. I shall concede that the evidence as to what Dr. Hodgen caused to be done with the Reed speculum 12 or 13 years since is, under the circumstances, not of that certain and convincing character which ought to be required to overturn the claims of a duly-issued pat-

ent. The second objection to the claim, however, is more formidable. The Reed speculum, before alluded to, shows "the tube, slot, and slide" combined in a manner that does not differ essentially from the form in which the same elements are combined in complainant's combination. To these three elements the patentee added a fourth,—the "incline in the front end of the chamber,"—but the "incline," as before stated, was itself an old device, which had been used in specula such as was produced by Dr. Mudd. Furthermore, it was used in the old instruments for the same purpose that complainant professes to have invented it; that is to say, to avoid injuring protruding membranes when the speculum was withdrawn. Even if complainant had been the first to use the incline in tubular specula having closed ends, the device was a very obvious one, scarcely rising to the dignity of an invention, considering the function it performed, as is well illustrated by the account which the patentee gives of the manner in which the idea was conceived. He states that he first constructed his speculum as shown in the specification, with a tube, slot, and slide, but without an incline. When he made the first trial of the instrument he discovered the risk of injuring such membranes as happened to protrude through the slot, as others had discovered who made the Mudd instrument. Thereupon he employed a jeweler to solder a small piece of metal in the forward end of the chamber, so as to form an incline, and subsequently amended his specification by adding the third claim, which is substantially a claim for the incline as an independent device. But regardless of the obvious nature of the improvement made by adding the incline, the court is of the opinion that the combination so formed was not patentable, because no new result or effect was produced by the united action of the old elements. To sustain a patent on a combination of old devices, it is well settled that a new result must be obtained, which is due to the joint and co-operating action of all the old elements. Either this must be accomplished, or a new machine of distinct character and function must be constructed. *Pickering v. McCutlough*, 104 U. S. 310; *Hailes v. Van Wormer*, 20 Wall. 353; *Tack Co. v. Manufacturing Co.*, 9 Biss. 258, 3 Fed. Rep. 26; *Machine Co. v. Young*, 14 Blatchf. 46. If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed, and in the old way, without uniting with other old devices to perform any joint function, it seems that the combination is not patentable. *Hailes v. Van Wormer*, *supra*; *Reckendorfer v. Faber*, 92 U. S. 347. In the present case the incline, when placed in combination with the "tube, slot, and slide," acted precisely as it did when placed in the forward end of a slotted tube not provided with a slide. Its action was in no sense modified by the new relation in which it was placed, nor did it, in unison with the other elements of the combination, produce a distinctively new result. In accordance with these views the bill is dismissed.

HOHORST v. HOWARD.¹

(Circuit Court, E. D. New York. December 1, 1888.)

1. EQUITY—JURISDICTION—LOSS BY SUBSEQUENT EVENTS.

The jurisdiction of an equity court is not entirely ousted by the happening of an event, subsequent to the commencement of an action, which precludes the exercise of the power to grant an injunction. *Kirk v. Du Bois*, 28 Fed. Rep. 460, followed.

2. PATENTS FOR INVENTIONS—ABATEMENT AND REVIVAL—DEATH OF PARTY.

A suit for alleged infringement of a patent, praying that defendant be required to make discovery of profits, and for an accounting and injunction, may be revived, after the decease of defendant, against his executor.

In Equity. Final hearing on bill of revivor, its answer, and replication.

W. S. Logan, for complainant.

John L. Devenny, for defendant.

LACOMBE, J. This action was brought for an alleged infringement of a patent. The original bill prays that the defendant be required to make discovery as to the use of said invention and of all gains and profits received by him therefrom, or by means thereof, and that he be required to account to the plaintiff; and an injunction is prayed for against the defendant, his agents, etc. The answer of the original defendant is a specific denial. The original defendant having died, his executrix denies complainant's right to have the action revived, for the reason that no injunction can issue against the dead defendant, nor against his executrix, who is not alleged to infringe; and that therefore, as the title of the principal relief—the injunction and discovery—fails, the incident right to an account fails also. Defendant cites *Root v. Railway Co.*, 105 U. S. 189, and *Draper v. Hudson*, 1 Holmes, 208 (1873.) The whole subject was discussed in the later case of *Kirk v. Du Bois*, 28 Fed. Rep. 460, (1886, W. D. Pa.,) and the conclusion reached that *Root v. Railway Co.* does not go to the extent of holding that jurisdiction is entirely ousted by the subsequent happening of an event which precludes the exercise of the power to grant an injunction. The decision in *Kirk v. Du Bois* will be followed here. The complainant is entitled to the usual decree that the suit be revived against the executrix, and be put in the same state it was in prior to the death of the deceased.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

COON v. ABBOTT.¹

(Circuit Court, E. D. New York. November 23, 1888.)

EQUITY—PRACTICE—TIME FOR TAKING TESTIMONY.

When a party's time to take his testimony has expired without its being taken, the court may, on cause shown, grant relief by allowing the testimony to be taken and filed *nunc pro tunc*.

In Equity. Application for extension of time to take testimony.

H. A. West, for complainant.

John J. Allen, for defendant.

LACOMBE, J. The defendant has failed to secure the taking of his proof by reason, apparently, of some misunderstanding between his counsel and his solicitor as to who would attend to it. To thus lose the opportunity of his presenting his defense, if he has any, would be a great hardship. The court has power under the rule to grant relief by allowing the testimony to be taken and filed *nunc pro tunc*. *Fischer v. Hayes*, 6 Fed. Rep. 76. In view of the fact that the next term for trial of equity causes will not be held till March, the granting of such relief will work no injustice to the complainant. The defendant may enter an order extending his time to take testimony to and including December 31st, such testimony, when taken, to be filed *nunc pro tunc* as of August 10, 1888. If defendant wishes to cross-examine any of plaintiff's witnesses who were examined on July 9th to July 13th, he may, before taking any of his own testimony, secure their presence by subpoena, and upon their appearance proceed with their cross-examination. Complainant may have 20 days after close of defendant's case to take testimony in rebuttal. Defendant must accept notice of trial for March term, and the case is ordered on the calendar for that term.

DUDEN v. MALOY.¹

(Circuit Court, E. D. New York. November 21, 1888.)

PARTNERSHIP—ACCOUNTING—PARTIES.

In an action between former partners for an accounting, defendant moved that a corporation be made a party to the suit on the ground that it had property belonging to the old partnership, and that complainant was irresponsible. Defendant had an action pending in the state court for similar relief, in which real estate had been impounded by the filing of a *lis pendens*. Held, that defendant must show a reasonable probability of his obtaining a judgment against complainant for a greater sum than that already secured in the state court. As all the evidence on that point had been regularly taken before the master, but defendant had not since then pressed the case to a decision, held, that the motion should be denied.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

In Equity. On motion to make the Associated Lace-Makers' Company a party to this suit.

Bill by Herman Duden against Michael F. Maloy for an accounting of the partnership assets of Duden & Co.

Howard Y. Stillman, for complainant.

J. M. Lyddy, for defendant.

LACOMBE, J. The Associated Lace-Makers' Company is not an indispensable party to this suit. The accounts of the firm of Duden & Co., of New York, the sole partners in which were the complainant and defendant, can be adjusted, and a decree for money judgment against either side entered, without the presence of the corporation. Defendant, however, claims that the Lace-Makers' Association should be brought in because it has become possessed of property of the old partnership, which may be dissipated unless the court impounds it, and which should be applied to the payment of whatever judgment the defendant may obtain against complainant upon the accounting; complainant himself being, as defendant contends, irresponsible. Defendant has an action pending in the supreme court against the corporation for similar relief, in which by the filing of a *lis pendens* he has impounded real estate worth from \$10,000 to \$15,000. The application now made is not of right, but addressed to the discretion of the court. It is essential to its granting that the defendant should show a reasonable probability of his obtaining a judgment against the complainant for a greater sum than that already secured by his *lis pendens* in the state court. That he will be able to obtain such a decree is vigorously disputed by complainant. The question is one which should not be decided upon affidavits. It appears that all the evidence upon that point deemed material by either party has been taken regularly before the master; but though the record was completed some time since, defendant has not pressed the case to a decision, and since the argument of this motion has, as the master informs me, asked for and obtained an adjournment. This fact, coupled with his long delay in moving to make the corporation a party, is sufficient reason for denying the motion.

ROSSMAN v. HEDDEN, Collector.

(Circuit Court, S. D. New York. December 12, 1888.)

1. CUSTOMS DUTIES—CLASSIFICATION—GLAZED TILES—REV. ST. U. S. § 2499.

Plain glazed tiles of different colors, used for hearths, bath-rooms, walls, dadoes, wainscoting, and ornamental purposes, are not "paving tiles," within the meaning of Schedule B of the tariff act of 1883, (Heyl, par. 130,) but are properly enumerated as "earthenware, * * * glazed, * * * composed of earthy or mineral substances, not especially enumerated or provided for in this act," (Schedule B, Heyl, par. 127,) and dutiable at 55 per centum *ad valorem*.

2. SAME—EARTHENWARE GLAZED.

The words "earthenware * * * glazed" are a sufficient enumeration of the merchandise (plain glazed tile) to take it out of the operation of the similitude clause, (section 2499, Rev. St.), as assimilating to either paving or encaustic tile.

3. SAME—VOLUNTARY PAYMENTS—RECOVERY.

Duties paid after delivery of goods to importer cannot be recovered back in an action against the collector.

(*Syllabus by the Court.*)

At Law. Action to recover excess of duty upon merchandise.

This action was brought by Adolph Rossmann against Edward L. Heden, collector of customs at the port of New York, to recover an alleged excess of duty upon certain plain glazed tiles imported into said port from Scotland and from France, by the steamers Canada, Furnessia, and Rhoetia, in February, May, and June, 1886. The collector assessed duty thereon at 55 per centum *ad valorem*, under Schedule B of the tariff act of March 3, 1883, (22 St. at Large, c. 121, p. 495,) Heyl, par. 127, which reads as follows:

"All other earthen, stone, and crockery ware, white, glazed, or edged, composed of earthy or mineral substances, not specially enumerated or provided for in this act, 55 per centum *ad valorem*."

The plaintiff protested as to the importation by the Canada and Rhoetia, as follows:

"We protest against your decision as to the rate, 55 per centum, and amount of duties to be paid on the tiles entered by us for consumption, because they are dutiable at 20 per centum, under Schedule B, as paving tiles directly, or by virtue of section 2499, Rev. St. If not so dutiable, then they should pay 35 per centum by similitude to encaustic tiles, under said section and schedule. We pay the excess exacted under compulsion, solely to get possession of the goods."

The protest on the importation by the Furnessia was as follows:

"We protest against your decision as to the rate and amount of duties to be paid on the tiles entered by us for consumption May 25, 1886, per Furnessia, 71,315, from Glasgow, because they are dutiable at 35% *ad val.*, under section 2499, Rev. St., by similitude to encaustic tiles, provided for in Tariff Schedule B. We pay the excess exacted under compulsion, solely to get the goods."

The paragraphs of Schedule B, referred to in the protest of the plaintiff, read:

"Encaustic tiles, 35 per centum *ad valorem*." Heyl, par. 129. "Brick, fire-brick, and roofing and paving tile, not specially enumerated or provided for in this act, 20 per centum *ad valorem*." Heyl, par. 130.

Section 2499, Rev. St., reads:

"There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned," etc.

Upon the trial it was shown by evidence that the plaintiff's importations were plain white, cream, and brown glazed tiles, used for walls,

dadoes, wainscoting, and also for the bottom and facing of hearths, for ornamenting the borders of floors, and for floors of bath-rooms and conservatories. They were not encaustic tiles. It was also shown as to the importation by the Canada that all of the goods were delivered to the importer on or before March 18, 1886, and the increased duty was not paid until May 10, 1886. At the close of the trial the plaintiff contended that the tiles in suit were "paving tiles," because in some of their uses they were laid horizontally, and any tile laid horizontally was a paving tile; that they were not earthenware, within the meaning of the tariff act of 1883; that the term "earthenware" was too general to enumerate the goods in suit; that if the jury should find they were not in fact paving tiles, then the similitude clause would apply. The defendant contended that they were not in fact "paving tiles," nor known as such at the time of the passage of the tariff act of March 3, 1883; that they were enumerated as "earthenware, * * * glazed, * * * composed of earthy or mineral substances," and that the similitude clause (section 2499, Rev. St.) had no application whatever to the merchandise, as that clause applied to non-enumerated articles only.

Stephen A. Walker, U. S. Dist. Atty., and *Henry C. Platt*, Asst. U. S. Dist. Atty., for defendant, cited:

Smith v. Field, 105 U. S. 53; *Arthur v. Sussfeld*, 96 U. S. 128; *U. S. v. Clarke*, 5 Mason, 30; *U. S. v. Telegraph Co.*, 2 Ben. 362; *Jaffray v. Murphy*, 19 Int. Rev. Rec. 143; *Newman v. Arthur*, 109 U. S. 132, 3 Sup. Ct. Rep. 88; *Reimer v. Schell*, 4 Blatchf. 329; *Marcel v. Merritt*, 116 U. S. 11, 6 Sup. Ct. Rep. 207; *Siemens v. Sellers*, 123 U. S. 276, 8 Sup. Ct. Rep. 117; *U. S. v. Johnston*, 124 U. S. 253, 8 Sup. Ct. Rep. 446; *Edwards v. Darby*, 12 Wheat. 210; Syn. Ser. 2419, 3352, 3705, 3714, 7051.

Hartley & Coleman, for plaintiffs, quoted:

Maillard v. Lawrence, 1 Blatchf. 504; *Arthur v. Fox*, 108 U. S. 125, 2 Sup. Ct. Rep. 371; *Cohen v. Phelps*, 2 Sawy. 531; *Cummins v. Robertson*, 27 Fed. Rep. 654; *Biddle v. Hartranft*, 29 Fed. Rep. 90; *Mason v. Robertson*, Id. 684; *Lloyd v. McWilliams*, 31 Fed. Rep. 261.

LACOMBE, J., (*orally, charging jury.*) The laboring oar of this case is with you, because it is entirely and solely a question of fact, and I shall detain you but a few minutes in formulating the precise question which you must answer under the evidence in the case.

In the first place, as to the importation by the Canada, as I have before intimated, your verdict must be for the defendant, for the reason that the payment was not in fact made to obtain possession of the goods. With regard to the importation by the Furnessia, the protest of the plaintiff restricted him to a single claim, to-wit; that these goods were similar in uses, quality, material, and texture to encaustic tiles, and should therefore pay the same duty as that paid by encaustic tiles. In the view which I take of the similitude clause, and guided by the decisions of *Smith v. Field*, 105 U. S. 53; *Arthur v. Sussfeld*, 96 U. S. 128; and *Arthur v. Butterfield*, 125 U. S. 70, 8 Sup. Ct. Rep. 714,—I shall, as to the importations by that particular vessel, direct a verdict for the defendant.

There is left, then, for your consideration, only the importation by the Rhoetia. The old English word "ware," with which you are familiar, in the combination of hardware, tinware, etc., is a comprehensive word. It is defined by Worcester and Webster as "goods, commodities, merchandise," and in the same dictionaries the term "earthenware" is defined as "ware made of earth or clay." Reading in for the word "ware" the definition which the dictionary gives it, we will find as the definition of "earthenware," "goods, commodities, or merchandise made of earth or clay." That, you see, is a very general, broad, and comprehensive word, and it was evidently used by congress in that same sense, for we find the word "earthenware" used as the heading of a schedule which contains articles as dissimilar as a porcelain teacup, a Parian vase, a fire-brick, and a slate pencil. It is sufficiently broad, this word "earthenware," to cover "tiles,"—to cover the articles imported by the plaintiff here as they appear and have been described by the witnesses. Therefore, unless they are covered by some other provision of the tariff act, they must be held dutiable as "earthenware," and the determination of the collector in that respect sustained. Now, the word "tiles" occurs twice in this tariff act,—once in combination with the word "encaustic," a specific and particular duty being laid upon encaustic tiles. It is conceded practically by both sides that these importations are not encaustic tiles. Encaustic tiles are composed of two or more kinds of clay in the same tile, moulded and mixed up together in some way, and the articles before us contain but one kind of clay in each tile. Therefore the provision in regard to encaustic tiles has no bearing on this case.

There is left, then, the clause No. 130: "Brick, fire-brick, and roofing and paving tile." The plaintiff contends that these goods fall fairly within that definition. The words "paving tile" have a plain, ordinary meaning, which any man of intelligence could determine for himself. A paving tile means a tile for paving. That is the way the word would be understood by any one who heard it or saw it in a book or in a statute. Congress, however, legislates upon these tariff acts, only after a careful examination of the condition of affairs touching the particular industry, or the particular kind of goods, with regard to which it is legislating. It looks into the history, it looks into the present condition, the uses, the material, the composition, the usages of trade, and the general use to which the article is put in the community; and of course the interpretation of an act of congress should, so far as may be, be had in the same light as that in which congress passed the act, and it is for that reason that I have allowed so voluminous a body of testimony to be imported into this case, bearing upon the character of the article, its composition, the materials of which it is made, how it is made, its qualities, its uses, and its history in the trade and commerce of this country. It was necessary to do that, in order, so far as might be, to enable you to answer the single question which goes to you; and in order that that question may be put so that you can readily carry it with you, I have reduced it to writing. It is this, and is the only question you will have to answer:

"On March 3, 1883, when this act was passed, was the character of these tiles such, and had their use up to that time been such, that they would fairly be included within the term 'paving tiles,' as used by congress in the section quoted; that is, the section providing for a duty on brick, fire-brick, and roofing and paving tiles?"

Now, you will perceive, in the first place, that it is immaterial whether or not they are now used for paving. Congress legislated under the facts as they were at the time; and you will further perceive that their use at that time for such purposes must have been sufficiently substantial, when compared with their other uses, if any, to suggest this particular kind of tile to any one who might at that time be preparing an exhaustive list of paving tiles or tiles for paving. If—taking into consideration the condition of the trade at that time, the size, the composition, the character of these articles, their adaptability to uses, and the uses they were put to at the time the act was passed—you are satisfied that they were then paving tiles, your verdict will be for the plaintiff; otherwise it will be for the defendant.

Verdict rendered for defendant.

BRIGHTLEY v. LITTLETON *et al.*¹

(Circuit Court, E. D. Pennsylvania. November 24, 1888.)

1. COPYRIGHT—WHAT WILL BE PROTECTED—BLANK LEGAL FORMS.

A blank form of application for a license to sell liquor at retail, composed of three blanks,—a "petition," a "bond and warrant," and a "justification,"—all intended to be filled up and filed by the applicant, is included in the term "book," and is the subject of a valid copyright.

2. SAME—ORIGINALITY.

A series of forms, prepared in accordance with a certain statute, minor parts in each being old, but so combined with parts drawn in pursuance of the statute as to make a complete form, possesses sufficient originality to be the subject of a copyright.

3. SAME—INFRINGEMENT.

Where parts of a series of forms are identical with those of a former copyrighted series except for a word or two inserted in several places, the whole series showing a substantial identity, and the counsel employed to draw up the second series acknowledges having the first before him while so doing, the second series will be regarded as a copy of the first, and an infringement.

In Equity. Bill for infringement of copyright.

The plaintiff was the author of a series of blank forms intended to be filled in by the applicant for a license to sell liquor at retail under the act of 1887. Littleton, the clerk of the court which had jurisdiction to grant the licenses, caused a number of similar forms to be drawn up and printed by Geddes, and given or sold to the applicants.

¹ Reported by C. B. Taylor, Esq., of the Philadelphia bar.

F. F. Brightley, pro se.

David W. Sellers, for defendants.

BUTLER, J. The plaintiff's copyright is valid. The act of congress provides that "any citizen of the United States * * * who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, drawing, chromo, statue, or statuary, * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, publishing, * * * and vending the same." This act is founded on the constitutional provision which confers on congress the power to protect authors and inventors in their respective works. The object of the act and constitutional provision, as expressed, is "to promote the progress of science and useful arts by securing to authors and inventors the exclusive right to their respective writings and their discoveries." The language of the act must be read in connection with the constitutional provision, and be so construed as to promote the object and conform to the purpose expressed therein.

If the question before me were new, I might find some difficulty in sustaining the plaintiff's claim. The statute, however, has been so liberally construed as to make it embrace within the term "book," every character of publication; whether a volume, pamphlet, newspaper article, calendar, or catalogue. In this construction our courts have simply followed those of England in their interpretation of similar language contained in the English statute. The matter must be original and possess some possible utility. The originality, however, may be of the lowest order, and the utility barely perceptible; *Drone, Copyr. 210*. It has been repeatedly held that a book of forms is entitled to the protection of the statutes. The plaintiff's forms are original in the sense here involved. They are founded upon and are adapted to the requirements of the Pennsylvania statute of 1887, relating to the sale of liquors. While minor parts of each form are old, they are so combined with the parts drawn in pursuance of the statute as to make a complete form. To prepare such instruments requires some learning, and involves some literary labor; quite as much as the compilation of facts or figures, or extracts from books. Such compilations are entitled to a copyright, under the construction given to the statute; *Drone, Copyr. 208-210*. The plaintiff's right, however, protects him only against transcribing and publishing his forms; in other words, against the appropriation of his work. It does not confer upon him a monopoly of the forms required by the statute of 1887. Any one is at liberty to prepare and publish such forms, and it is immaterial that they may resemble his, or be substantially identical with them, provided they are not copies. The requirements of the statute in this respect are simple, and all forms prepared in pursuance of them by different individuals must necessarily have close resemblance to each other.

Have the defendants infringed? They have printed and published forms identical in most respects with the plaintiff's. The petitions,

from the paragraph marked with the figure 4 to the end, (excluding the affidavit, which may have been copied from any other,) are identical, except where a word or two has been added by defendants in two or three instances. The same is true of the bonds and warrants of attorney. In the justification of sureties, the only difference is in the addition by defendants of two lines at the close. Were these forms copied from the plaintiff's? The plaintiff's forms, with others drawn by different individuals, were placed in the hands of counsel by Mr. Littleton, with instructions to prepare forms to meet the requirements of the statute. Between the plaintiff's and the others so placed in counsel's hands, there is such difference as would naturally be expected in forms prepared by different individuals. A variation in language, in arrangement of parts and sentences. The identity existing between the plaintiff's and those published by the defendants, taken in connection with the fact that the counsel who prepared the defendants' had the plaintiff's before him, justifies and demands a conclusion that the defendants' were mainly copied from the plaintiff's. Especially is this so in the absence of any positive evidence to the contrary. The counsel, when examined as a witness, does not appear to have been interrogated directly respecting it, and his testimony does not cover the point. What he says amounts to no more than that he prepared the forms after having examined those brought him, and found them defective. In so far, therefore, as the defendants' forms are identical with the plaintiff's, I must and do regard them as copied from the latter. For the injury which the plaintiff may show has resulted to him from this appropriation of his work the defendants must respond in damages.

To avoid the danger of misapprehension, it is proper to say something further, although what has been said is sufficient to dispose of the question before me. The plaintiff's object in obtaining his copyright appears to have been, not so much to secure the monopoly of selling his work as a book of instructions to those who contemplated proceedings under the statute of 1887, as it was to secure a monopoly of the use of his forms in such proceedings as petitions, bonds, etc., thus entitling him to enjoin individuals who may buy his work, against employing and following it in the preparation of petitions, bonds, etc., for their own use in court. When the question arises whether his right secures such a monopoly, a different case will be presented from that now decided. Possibly the question may arise in the assessment of damages when the extent and value of the plaintiff's right are under consideration. A decree may be prepared in accordance with the foregoing opinion.

UNITED STATES v. CLARK.

(Circuit Court, D. Minnesota. December 14, 1888.)

POST-OFFICE—OFFENSES AGAINST POSTAL LAWS—OBSCENE MATTER—INDICTMENT.

An indictment under Rev. St. U. S. § 3893, charging that defendant did knowingly deposit for mailing and delivery certain obscene pictures, etc., is not open to the objection that it is not alleged that the defendant knew the character of that which he deposited.¹

Indictment for Mailing Obscene Matter.

Geo. N. Baxter and Henry C. Wood, for plaintiff.

Gould & Snow, for defendant.

BREWER, J. This is a motion in arrest of judgment. The indictment charges that the defendant did unlawfully and willfully, knowingly deposit and cause to be deposited for mailing and delivery, in a post-office of the United States, to-wit, the post-office at Wiscoy, in said district of Minnesota, a certain lewd, obscene, and lascivious picture of an indecent character, etc. The indictment does not separately charge both the knowingly depositing of something in the post-office, and also that the defendant knew that this which he deposited was obscene; and the point is made that the gist of the offense is that he knew the character of that which he deposited, and that, in the absence of such an allegation, the indictment is defective. The indictment follows the statute. That, of course, is not always conclusive, for it is settled by the supreme court of the United States that it is not sufficient in an indictment "to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging all the facts necessary to bring the case within that intent."

U. S. v. Carll, 105 U. S. 611, and cases cited. Yet there is always a presumption that the language of the statute fully describes the offense intended to be punished, and consequently that an indictment using that language also fully describes the offense. Now, the statute (section 3893, Rev. St.) declares that every obscene, lewd, or lascivious book, etc., is hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office, nor by any letter carrier; and then adds that any person who shall knowingly deposit anything declared to be non-mailable, shall be deemed guilty of a misdemeanor, etc. The matter mailed as described in the indictment was unquestion-

¹In *U. S. v. Chase*, 27 Fed. Rep. 807, an indictment similar to that in the principal case was held defective in matter of form only, and cured by Rev. St. U. S. § 1025. For full discussions of the offense of mailing obscene matter, see *U. S. v. Mathias*, 36 Fed. Rep. 892, and cases cited.

ably non-mailable. The statute declares that whoever knowingly deposits non-mailable matter is guilty. The indictment alleges that the defendant knowingly deposited this non-mailable picture. Doubtless the question turns largely on whether the word, "knowingly," as used in the statute and the indictment, qualifies simply the adjacent verb "deposit," or the whole matter described. It may be conceded that ordinarily an adverb is understood as qualifying its adjacent verb; and yet that is not always true, and in construing words and sentences used in an indictment we are to give them their ordinary significance, in the absence of some technical construction necessarily imposed upon them. Now, it is a familiar use of the adverb "knowingly" that it qualifies both its adjacent verb and the full act thereafter described. A few simple illustrations will make this clear: I say that a party knowingly told a lie. Every one understands from that that I mean that the party has stated that which he knew to be a lie, and not simply that he stated that which was in fact untrue, yet unknown to him to be untrue. And in the same way, when I say that a party knowingly deposited an obscene picture, no one supposes that I mean that he simply deposited a picture, the character of which he was ignorant of. All understand that I mean to say that he has deposited that which he knew to be obscene; and this because the adverb "knowingly," used in sentences of this kind, by the common understanding of all, goes beyond the mere verb, and includes broadly all that is expressed in the full act charged to have been done. Now, congress, in the section under which this indictment was framed, chose to use language in this way; and, after defining what was non-mailable matter, declared that any one who knowingly deposited such non-mailable matter should be punished. Shall I ignore this common understanding of the use of the word "knowingly" in sentences of this kind, or shall I recognize that congress has used this language in its ordinary acceptance; and, having thus sufficiently described the offense, hold that an indictment which follows that description is sufficient? Beyond all this there is a section (1025) which declares that "no indictment * * * shall be deemed insufficient, nor shall the trial stop, or other proceedings thereon be affected by reason of any defect or imperfection of matter of form only which shall not tend to the prejudice of the defendant." Can it be possible that the defendant was misled by the language of this indictment as to the exact offense with which he was charged? Did he for a moment suppose that he was charged with putting in the post-office something of which he was entirely ignorant, or did he understand from the ordinary meaning of the language used that he was charged with putting in the post-office an obscene picture,—that which he knew to be obscene? I can have no doubt that he was fully informed as to the charge against him, and not in the slightest degree misled. I am fully aware that there are authorities which do not concur with this view, and yet I think those authorities adhere too closely to the rigor and technicality of the old common-law practice, which, even in criminal matters, is yielding to the more enlightened jurisprudence of the present,—a jurisprudence which looks evermore at the matter

of substance and less at the matter of form. Believing that the defendant was fully informed of the matter charged against him, notwithstanding the cases cited to me of *Com. v. Boynton*, 12 Cush. 499, *U. S. v. Slenker*, 32 Fed. Rep. 691, I am constrained to hold that this indictment is sufficient, and that the motion in arrest must be denied. My brother NELSON agrees with me fully in this matter, and it will be so ordered.

UNITED STATES *v.* JOLLY, (two cases.)

(District Court, W. D. Tennessee. November 15, 1888.)

1. FORGERY—OBLIGATION OF UNITED STATES—INDICTMENT—ALLEGATION OF INTENT.

If the indictment be for falsely making and forging an obligation of the United States, it is sufficient to aver in the general language of the statute an intent to defraud, and the name of any person sought to be defrauded need not be mentioned, nor is any more specific averment necessary, such as might be required if the offense charged were that of passing or attempting to pass, uttering or publishing the forged security. Guilty knowledge, and an intention to defraud the United States, if no one else, are necessarily implied from the language of the Revised Statutes, § 5414, describing the offense.

2. SAME—WHAT CONSTITUTES—INDORSEMENT OF POST-OFFICE WARRANT.

It is an offense against the United States, and forgery, under Rev. St. § 5414, to falsely and fraudulently write the name of the payee upon the back of a post-office warrant upon the treasury of the United States, such indorsement being in a legal sense a part of the instrument itself.

3. POST-OFFICE—LARCENY FROM THE MAILS—PLEADING AND PROOF.

The offenses denounced by Rev. St. §§ 5469, 5470, are not confined to the larceny of articles from the mails, or receiving articles stolen therefrom, and it is not essential to aver or prove all the ingredients of that offense to sustain the indictment. Any taking or abstracting the articles, or receiving them, when so taken, with the object described in the statute to "open," "secrete," "destroy," "embezzle," or "steal," is within the statute.

4. INDICTMENT AND INFORMATION—REFERRING ONE COUNT TO ANOTHER.

It is not good pleading to refer to a former count in aid of the averments of another, but it is a matter of form only, and cured by section 1025 of the Revised Statutes.

Indictments for Forgery, and for abstracting and embezzling a letter from the mails. On motion to quash.

H. W. McCorry, U. S. Dist. Atty.

W. W. Murray and *E. L. Bullock*, for defendants.

HAMMOND, J. The indictment for forgery of the treasury warrant issued from the post-office department for transportation of the mails, and set out *in hæc verba*, avers that the defendant did, "with intent to defraud, falsely make and forge the name of 'Jas. J. Morgan' on the back of a warrant," etc., (describing it.) The warrant, as described, and as shown by its words, is one of the securities or obligations of the United States which section 5414 of the Revised Statutes of the United States was designed to protect against forgery, counterfeiting, or altering "with

intent to defraud," to use the language of the statute. Primarily, the implication is that the United States will be defrauded by such conduct; and the intent to defraud the United States is necessarily indicated by the statute by the very use of the words, "any obligation or security of the United States," and therefore it cannot be necessary to aver any specific intent to defraud the United States, or any other person who may be defrauded by the act complained of by the indictment. In an indictment for the common-law crime of forgery perhaps it might be necessary, in the absence of legislation changing the rule, to allege the name of some person intended to be defrauded, or that the name of that person was to the jurors unknown. Bish. Dir. & Forms, § 457. But our federal jurisprudence knows only statutory offenses as they are defined by acts of congress, and only a general intent to defraud is required or defined by this section of the Revised Statutes, which is intentionally so general as to protect all the securities of the United States, and a more specific intent to defraud particular persons other than those implied by the language used in describing the intent cannot be imported into the act of congress without usurping legislative functions.

In the case of *U. S. v. Carll*, 105 U. S. 611, the defect was that the indictment for "passing, uttering, and publishing" a forged obligation under Rev. St. § 5431, did not aver a guilty knowledge of the forgery by the defendant, wherefore the "intent to defraud" was not described sufficiently by using the language of the statute in that section, which is identically the same as that used in section 5414, which we are considering. But the difference in the character of the two offenses, in this regard, is quite obvious. One may pass a forged instrument innocently, because he does not know it to be forged, and believes it to be genuine; but one cannot innocently make or himself forge the instrument without guilty knowledge of the fact of the want of genuineness, if his intention be "to defraud," in the language of the statute. He might, without intention to defraud, make such an instrument, or counterfeit it by copying it or otherwise imitating it, idly, say, or for some lawful purpose; but it is entirely sufficient in and by the very language of the statute to negative that kind of innocent conduct by averring that the forgery was done with an intent to defraud. The difference is in the essential nature of the two offenses, and the case falls directly within the principle announced as an exception to the rule in the case of *U. S. v. Carll*, *supra*: "Unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." That is the case here. *U. S. v. Britton*, 107 U. S. 655, 661, 2 Sup. Ct. Rep. 512. Nor is this case like that of *Hooper v. State*, 8 Humph. 92, which was, again, an indictment for passing a counterfeit bank-note, where it was held that the indictment did not sufficiently charge the intent to defraud the person to whom the note was passed. That person might have known the note to be spurious, and so would not be defrauded, or some other circumstance might intervene to relieve the act of the fraudulent intention, which fact would be not at all inconsistent with the act of passing, where-

fore the indictment should allege the fraudulent intention specifically. But with the act of making or committing the forgery itself it is entirely different, as before pointed out. *U. S. v. Otey*, 31 Fed. Rep. 68. Meager as the indictment is, the objection that the intent to defraud is not more specifically set out by naming some person intended to be defrauded is not, therefore, well taken.

The next objection is that the indictment is only for the forgery of an *indorsement* upon the post-office warrant, which is not within the Revised Statutes, § 5414, but is at most only a common-law or state offense, of which this court has no jurisdiction. This is a very narrow view of the statute, and trims it to dimensions that would very materially impair its usefulness, and leave the obligations and securities of the United States at the mercy of forgers and counterfeiters. I do not comprehend why the name of the payee is not as much a part of the instrument as that of him who, in behalf of the United States, signs the warrant or check. It is conceded that it is so, as appearing on the face of the instrument, but it is denied that it is so when placed on the back of it, because, it is urged that it is then a mere private writing used for a purpose wholly independent of the warrant, and only to pass title to it; and that it is no more forgery than it would be to hand the warrant over to another, if it were payable to bearer, as it might be, and pass it by mere delivery. It was very nearly held in *U. S. v. Long*, 30 Fed. Rep. 678, that the mere impersonation of the payee would be forgery. Certainly it is, if, as in that case, the name of the payee was signed to the receipt upon the money-order by the person impersonating him, and that under a statute quite as general as this we are considering. So, too, in *Ex parte Hibbs*, 26 Fed. Rep. 421, 431, a postmaster who issued money-orders genuine in their form and substance to all intents and purposes, so far as these qualities related to his power to issue them, but designed to accomplish his fraudulent purpose of appropriating to himself, under that form of genuineness, the money belonging to the funds provided to pay money-orders, was held guilty of forgery under a statute quite as general as this. He made out the orders to a fictitious person, used the name of that fictitious person through a bank to collect the money, and it was forgery. It is obvious to the court that the principle of these cases is correct. The very fact that the warrant is made payable "to order," rather than "to bearer," when it would pass by delivery, like a bank-note, shows that the practice of so writing them is intended to bring the indorsement within the protection of the law against forgery. It constitutes about all the value there is in so writing them, and the writing the name of the payee falsely and fraudulently on the back is just as much a forgery of the instrument as any other false writing concerning it would be. It is in every legal sense a part of the instrument itself.

The other of these two indictments is drawn under Rev. St. §§ 5469, 5470, and charges in the first count that the defendant took from the mail, feloniously, the letter containing the above-mentioned warrant, and then and there opened and embezzled the said letter; and, in the second count, that he did feloniously "receive" the said check "set out by words

and figures in the first count of this indictment," well knowing the same to have been stolen or embezzled from the mail. It is objected that this indictment does not contain the necessary averments to constitute the crime of larceny or receiving goods stolen from the mails, inasmuch as it does not charge the technical larceny of the letter. If it was intended in *Jones v. U. S.*, 27 Fed. Rep. 447, to hold that these statutes or the similar one—Rev. St. § 5467—involved in that case provide only against the crime of larceny of the letters or packets described in the statute, I cannot agree to that ruling. It has been ruled in this court always that these statutes were not confined to a technical larceny from the mails, but also punished the simple taking to open, embezzle, or destroy, or the obtaining of a possession by fraud or deception, etc. Of course, a technical larceny would be included; but likewise acts and conduct not at all amounting to technical larceny are denounced by the statute, as it seems to me is plainly indicated by the language used, the general scope and the evident purpose of the statutes to protect the mails against all manner of pilfering or other wrong-doing by taking from them that which should be safely kept in them until delivery to the addressee. The mails would be disastrously plundered, and all idea of their sanctity gone, unless this be the proper construction. It was said in *U. S. v. Stone*, 8 Fed. Rep. 232, 247, that the word "steal" is not the technical word to describe the common-law crime of larceny. That word is not at all essential to describe that crime, and it is a mistake, in my judgment, to imply from its use only the technical offense of larceny. It is the common speech to describe that offense, no doubt, but not the technical words. To "feloniously take and carry away" are the technical words; the word "steal" having crept from common speech into statutes, decisions, and indictments, perhaps. I have not followed out this conception because it is not necessary to establish it here, since the statute uses the word "take," without the word "feloniously," and in altogether a different sense, in connection with "open," "secrete," "destroy," "obtain," etc., describing very clearly, to my mind, a class of acts wholly disconnected with larceny, and for the obvious purpose of the most complete protection of the mails from all kinds of interference and meddling with their contents, and are not at all confined to the punishment of larceny. This, it seems to me, must be so, and it is emasculating these statutes to imply that they punish larceny only, from the use of the word "steal."

The last objection is that the second count should be complete within itself, and should not refer to the other count in aid of its averments. That is undoubtedly the best form of good pleading. Whether a count drawn as this is could be sustained at common law is very doubtful. Perhaps it could not; and there seems to be authority both ways. But our Revised Statutes, § 1025, forbid us to quash the indictment for that defect of form, as I think this clearly is, and we must therefore amend it by overlooking the defect, and reading the averments as if the words of the first count referred to as describing the warrant were inserted in this second count itself. It is not a technical amendment, but amounts to the same thing. I wish to say, however, that the court cannot ap-

prove such pleading, and desires that it shall be abandoned. The ordinary precedents, long established, should be adhered to as the safest, and affording no opportunity for objections like this. Motion overruled.

UNITED STATES *v.* OWENS.

(Circuit Court, W. D. Tennessee. December 12, 1888.)

1. COUNTERFEITING—INDICTMENT—LIKENESS AND SIMILITUDE OF TREASURY NOTES.

It is not essential, in an indictment for counterfeiting United States compound-interest treasury notes, to aver that the alleged counterfeits are in the likeness and similitude of genuine notes authorized by the act of congress under which they purport to have been issued. This may sometimes be necessary under special statutes creating specific offenses as to particular issues of government securities, but not under section 5431 of Revised Statutes, as interpreted by section 5413, providing a general law for punishing the forgery of any and all of the obligations or securities of the United States.

2. SAME—DESCRIPTION OF OFFENSE.

The use of the words "false, forged, and counterfeited obligation of the United States" in the statute and in an indictment following its language, to describe the offense, is sufficient to imply, without more, that the alleged counterfeit set out *in hæc verba* in the indictment purports to be a genuine obligation of the United States, and that it is likewise intended to aver that there is or was outstanding or authorized by law a genuine obligation of which the alleged imitation was intended to be a forgery or counterfeit.

Indictment for Counterfeiting. On motion in arrest of judgment.

H. W. McCorry, U. S. Dist. Atty., and H. C. Anderson, Asst. U. S. Dist. Atty.

John J. Du Puy, for defendant.

HAMMOND, J. The indictment in this case is for a violation of Revised Statutes, § 5431, by passing, or attempting to pass, concealing, with intent to defraud, and having in possession with like intent, two counterfeited compound-interest treasury notes of the United States, of date July 15, 1864, which are set out *in hæc verba* in all the counts of the indictment. It is only necessary to quote the following clause in the first count, the others being similar, to explain the objections that are now made to the indictment on this motion to arrest the judgment: "That said defendant did feloniously utter, publish, and attempt to pass a certain false, forged, and counterfeited obligation of the United States, to-wit, a certain false, forged, and counterfeited United States compound-interest treasury note of the denomination of fifty dollars, which said false, forged, and counterfeited United States compound interest treasury note is as follows, that is to say:" (and here it is copied *verbatim* in the pleading.) It is objected that this pleading does not say in terms that this alleged counterfeited note is in the likeness or similitude of any genuine obligation of the United States, and that it does not aver that

any genuine note of the United States has been authorized by law, or is or ever was in circulation as an obligation of the United States. As to the latter branch of the objection, it may be said now, as it was ruled on the trial upon objections to evidence, that we take judicial notice of the acts of congress authorizing the obligations of the United States, and that the form and substance of those obligations, when issued, like the forms of the coins that are minted by law, and especially such as are used as money, as the genuine notes of this issue were, become a matter of common knowledge, that need be neither averred nor proved on a trial for forging or counterfeiting them, especially under a statute framed, as this was, to protect all the obligations or securities of the United States from such depredations. There may be special offenses created to protect particular issues or securities "issued under this act," as the phrase usually runs; and, indeed, that was the common practice at first, as the history of this legislation shows, to include in an act, authorizing the issue of an obligation, provisions to protect that security from forgery and all forms of counterfeiting; and possibly, under some or any of those special acts, it would be necessary to aver (and the omission might be fatal) that the given security was issued under that particular act so as to set forth the especial and particular offense which that act might define and punish, the definition and the punishment being alike especial and particular. The obvious advantage of a general statute was so great that by the act of June 30, 1864, (chapter 172, § 10, 13 St. 221,) this section of the Revised Statutes was first enacted in the broadest possible terms to cover the forgery or counterfeiting of "any obligation or other security of the United States." This and other sections have been consolidated and broken up in the revision for convenience of systematic arrangement; but now, as at first, they constitute a general criminal code against the forgery and counterfeiting of these securities. And to make the matter still more certain, a statutory definition was given of the words "obligation or other security of the United States," which has been from time to time so extended that it appears in the Revised Statutes (section 5413) so broad that it includes almost everything one can think of as an obligation of the United States, even including postage stamps, issued under any act of congress. Rev. St. 5413, (act 1864, c. 172, § 13, 13 St. 222.) Therefore, even where special provision is made against counterfeiting particular securities, as for example, by Rev. St. § 5415, protecting national bank-notes, it may be that the prosecuting district attorney has his choice to proceed under the special act or under this more general law against all counterfeiting of any obligation or security, since we see that class of notes included in the statutory definition. Rev. St. § 5413. Be this as it may, under the general law the courts are commanded, as all others are, to hold those words to mean—and they are the words used in this indictment—"all treasury notes issued under any act of congress," to apply them to this case. *Id.* It must be, therefore, that these words are sufficient in the indictment to indicate the existence of, and the form and substance of, the genuine notes, without any more especial description than is furnished by their use. In other words, the

language of the statute itself sufficiently describes the offense, without more; and the averments here that the obligation counterfeited was "a United States compound-interest treasury note," etc., accompanied with the most minute description in *hæc verba* of the alleged forgery itself, were ample to answer the constitutional requirement that the defendant should have notice of that which he is called upon to defend. *U. S. v. Britton*, 107 U. S. 655, 661, 2 Sup. Ct. Rep. 512; *U. S. v. Carl*, 105 U. S. 611; *U. S. v. Jolly*, *ante*, 108.

The state decisions referred to concerning acts of the legislature authorizing private corporations to issue bank-notes, and deciding that the authority to issue the notes and the fact of issuing them should be averred in an indictment for counterfeiting them, are not in point, in my judgment. Those are in the nature of private notes circulated as currency by law, and those facts are perhaps essential, under the statutes or the common law punishing their forgery or use as counterfeits, to be averred; but the United States' statutes proceed upon a broader ground to punish by general law, designed especially for that purpose, all forging and counterfeiting of any of its obligations or securities, and congress may make the law according to its wisdom as long as the defendant's constitutional right to be informed of the statutory offense with which he is charged be not invaded, but protected, by either so describing the offense in the statute that he shall know, or supplementing the statute by the averments of the indictment.

The other branch of the objection to the indictment is quite nearly akin to that already considered. The force of it may be stated to be a complaint that the indictment avers a conclusion of fact, and not the substantial acts of the defendant constituting the offense, by merely alleging that the note was "false, forged, and counterfeited," and not alleging that it was "in the likeness and similitude" of the genuine note. The statute does not contain these last quoted words, nor does the other section denouncing the act of the forgery itself contain them. Rev. St. §§ 5414, 5431. The statute against counterfeiting the coin does contain them, but the two must not be confounded. *Id.* § 5457. What has been said about the fullness of the implications of the words "obligation or other security of the United States," and the statutory definition of them, as used in the section constituting this offense, and necessarily also when used in an indictment following the statutory words so defined, applies with full force here. They necessarily imply under that definition that an averment in those words of "a certain false, forged, and counterfeited obligation of the United States" is based upon a mental substitution of the preceding and essential notion of a genuine note to be counterfeited; that is to say, that this instrument alleged to be false, forged, and counterfeited is in the similitude and likeness of a genuine "obligation of the United States" of the same tenor, purport, and effect, if I may so express it. Fortunately, I find this point distinctly decided and cleared up by the supreme court of the United States, though it was not there presented in precisely the same way that it is here; for in that case the indictment, which was under one of the special acts I have referred to punishing the

counterfeiting of securities "issued under the authority of this act," did aver that the false note purported to be issued under the authority of that act of congress, and perhaps, as I have already endeavored to explain, that averment was necessary, under such a special law. But it will be observed there was there as here no averment of any genuine note being either authorized or issued, only that the false note purported to be under the given act of congress, etc. The objection was made that a false note was no note at all, and it was quite immaterial that it should purport to be issued under an act of congress. It was none the better for such purport, and congress had not made it an offense to issue a false note pretending to be issued by authority of congress, and therefore there was a fatal repugnancy, since the allegation of its being false, and the allegation of its being issued by a purported authority, were inconsistent; and this infirmity extended to the statute as well as to the indictment. The supreme court, overruling a former decision, perhaps,—for that court rarely admits that it overrules one of its own decisions, but leaves other courts to determine whether it does or not, as best they may,—held, as we do here, that what is meant by a "false, forged, and counterfeited" bank-note is "a forged paper in the similitude of a bank-note, or which on its face appears to be such a note," to use the language of Mr. Justice MILLER. This implication for supplying that which is left out, and which the best pleading, I have no doubt, ought not to leave to implication, is all the stronger under these general laws and the sections of the Revised Statutes which have been already fully cited, than they were in that case of *U. S. v. Howell*, 11 Wall. 432, 436; and on its authority the objection made here seems not to be well taken, plausible as it is, and was thought to be in that case. But it may be added, by way of caution, that the words which this objection suggests as those which ought not to have been omitted—that the forged note was "in the likeness and similitude" of the genuine note—are not in this statute, and perhaps were intentionally left out for a better reason than that the reader might be left to "mentally supply the ellipsis," as the court says we may properly do as above indicated. And this reason may be suggested as an intention on the part of congress to widen the description of the offense, and punish the forgery and counterfeiting of the obligations of the United States when the forgeries were not in the likeness and similitude of any genuine notes. Suppose, for instance, these counterfeits, instead of being printed in green and black colors with golden tints upon the face, had been printed in red and black, would they have been any less counterfeits under these acts of congress? The objection here implies they would, but I am not willing to agree to that implication, since there may be an intention to punish the forging of the "obligation," however and in whatever form the words of the obligation and its signatures may be written or printed, and however far the counterfeit may depart from the form of the genuine. Coin is not an obligation of the United States, but is the thing itself,—money,—and likeness and similitude are essential; but these promises to pay of the United States should not be forged or counterfeited in any form whatever. This point is not presented for discus-

sion, of course, but it is well enough to suggest that we should reserve any sanction of the idea that "likeness and similitude" are in all respects essential under these statutes to establish a counterfeit.

The importance of an allegation as to the existence of a genuine note is made somewhat exceptionally prominent by the facts of this case. Here are two counterfeit "compound-interest treasury notes," nearly a quarter of a century old, which have lain in "the chest"—as she expressed it—of an old colored woman for nearly that length of time, having been brought home "after the surrender," by her husband, "from the war." The genuine, as the witnesses say, have been long since withdrawn from circulation, and none has been seen by any of the experts for eight or ten years. The truth is, they have been quite forgotten as a part of the circulation, or as ever having had any existence at all. It does seem to me that under such circumstances an allegation in some form of their existence formerly would have been best, although I have no doubt the indictment is good, technically, without it. It follows substantially the precedents. Whart. Prec. Ind. Nos. 312, 315; Bish. Dir. & Forms, §§ 331 *et seq.*, 453 *et seq.* Motion overruled.

THE WILLIAM H. VANDERBILT.

BROOMAN *v.* THE WILLIAM H. VANDERBILT *et al.*

(Circuit Court, S. D. New York. October 15, 1888.)

COLLISION—FAILURE TO COMPLY WITH SIGNAL.

The steam-tug Lee, coming down North river with libellant's boat in tow, while rounding to go to the Erie elevator, Jersey City, was delayed by another tow running inside of her. She whistled twice, the latter of which was heard and answered by an assenting whistle from the Vanderbilt, coming up the river. The assenting signal meant that the Vanderbilt would keep to the eastward, out of the way, and that the Lee might wait in safety. Libellant's boat was in view of the Vanderbilt, and was gradually swinging down the river, until it came into collision with the Vanderbilt. The testimony as to whether the Vanderbilt immediately stopped and backed was conflicting. *Held*, that the finding of the district court that the Vanderbilt did not stop and back, or keep out of the way, as indicated by her signal, and that she was liable for the injury, cannot be disturbed.

In Admiralty. On appeal from district court.

Libel by Thomas Brooman against the steam-tug William H. Vanderbilt, John H. Starin, claimant, and the steam-tug John Lee, Thomas Curran and others, claimants, for damages for the collision of the William H. Vanderbilt with libellant's boat in tow by the John Lee. In the district court Judge Brown delivered the following opinion:

"The steam-tug Lee, coming down the North river with the libellant's boat in tow, while rounding in order to go to the Erie elevator, Jersey City, was

delayed by another tow running inside of her. While waiting a few minutes to let that tow pass to the north, the libellant's boat was run into by the Vanderbilt coming up river from below.

"I am satisfied that the Lee, in running in towards the New Jersey shore, went as near to the inside tow as was safe. No fault can be predicated of her in this respect.

"The Lee had a right to turn around in order to make her slip, and to stop for any obstacle in the way, until it had passed; but she had no right to turn so suddenly as to make the necessary swing of her tow, which was in all nearly 400 feet long, dangerous to vessels coming up the river. I am satisfied that the unexpected long swing of the tow in proximity to the Vanderbilt was one cause of the collision, though the main cause, notwithstanding the Vanderbilt's testimony, was the failure to stop and back at once after her assenting whistle. I am satisfied that there was ample time and space to avoid the tow, had she reversed immediately after her assenting whistle. There is a difference of over 600 feet in the estimates given as to the distance of the Lee from the Vanderbilt when the whistles were exchanged between them. The Vanderbilt's witnesses are more likely correct as to her own position at that time, *i. e.*, opposite the stock-dock. A person looking from aboard the Lee would naturally suppose the Vanderbilt further south than she really was. The Lee had previously given a signal of one whistle, when the Vanderbilt was one pier further down the river, which was not answered, because not heard. The Lee then stopped her engines, and gave a second whistle, but went on again as soon as the answer of one whistle from the Vanderbilt was received. Before this exchange of whistles the pilot of the Vanderbilt supposed the Lee intended to wait and let the Vanderbilt go inside of her. When the whistles were exchanged, the courses of the two tugs were crossing. The Vanderbilt, having the Lee and her tow on her own starboard hand, was bound to keep out of the way of the Lee and her tow. The answer of one whistle was an assent by the Vanderbilt and an agreement to go to the eastward. The tow was in sight. The Vanderbilt could see its length; and if her pilot thought there was not room to maneuver in accordance with the signals, and keep out of the way of the tow, she was bound to give danger signals, and not to have misled the Lee by answering with a signal of one whistle, that the Lee should go ahead and cross the Vanderbilt's bow. It must be assumed from the assenting signal and the Lee's testimony that there was room for the Lee to go ahead safely towards the dock, under all the circumstances of the situation. One of these circumstances was the inside tow, which was a partial obstruction, and required the Lee to wait, when she had got near her, till the tow had got out of the way, and during this time the tow was necessarily gradually swinging down river.

"It is immaterial just what was the precise position or heading of the Lee if she went as far in towards the tow as was safe, which I consider proved. It was not the duty of the Lee to go on up river, and away from her destination, in order to keep out of the way of the Vanderbilt, unless a special emergency arose requiring it, of which the Lee had knowledge in time to avert collision by that means. In general, the Lee had the right to wait, holding her place in the river, as she did, till she could go into her slip, and, having given the Vanderbilt timely notice to keep away to the eastward, or avoid her by stopping, and having received an assent thereto, she had a right to expect the Vanderbilt to do one or the other, and thus avoid her tow. The Vanderbilt's signal I must consider confirmatory proof of the Lee's testimony that she had time and space for keeping away; and that the only reason she did not do so was because she either neglected to observe the inside tow and did not allow for the Lee's necessary stop, or else miscalculated the length of the tow and its swing, and did not stop and back as soon as she might and ought to have

done. I see no legal fault in the Lee, and think that the Vanderbilt must be held alone to blame.

"Had the Lee, in the situation as it actually existed during a minute before the collision, under the prior assenting signals, had clear reason to suppose that the Vanderbilt was not either stopping or backing in time, or not going to the eastward in time to avoid colliding with the end of her tow, it would doubtless have been a fault in the Lee that she did not hook up and go ahead so as to aid in taking her out of the impending danger of collision. But the Lee was 400 feet away from the end of her tow, and it had already swung nearly straight down river. It was not possible, I think, for the pilot of the Lee, in that situation, to have perceived that there was any necessity for him to hook up strong, in time to have started such a tow so as to be of any service. Had there appeared to be danger, or need of the Lee's aid, it seems fair to assume, after the Vanderbilt's assenting signals had been given, that some further notice of danger or signal to the Lee should have been given by the Vanderbilt. No such notice or further signals were given by the Vanderbilt, and I cannot find, therefore, that the pilot of the Lee was chargeable with any timely notice that the end of his tow was in danger through any inability or neglect of the Vanderbilt so as to require him to deviate from the ordinary course in waiting until the inside tow had moved out of the way. The real cause of the collision, I am satisfied, was partly miscalculation by the Vanderbilt, but chiefly her tardiness in reversing after her assenting signal.

"The libellant is entitled to judgment against the Vanderbilt, with costs. As against the Lee, the libel should be dismissed, with costs."

Whereupon respondents appeal.

W. W. Goodrich, for Starin.

Peter Alexander, for Curran.

Josiah A. Hyland, for libellant.

LACOMBE, J. I see no reason for reversing the decree of the court below. There is a conflict of testimony as to whether the Vanderbilt did or did not stop and back at once after giving her assenting whistle. The learned district judge, who heard the witnesses, credited those who testified that she did not so stop and back, and disbelieved those who swore that she did. There is nothing in the case which makes that testimony so incredible that this court, which has not heard the witnesses, and is therefore without facilities for estimating the value of the personal equation, with which all human evidence is to be tested, should disturb his finding on that point. He has also found that the Lee stopped only to permit the inside tow to pass, going as near to such tow as was necessary and proper. The evidence abundantly sustains that finding. The Lee's tow, though a long one, was not improperly so, in view of the presence of ice in the river. She had a right to stand to for her slip; and when the Vanderbilt, whose pilot could see both the length of the Lee's tow and the presence of the inside tow, avoidance of which would necessarily delay the Lee, gave its assenting whistle, the Lee was justified in carrying out the maneuver which it had offered to make, and which would have been successfully accomplished had the Vanderbilt stopped and backed at once.

THE SARATOGA.¹

COOPER v. THE SARATOGA.

(District Court, S. D. New York. December 15, 1888)

1. COLLISION—BETWEEN STEAM AND SAIL—NIGHT—NARROW CHANNEL—HIGH SPEED—NEGLIGENT LOOKOUT.

The steamer S., going down the Hudson river at the rate of 14 knots, on a night which was not intensely dark, and in a place where the channel was not over 700 or 800 feet wide, ran into a schooner beating down river. *Held*, that the S. was in fault for the collision for not seeing the schooner at least 500 feet away, and in time to avoid her, had the lookout been vigilant.

2. SAME—SAILING VESSEL—APPROACH OF STEAMER—FLASH-LIGHTS.

The schooner beating down, and having seen the steamer a mile distant, rapidly overtaking her, and knowing that her own colored lights were not visible to the steamer, till a few moments before collision, *held* also in fault for not exhibiting to the steamer a flash-light, or any other signal of her presence.

3. SAME—REV. ST. U. S. § 4234.

Section 4234, Rev. St. U. S., applies to all sailing vessels.

In Admiralty.

Libel by the owner of the schooner L. Holbrook for damages caused by collision with the steam-ship Saratoga.

Wing, Shoudy & Putnam, for libellant.

Hyland & Zabriskie, for claimant.

BROWN, J. On the night of August 15, 1888, as the libellant's schooner L. Holbrook, loaded with a cargo of brick, was beating down the Hudson river in a light wind, the tide being ebb, she was run into by the passenger steam-boat Saratoga, on her way from Troy to New York. The place of collision was about in mid-channel, nearly opposite Catskill Point, where the available channel-way was only some 700 or 800 feet wide. The wind, as admitted in the pleadings, was about S. S. E., and the schooner was on her starboard tack. She must have been heading, therefore, nearly directly across the river, or possibly one point down river; not enough to shut out her red light completely when on her course. She was struck on the port side, near the main rigging, and sank almost immediately under the stem of the Saratoga.

The claimants contend that the night was so dark that it was impossible for the pilot of the steamer to see the Holbrook, until they were close upon her,—within 50 feet, as her witnesses allege. The steamer was going at the rate of about fourteen knots through the water; the schooner about one and one-half. The lights of the steamer were seen on board the schooner when she was over a mile distant. No flash-light was exhibited from the schooner. On the schooner's previous tack—her port tack—her head was undoubtedly pointed so much down river that her green light was not visible to the steamer behind; and the steamer, being then upon a bend in the river, showed her red light only. The

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

schooner was on the port tack probably about five minutes. She began to come about from her port to her starboard tack probably three or four minutes before the collision; but as the wind was light, she would be slow in coming around and filling away. When she got filled away on the starboard tack, her red light would not, probably, have come into view to the steamer more than a minute or a half minute before the collision. When she last tacked the two colored lights of the steamer were visible, estimated about a half mile distant. The claimants contend that a good lookout was kept on the steamer, and that no lights at all on the schooner were seen, or were at any time visible. This would be so, if the schooner on her starboard tack headed two points down river. But upon the admitted direction of the wind, it is not probable she headed down so much.

The libelants contend that the night was not dark; that the collision was about 15 minutes before the setting of the moon; that though the sky was somewhat obscured, the stars were visible overhead; and that the hulls and sails of vessels could be seen without a light at least half a mile distant. Some witnesses say that the moon was still visible. Numerous witnesses sustain each side on this point.

1. I am not satisfied that the night was as dark as contended for by the claimants. There is no doubt that the time of collision is accurately fixed at very near 11:35 P. M. This was at least 20 minutes before the moon had set. Whether the moon had at the time sunk behind the western hills or not, its light would not be wholly lost. There was no fog; the clouds were not thick, and were at least broken in places. The large passenger steamer *Dean Richmond* passed by at 1 A. M. Her pilot and wheelsman saw the schooner's mast and sails projecting above water when about 500 feet distant. She lay a little to the eastward of the *Richmond's* usual course. The latter, however, veered about a half point to the westward and passed the wreck about 150 feet off. Naturally it would have been darker then than at the time of collision before the moon had set. Whether, therefore, the schooner's red light was exposed to view or not, it is more probable that the schooner, or her light, if visible, was not seen through some momentary inattention of the lookout during the minute or half minute before collision, than that the darkness was so dense that she could not be seen at all until within 50 feet of her, as the claimants allege. In a half minute the *Saratoga* traveled about 700 feet. If the night was as dark as the claimants allege, the high speed of the *Saratoga* in so narrow a channel, and where other vessels were to be expected, was unjustifiable. *The Batavier*, 9 Moore, P. C. 286; *The Colorado*, 91 U. S. 692, 703. I think, however, the schooner could have been seen at least 500 feet distant, and probably much further off than that. Had she been seen at that distance, as the *Richmond* saw her, there was ample time to change a point to the westward; and half that change would have avoided the schooner. In so narrow a channel-way, where vessels were likely to be beating down, with the steamer going at such speed, and when the lights of sail vessels beating downward would be mostly, if not wholly, obscured, the vigilance of the lookout

ought to be proportionate to the danger; much stricter, therefore, than in the open sea where vessels are few; as in *The Algiers*, 21 Fed. Rep. 343. I cannot believe that if this schooner had been seen even 300 feet away, as she ought to have been, the steamer would not have been able easily to go astern of her by porting her helm. The libellant, indeed, contends that the schooner was seen, and that the steamer's helm was starboarded, and that she attempted to cross ahead of the schooner. But this rests chiefly on the steamer's head swinging to the eastward after the collision, and the appearance of the red light just before collision. The near approach of the steamer, however, would cause the latter change in lights to an observer on the after-part of the steamer. But as the officers in charge deny any change of helm, I accept their account of the matter in that respect, though not without some doubt, as the steamer had just before been under a starboard helm in coming around the long bend.

2. The libellant's schooner I must hold to have been equally to blame for showing no signal to the approaching steamer. Her lights were seen some time before; first her red light a mile off, afterwards both colored lights, making directly for the schooner, when nearly a half mile distant. She must have known that her own colored lights on her previous tack and on coming about were not visible. There was special need, therefore, of some signal to apprise the steamer of the schooner's presence. In the case of *The Excelsior*, 12 Fed. Rep. 203, the failure to exhibit a flash-light in the North river, under section 4234, Rev. St., was held to be a fault contributing to the collision. The libellant contends that that section applies only to sailing vessels of which the collector or general officers of the customs have jurisdiction. The language of the section says "all sailing vessels." The purposes of the act are certainly applicable alike to all vessels engaged in trade and commerce. It would result in great confusion and misunderstanding if the exhibition of a flash-light were obligatory on some vessels, and not on others. I think all alike are intended.

Aside from the statute, the circumstances in this case were such that the exhibition of a signal-light by the schooner was an obligation of reasonable prudence. The presence and the approach of the steamer and her great speed, as one of the usual passenger steamers, were known; the channel-way was narrow; and the fact that the schooner's colored lights, for several minutes previous, had not been visible, and certainly up to within two minutes of collision were not visible, when it was clearly time that the steamer ought to be apprised of the schooner's presence ahead, made it obligatory on the schooner to show some signal. The signal lantern was at hand and could have been used easily. The situation was, therefore, one of manifest danger, before the schooner's red light could have come into view. The obligation of vessels whose colored lights are obscured to make known their presence seasonably, to another vessel behind in circumstances of danger, has been frequently adjudged. *The Oder*, 13 Fed. Rep. 272; *The State of Alabama*, 17 Fed. Rep. 855, 856; *The Erastus Corning*, 25 Fed. Rep. 574; *The Anglo-Indian*,

3 Asp. 1, 4, 33 Law T. (N. S.) 233, 235. A flash-light, or the globe-light which she had at hand, manifestly ought to have been exhibited to the steamer as early as the time of the schooner's last tacking, and continued at least until her own red light should be clearly shown to the steamer. Had this been done, there can be no doubt the light would have been seen on the steamer, and the collision avoided. The omission of the light or any other timely signal was therefore a fault contributing to the collision. The fault of the schooner did not, however, excuse the steamer for the inattention of the lookout, in the special circumstances above noted. The damages must therefore be divided.

THE JOSÉ E. MORÉ.

KERR v. THE JOSÉ E. MORÉ.

(Circuit Court, E. D. New York. December 1, 1888.)

1. COLLISION—EXTENT OF LIABILITY.

The liability of the owners of a vessel for damages resulting from a collision, in which she was at fault, is limited to the amount of their risk in the voyage, which is (1) the value of the ship; (2) the expenses of the voyage, including ship-stores, loading charges, and pay of crew; and (3) the actual gain of the voyage, estimated by deducting from the freight earned the amount of the voyage expenses and such additional expense as is incurred in earning the freight after the collision.

2. SAME—INTEREST ON AWARD.

Interest on the amount awarded against the owner of a vessel causing a maritime collision is chargeable only from the date of the decree. Following *The Manitoba*, 7 Sup. Ct. Rep. 1158.

In Admiralty. On report of commissioner.

On December 6, 1885, a collision occurred between the steam-ship Pomona and the barkentine José E. Moré, off Barnegat, N. J. Cross-libels were filed, and this court, affirming the district court, has held the barkentine solely at fault, and adjudged that libellant's damages amount to the sum of \$14,002.51. 35 Fed. Rep. 921. The claimants of the barkentine then paid libellant the sum of \$6,105 on account, and this court ordered a reference to report the value of the interest of the claimants in the José E. Moré and her freight moneys as of the date of the collision, for the purpose of limiting the liability of the claimants. The commissioner has reported all the proofs taken before him. The barkentine, which completed her voyage, and arrived at this port the day after collision, was appraised soon after the filing of the libel, and her value was ascertained to be \$6,000. This valuation has been mutually accepted. Two questions are now raised: *First*, whether claimants are bound to pay interest from the date of collision or from the date of decree; *second*, whether they are bound to pay anything more than net freight, and what charges are to be deducted from the gross freight to ascertain what is net freight.

Jas. K. Hill, Wing & Shoudy, and Harrington Putnam, for libellant, cited:

To the question of freight: *The Scotland*, 105 U. S. 24; *The City of Norwich*, 118 U. S. 492, 6 Sup. Ct. Rep. 1150; Laws U. S. 1884, c. 121, § 18; *The Linda Flor*, Swab. 309; *The Maria and Elizabeth*, 12 Fed. Rep. 627; *The Abbie C. Stubbs*, 28 Fed. Rep. 719; *In re Wright*, 10 Ben. 14; *Allen v. Mackay*, 1 Spr. 219; *The Benares*, 14 Jur. 581; *Wilson v. Dickson*, 2 Barn. & Ald. 2; *The Jersey Tar*, 8 Ir. Jur. 317; Lown. Av. (Lond. Ed. 1888) 324. To the question of interest: *The Dundee*, 2 Hagg. Adm. 143; *The Amalia*, 34 Law J. Pr. 21; *The Northumbria*, L. R. 3 Adm. & Ecc. 6, 12; *Ex parte Rayne*, 1 Gale & D. 374; *Straker v. Hartland*, 34 Law J. Ch. 123; *Smith v. Kirby*, 1 Q. B. Div. 131; *The Wanata*, 95 U. S. 600; *The Favorite*, 12 Fed. Rep. 213; *The Vernon*, 36 Fed. Rep. 113; *The Scotland*, 105 U. S. 24.

Owen & Gray and Edward L. Gray, for claimants, cited:

The Manitoba, 122 U. S. 97, 7 Sup. Ct. Rep. 1158; *Sumner v. Caswell*, 20 Fed. Rep. 249; *In re Wright*, 10 Ben. 14; *Williamson v. Barrett*, 13 How. 111; *The Heroine*, 1 Ben. 227.

LACOMBE, J., (*after stating the facts as above.*) The question as to interest has been settled by the supreme court in the case of *The Manitoba*, 122 U. S. 97, 7 Sup. Ct. Rep. 1158. It is chargeable only from the date of the decree of the district court.

At the date of the collision the claimants had at risk in their maritime adventure the value of the vessel, \$6,000; the investment they had made by way of loading charges, etc., \$231.87; the investment they had made by purchasing ship-stores and hiring master and mariners, \$461.25; and whatever actual gain there might be by way of freight over the amount of these last two investments. At that time the apparent gain was \$398.38, less whatever additional it might cost to earn it. Had the barkentine sunk in mid-ocean, the sum of all these items would have been lost to the owner, and would have been the limit of his loss. The apparent gain by way of freight, \$398.38, was in fact saved by means of expenditures subsequent to the collision amounting to \$386.60, thus leaving \$11.78 as the actual gain which stood at risk at the date of collision. The aggregate of all these sums thus at risk is \$6,704.90, which is the value the vessel, \$6,000, plus the gross freight earned, less expenses after collision, (\$1,091.50—\$386.60=\$704.90.) There is no reason, on principle, why these investments, which the owners had up to the date of the collision exposed to the risks of their maritime adventure, should not respond for all loss incurred; and the latest authority cited apparently sustains this view. *The Abbie C. Stubbs*, 28 Fed. Rep. 719. The value of the claimants interest in the José E. Moré and its freight moneys as of December 6, 1885, is adjudged to be the sum of \$6,704.90. The wages and board of master and mariners for the day succeeding the accident and in which voyage was completed are also to be deducted from freight. Decree accordingly.

HULL v. A CARGO OF PIG-IRON, etc.¹

(District Court, S. D. New York. December 11, 1888.)

DEMURRAGE—DEMURRAGE DAYS—COMPUTATION—CHARTER-PARTY—WORKING HOURS.

A steam-ship's charter provided as follows: "To be discharged as fast as steamer can deliver during ordinary working hours, all time on demurrage over and above the said lying days at 20 shillings per hour to be paid by charterers for any time expended over and above the said hours for loading and delivery." The vessel having been detained 2 days and 8 hours, or 51 hours after sufficient time to unload at the usual rate of 10 working hours per day had elapsed, *held*, that the demurrage days counted 24 hours per day, and not 10 hours only, and that the vessel was entitled to 51 hours' demurrage.

In Admiralty.

Action against the cargo of the steam-ship Hartington for demurrage.
Buller, Stillman & Hubbard and *Wilhelmus Mynderse*, for libellant.
Knox & Woodward, for claimant.

BROWN, J. The libel was filed to recover demurrage for the detention of the steamer Hartington at New York, in the discharge of a cargo of pig-iron, in July, 1887. The libellant claimed for 67 hours' detention at the rate of 20 shillings British sterling per hour. The charter provided as follows:

"The cargo to be loaded and discharged as fast as the steamer can load and deliver during ordinary working hours, according to the custom of the respective ports of loading and discharge, except in case of riot, or any hands striking work, or accident to the machinery which may impede the ordinary loading and discharging of the vessel. And all time on demurrage over and above the said lying days at 20/ per hour to be paid by the charterers for any time expended over and above the said hours for loading and delivery."

In the original charter the words "20/ per hour" are written in place of an erasure of "— Pounds per day." The principal facts were admitted; it being stipulated that the vessel was ready to discharge after due notice at noon on the 12th of July; that afterwards, on the 13th, she went to Constable Hook on the charterer's request; that on the 14th only three hours were employed in discharging; that she began again at 8 o'clock on the 15th, when her discharge proceeded regularly until it was finished, as shown by the log, at 11 o'clock on the 22d; and that the "ordinary working hours, according to the custom of this port," in the discharge of vessels, is 10 hours per day, viz., from 7 to 12 in the forenoon, and from 1 to 6 in the afternoon. The litigation related solely to the construction of the above clause of the charter, and whether during the days that the vessel was detained, demurrage was to be charged for only 10 hours per day, or for 24 hours.

The actual time occupied in discharging was 66 hours. Had the discharge commenced when the vessel was ready after due notice, namely,

¹Reported by Edward G. Benedict, Esq., of the New York bar.

at 12 o'clock on the 12th of July, her discharge would have been completed (the 17th being Sunday) at 8 o'clock on the 20th. As she was in fact discharged at 11 o'clock on the 22d, the actual time of her detention beyond the time authorized by the charter was 2 days and 3 hours, or 51 hours, instead of 67 hours, as claimed in the libel. The defendants contend that the demurrage days are to be counted for 10 hours only, making, therefore, on this construction, only 23 hours' demurrage.

I cannot sustain the defendant's contention. The charter declares that the vessel shall be "on demurrage over and above the said lying days at 20/ per hour for any time expended over and above the said hours for loading and delivery." The "said hours for loading and delivery" expired, as above stated, at 8 o'clock on the 20th of July. The charter does not say "demurrage to be paid for the ordinary working hours expended," but "for any time expended over and above the agreed hours." The "said lying days" referred to are the days necessary for loading or unloading, reckoned according to working hours; all after that are demurrage days. The distinction is between the contract "lying days" and the demurrage days, as Mr. Eadie, the experienced witness called by the defendant, points out. After the contract "lying days" had expired, every hour was or might be valuable to the ship. Upon the voyage every hour counts: and every day's detention, after the lay days have expired, is a loss of 24 hours to the ship in her subsequent voyage. Nothing but a clear expression in the charter ought, therefore, to reduce the vessel's time allowance below her actual loss of 24 hours per day. The adoption in the charter of compensation by the hour, instead of by the day, is sufficiently explained by the intent to reduce the ship's claim for detention to a more exact rule than a reckoning by days would give. Upon an allowance by the day the charterer would be obliged to pay for a whole day, though but an hour of it were consumed. Upon payment by the hour, the ship cannot claim for any part of the whole day of 24 hours beyond the hour of detention. The change in the printed form of the charter so as to pay by the hour, is a change in the charterer's interest; and in this case he gets the benefit of it, as I think, to the full extent designed.

Decree for 51 hours at 20 shillings per hour.

THE RALEIGH.

WARD v. THE RALEIGH.

(*Circuit Court, S. D. New York. December 29, 1888.*)

MARITIME LIENS—DISCHARGE BY SALE OF VESSEL.

A wrecked vessel was sold by the master, for a small sum, to one of the surveyors who recommended the sale, and the master appears to have contracted for employment upon the vessel. The sale was made, however, with the approval of the underwriters who had insured the vessel, and who, after a thorough examination of the wreck, regarded it as impracticable to raise the

vessel, and advised a sale; and before the sale the owners had made an abandonment to the underwriters, and the underwriters paid insurance as for a total loss. The sale was had at public auction, after due notice, and the vessel was bought by the highest bidder at the sale. At the time of the sale it was doubtful whether the vessel was worth the cost of salvage. After a large sum was expended upon the vessel for repairs, she was libeled for supplies furnished previous to the time she was wrecked. *Held*, that the pre-existing liens were discharged by the sale of the vessel, and that the purchaser had established a valid title, notwithstanding he was one of the surveyors who recommended the sale, and the relations between the master and himself were such as to excite suspicion.

In Admiralty. On appeal from district court, 32 Fed. Rep. 633.

Libels by Madgett, Ward and Wilder against the steam-ship Raleigh for advances and supplies. Decree dismissing libels, and Ward appeals.

Owen & Gray, for claimants.

Henry D. Hotchkiss, for libellant.

WALLACE, J. The testimony in this case has been read with the assistance of an extremely able and thorough argument of counsel. It has been considered in view of the rule that the burden of proof is upon the purchaser of a vessel, who asserts that pre-existing liens have been divested by his purchase on a sale by the master, to show a valid title, and consequently to prove that the master was justified in making the sale by adequate necessity, and acted in entire good faith for the interest of all concerned. *Abb. Shipp.* 16; *The Glasgow*, 1 Swab. 145; *The Australia*, Id. 480; *The Tilton*, 5 Mason, 465; *Freeman v. East India Co.*, 5 Barn. & Ald. 622; *Stephenson v. Insurance Co.*, 54 Me. 55; *The Sarah Ann*, 13 Pet. 402; *The Henry*, Blatchf. & H. 465; *The Amelia*, 6 Wall. 18; *Hartman v. Will*, 4 Pa. Law J. 110. The very small sum realized by the master and paid by the purchaser, the purchase by a person who was one of the surveyors who recommended the sale, and the fiduciary relations which supervened between the master and the purchaser immediately after the sale, and have existed ever since, are features of the transaction which give it an unfavorable coloring, and militate against its apparent integrity sufficiently to require an ample vindication. Nevertheless, the evidence justifies the conclusion that the exigencies of the situation justified the sale as the only means of realizing anything whatever out of the wrecked vessel, and that the master acted in entire good faith in the transaction.

It will not be profitable to enter upon an extended statement of the evidence, or of the reasons for the conclusions reached. The steamer was wrecked on the 20th of January, 1886, being driven ashore by the ice in the Chesapeake bay, about 17 miles from the city of Baltimore. Efforts were made to get the vessel off, unsuccessfully, with the assistance of a powerful ice-boat. Thereafter, and on the same day, the master went to Baltimore to obtain assistance, and notified the owners by telegram, and consulted the agent of the Boston Marine Insurance Company, underwriters on the vessel. The owners gave notice of abandonment to the insurers. At the suggestion of the agent of the underwriters the master applied to Mr. Pentz, who subsequently became the purchaser

of the vessel, and who was agent of the Baltimore Wrecking Company, for assistance in saving the vessel. The next day the master, Mr. Pentz, Capt. Freeman, (agent of the Boston Marine Insurance Company,) and others visited the steamer to examine her. As a result of the examination Mr. Pentz, on behalf of the wrecking company, offered to raise her, and bring her into port, for \$3,000. The master refused to accept this proposition until he had consulted with the owners. The following day Mr. Pentz, Capt. Freeman, Capt. Hayes, surveyor for the Phoenix Insurance Company, (which company had reinsured the risk of the Boston Marine Insurance Company,) with others, again visited the steamer, and found her apparently a broken wreck. Her condition and situation were such that Mr. Pentz withdrew the proposition for raising her, made the day before. The next day a survey was held upon the steamer by three surveyors, of whom Mr. Pentz was one and they reported that in their opinion it was impracticable to save the vessel, and recommended the master to strip and abandon her. On the next day (January 24th) Capt. Trecartin, surveyor of the Boston Marine Insurance Company, who had been sent expressly from New York to examine the steamer, visited her, with the master and others, and came to the conclusion that she was not worth the expense of raising, and recommended that everything should be taken off, and the hull and cargo sold. The master adopted this recommendation, and about a week after stripped the vessel.

The evidence does not authorize a suspicion of bad faith on the part of the master up to this time in the history of the transaction, but shows that he abandoned the project of raising the vessel, and concluded to sell her, with the acquiescence and approval of the owners and underwriters, upon the advice of competent experts, and upon his own honest judgment that she was not worth the expense of salvage and repairs. The report and recommendation of the surveyors, although of value as formal evidence, are far less valuable as exhibiting the real condition of the vessel, and the apparent impracticability of attempting to raise and repair her, than the *consensus* of opinion of the agents and experts of the underwriters, and of other competent judges who saw her before she was raised, so far as this opinion can be ascertained from unprejudiced or reliable witnesses. The vessel was not advertised for sale until February 26th, when, upon consultation between the master and the underwriters, the cargo and the vessel were advertised to be sold separately, but at the same time and place. About that time the underwriters paid the insurance to the owners as upon a total loss. It is probable, although there is no direct testimony to this effect, that in the mean time the master came to an understanding with Mr. Pentz, looking to his own employment in the event of a purchase of the vessel by the latter. Mr. Pentz was the manager of a towing company and of a wrecking company, and his circumstances were such as to render it probable that he might be induced to take the chances of a speculation with the vessel. It was apparent to the master that there was no chance of inducing those interested in the vessel to incur the expense of raising and repairing her, that his occupation was gone, and that he must seek other employment.

He owed them no duty except to see that the vessel was sold for the best price that could be got. Under these circumstances it was natural for him to seek to induce Mr. Pentz to purchase her with a view of obtaining employment himself in raising and repairing the vessel. This conduct was not necessarily inconsistent with his duty as a fiduciary, but it was close to the line of disloyalty; and if there were any fair doubt that the sale was honestly conducted, or that the vessel was sold for all she was worth, the fact that such an understanding was in the minds of the master and Mr. Pentz would justify the most unfavorable conclusion. But the sale was made at public auction to the highest bidder, upon competition, after reasonable notice by publication in a newspaper as well calculated to give publicity as any which could have been selected. Several weeks elapsed before an attempt was made to raise the steamer. It cost about \$3,100 to do so, and about \$1,300 was realized by the sale of the cargo. After the expense of raising her had been incurred, and she was brought to Baltimore, it was doubtful whether she was worth repairing; and nothing was done towards repairing her until the following October. No doubt is entertained that she produced every cent that could have been obtained for her by the master at the time of the sale, or at any time after he concluded to sell her, and before she was raised. Although the sum realized was insignificant, nothing at all could have been realized in any other way than by a sale. The owners and underwriters appear to have been satisfied, and apparently did not expect that anything appreciable would be realized, because they did not attend the sale, or make efforts to find a purchaser. They undoubtedly believed that the purchaser would only buy a chance in a lottery. This was really all he did buy, according to the great preponderance of the testimony respecting the condition and situation of the vessel at the time of the sale. It is a circumstance of some significance that the principal parties who have asserted liens against her were aware of the material facts relating to her loss and sale, and made no attempt to libel her until August, 1887, when the purchaser had expended over \$10,000 in repairs. It is obvious that the survey was a mere formality, and was not intended to and did not influence the judgment of the master or the underwriters; and the fact that Mr. Pentz was one of the surveyors, under these circumstances, is not important. *The Australia*, 1 Swab. 480; Pars. Mar. Ins. 147. Nor is there anything in the circumstance that he employed another to bid for him at the sale which impeaches his good faith. It is difficult to imagine what his motive was in doing this, but it is frequently done when there is no improper motive. It may be he thought that if he appeared as a bidder competition might be stimulated. If this was his notion it was nevertheless legitimate for him to employ another to bid. In view of the conclusion that the claimant acquired a valid title under his purchase of the steamer, it is unnecessary to consider the other defenses which are relied upon. A decree is ordered dismissing the libel, with costs of the district court and of this court.

PENNSYLVANIA RY. CO. v. BALTIMORE & N. Y. RY. CO. *et al.*

(Circuit Court, S. D. New York. December 29, 1888.)

1. STATUTES—PLEADING—JUDICIAL NOTICE.

On a complaint for obstructing navigation by a bridge over navigable waters, the court will take judicial notice of an act of congress authorizing its construction by defendant.

2. CONSTITUTIONAL LAW — INTERSTATE COMMERCE — NAVIGABLE WATERS — BRIDGES.

Congress can lawfully confer upon a private corporation the capacity to occupy navigable waters within a state, and appropriate the soil under them, upon acquiring the rights of the owners, in order to construct a bridge over such waters for the purposes of interstate commerce, without the consent, and notwithstanding the protest, of the state. Following *Decker v. Railroad Co.*, 30 Fed. Rep. 723.

3. NAVIGABLE WATERS—OBSTRUCTION—BRIDGES—BURDEN OF PROOF.

Where the act authorizing the construction of the bridge prescribes certain details of construction, and requires the plans to be approved by the secretary of war, the burden, in an action for obstructing navigation, is upon defendants to show compliance with such provisions. In a complaint alleging special damages in consequence of the obstruction, it is not necessary to allege that the bridge was not built in conformity with the terms of the act authorizing the structure.

In Equity. On demurrer.

Robinson, Scribner & Bright, for plaintiff.

McFarland, Bourdman & Platt, for defendants.

WALLACE, J. This is a demurrer to a complaint, alleging, in substance, that the defendants have erected and constructed a bridge across the public navigable waters of the Arthur Kill, a portion of Staten Island sound, so located as to unnecessarily obstruct and interrupt the navigation of the waters by the plaintiff, whereby the plaintiff, as a common carrier of goods and passengers, has been subjected to special loss and injury in the prosecution of its business. The complaint also alleges that it was practicable and feasible for the defendants to locate the piers of their bridge and build their structure on a plan which would have been convenient for the defendants, and would have afforded ample accommodations for the purposes of the navigation of the Arthur Kill, but that, instead of doing this, they have adopted a location and plan unnecessarily obstructive of navigation, in willful disregard of the interests of the plaintiff and the public. Although it does not appear by the complaint that the defendants were authorized by an act of congress to build and maintain a bridge over the Arthur Kill, the court must take judicial notice that they were. Moreover, it is not now open to discussion that congress could lawfully confer this authority for the purposes of interstate commerce, notwithstanding the waters are partly within the state of New Jersey, and that state has not consented to, but has protested against, the erection of the bridge. That question has been adjudicated by this court in favor of the defendants. *Decker v. Railroad Co.*, 30 Fed. Rep. 723. The act of congress prescribes various conditions and details

of location and construction which are to be observed by the defendants in exercising the authority granted, (act June 16, 1886,) and requires the approval of the secretary of war to the plan and location of the structure, precedent to its erection. It is now insisted in behalf of the defendants that the court must presume that these conditions have been complied with, and consequently that the bridge is a lawful structure. The demurrer thus raises the question of the burden of proof in a case where the navigation of public waters has been obstructed under circumstances that constitute a nuisance, unless those concerned are authorized by competent authority to maintain the obstruction in the manner and to the extent in which it exists. I have no hesitation in deciding that those who obstruct the use of a public highway, whether on land or water, must justify the act by producing their authority, and proving that they have exercised it in essential conformity to its terms. Their act is an encroachment upon the rights common to all, unless they have a peculiar privilege which exempts them from the general rule of obligation. The fact that a bridge over navigable waters has been sanctioned by congress, or by the state within whose limits they are situated, and that it has been built by the person or corporation authorized to build it, does not render it a legal structure, unless as built it conforms to the terms and limitations of the authority. *City of Georgetown v. Canal Co.*, 12 Pet. 97; *Packet Co. v. Railroad Co.*, 2 Fed. Rep. 285; *Railroad Co. v. Packet Co.*, 125 U. S. 260, 8 Sup. Ct. Rep. 874; *Rutz v. City of St. Louis*, 7 Fed. Rep. 438. If the contention for the demurrer is sound, it would devolve upon a plaintiff, whose right to the free navigation of public waters has been interrupted by an impediment which *prima facie* is a nuisance, to prove that the defendant acted under an assumed authority, but was not justified, because his acts were outside of the limitations of his authority; in other words, to negative facts by way of defense which are peculiarly within the knowledge of the defendant. It would be as reasonable to contend that the burden of proof is upon a plaintiff, who has sued an officer for false imprisonment for taking him in custody on the public highway, to show that the officer acted without process, or under void process, or without probable cause. The demurrer is overruled, with leave to the defendants to answer upon the usual terms.

WILCOX v. CARR *et al.*

(Circuit Court, S. D. Iowa, W. D. December 31, 1888.)

MORTGAGES—PAYMENT—PRINCIPAL AND AGENT.

Plaintiff, a resident of Connecticut, placed in the hands of her agent in that state a sum for investment in western loans, which the agent procured to be negotiated by C., in Iowa. Part of the amount was loaned through C. to defendant, the principal and interest being made payable at the agent's office in Connecticut. C. collected the principal and interest of the various loans, including nine installments of interest, from defendant, and returned to defend-

ant his coupons. *Held*, that the payment of the principal to C. in response to the usual notice from him of its maturity was justified, and discharged the debt, notwithstanding C.'s embezzlement of it.

In Equity.

Bill by Almira R. Wilcox against Benjamin W. Carr and others for the foreclosure of a mortgage on real estate.

Cummins & Wright, for complainant.

L. L. Delano and Lehman & Park, for defendants.

SHIRAS, J. This suit is brought for the purpose of foreclosing a mortgage on realty, executed by Benjamin W. Carr and his wife, to secure the payment of a coupon bond for \$700, dated May 1, 1880, and maturing May 1, 1885. The defense is that the debt has been paid. The evidence shows that it is another of the contests caused by the embezzlements of Hugh R. Creighton, of which several have already been heard and determined in this court, and in which the ultimate question to be solved is, which of the parties, both being free from fault, must bear the loss occasioned by the wrong-doing of the said Creighton?

In this case it is not disputed that about the date of the maturity of the mortgage debt the defendant Carr, for the purpose of paying off complainant's debt and mortgage, negotiated a loan of \$650 of the German Savings Bank of Davenport, Iowa, and through Holmes, Nash & Phelps remitted the same, with \$78 additional, to Hugh R. Creighton, at Des Moines; the amount thus remitted being sufficient to pay in full the principal due complainant, with the six months' interest due May 1, 1885. The money thus sent was received by Creighton, but was not forwarded to complainant; and in the June following Creighton absconded, being a defaulter in a large amount. In determining upon whom the loss must fall it is necessary to ascertain the position occupied by Creighton when he received the money, and whether he received it as the representative of the complainant or of the defendant Carr. On behalf of complainant it is claimed that as the bond and mortgage by their terms were payable at the office of B. R. Abbe, in Hartford, Conn., no payment was completed until the money was actually received at the designated place of payment; that the complainant had no knowledge of Creighton, and never authorized him to receive any payments for her; and that he must be held to be the agent of the defendant, charged with the duty of forwarding the money received from defendant to Hartford; and that the consequences of his failure so to do must fall upon defendant. On behalf of the defendant it is claimed that Creighton acted, in receiving the money, as the representative of complainant; that defendant was justified in dealing with him as complainant's representative, and in making the payment to him as such. To settle this question it is necessary to ascertain the facts attending the inception of the loan, and the relation of the parties who were instrumental in negotiating the same.

On part of complainant is submitted the testimony of complainant and of B. R. Abbe, by which it is sought to show that the latter, as the agent of the Union Loan Association of Des Moines, sold to complainant

the bond and mortgage in suit, and that there was in fact no connection between complainant and Creighton in the transaction. The true facts of the case, however, are quite clearly shown in the correspondence that passed between Abbe and Creighton. It should be first noted that the complainant, in answer to the question, "Who acted for you as your agent in making the loan to the defendant Carr?" replied, "Mr. B. R. Abbe;" and she also testified that in the early part of the year 1880, she placed in the hands of B. R. Abbe the sum of \$2,000, to be by him invested in western loans for her. On January 7, 1880, Abbe wrote as follows to Creighton, at Des Moines:

"Mrs. Almira R. Wilcox, of Hartford, has left an order for \$2,000 of farm loans, none of the loans to be over \$500, all at 9 per cent., good choice ones. Now, Brother Creighton, I want you to get some extra loans for this lady. She has been dealing with Pearson, of Chicago, but has come to me, because I represented you as choice, reliable, and sound, and that you would get her just what she wanted. Don't disappoint her. She has more to invest beside in time. * * *

January 21, 1880, Creighton replied to Abbe as follows:

"I have your telegram of the 20th, and Thomas A. French, Thomas Snyder, and Mary E. Dowell will be closed at once. * * * I will draw on you to-day for the Almira R. Wilcox money,—\$2,000, less 1 per cent. com. to you, \$20.00; amt. of draft, \$1,980.00,—as authorized by your letter of the 7th inst. If I am obliged to place any of it at 8 per cent. interest I will allow you a little more. Mr. Smith of this office is out now looking up some good applications for Mrs. Wilcox."

February 12, 1880, Creighton wrote Abbe a statement, showing that he had forwarded him for Mrs. Wilcox: Note of Abraham Angervine for \$200; note of August Kast for \$500; and of Adam Buter for \$500,— "which leaves to be placed \$700; papers to be dated January 10, 1880." In a number of letters passing between Abbe and Creighton reference is made to the investment of this \$700, until in letter of July 1, 1880, Abbe acknowledged receipt of the evidence of investment.

Turning now to the mortgage executed by the defendant Carr, we find it was acknowledged on the 26th day of June, 1880. Thus it is made clear that in January, 1880, the complainant placed in charge of B. R. Abbe, as her agent, at Hartford, the sum of \$2,000, to be invested for her in loans upon western lands; that Abbe intrusted the actual making of the loans to Creighton; that Creighton drew for the money about January 21, 1880, the draft being for \$1,980, the balance being left with Abbe as a commission due him; that in February \$1,300 of the sum had been invested in the loans to Angervine, Kast, and Buter; that the remainder was not invested until about June 26th, when it was loaned to the defendant Carr, and the bond and mortgage sued on were taken and forwarded to Abbe for complainant. There can be then, no possible question that the money of complainant was by Abbe placed in Creighton's hands for investment before any loans had been secured. He held it as her money, to be invested as directed by Abbe; and in seeking the investments and in placing the loans he was beyond question acting for Abbe, and through him for the complainant. Had he then embezzled

the money, or had he otherwise failed in the proper performance of his duty, the complainant, either directly or through Abbe, could certainly have called him to account for her money thus placed in his hands. Having, however, made the investments as stated, he returned the papers to Abbe, and the question is whether he was authorized to represent the complainant in collecting the interest and principal of the loans thus made by him.

Up to the time of the disappearance of Creighton the correspondence in regard to these loans was conducted between Abbe and Creighton, and from these letters it clearly appears that to Creighton was intrusted the duty of collecting the several installments of interest as they matured, and also the principal of the loans made. In his deposition Abbe denies that Creighton had any authority in the premises, yet he admits that he never had any correspondence with the debtors in regard to the loans, and that all letters touching the same were sent to Creighton; and further that he expected that the interest and principal would be sent through Creighton to him, the loans being payable at his office. The letters, however, passing between Abbe and Creighton, as already said, clearly show that Abbe expected Creighton to look after the collection of the amount due on these loans, and at least eight payments of interest were made by the defendant Carr to Creighton, and the coupons therefor were duly returned to the defendant. As an illustration of the relation held by Creighton to these loans owned by complainant, take the correspondence in regard to the loan of Abraham Angervine. Under date of August 13, 1881, Creighton writes to Abbe:

"We find it necessary to foreclose loans No. 550, Wm. Boardman to Saml. B. Hull; No. 650, Almira R. Wilcox to Abraham Angervine; and No. 726, Wm. Bolles to Andrew J. and Fannie Childs. The papers in No. 550 are notes, mtg., and abst.; in 726 are notes, mtg., and his policy. Please send these papers, if possible, by return mail, as we have begun first two for term of court beginning Aug. 25th, and the third for a term a few days later; so please send as soon as you can. There will be no trouble to get full amount of mortgagee's claims out of the premises."

May 30, 1882, Creighton writes to Abbe:

"Get the Angervine certificate of sale from Almira R. Wilcox, and send it on, as I am informed the money is paid to the clerk of Audubon county, and interest is stopped, and we will collect and forward."

June 7, 1882, Creighton to Abbe:

"Your favor of ——— is received, with inclosures as stated, Almira R. Wilcox cert., which will be collected."

The correspondence further shows that as the six months' interest came due upon the other loans belonging to complainant for the years 1881, 1882, 1883, and 1884, the same was collected by Creighton, and forwarded to Abbe for complainant. When Abbe learned the fact that Creighton had made an assignment, he wrote him under date of June 15, 1885, as follows:

"* * * Also give me an itemized account of any monies paid to you on account of any of the mortgagees whose loans have been made payable at my

office except Wm. Bolles, viz., John Sheldon, * * * Almira R. Wilcox. * * * I want to know if any money has been paid to you for the account of these parties, which you have not sent to me, and, if so, how much, and from whom, as mortgagor, it was paid to you. Also you are hereby forbidden to receive any money from any mortgagor, for the account of any of the above-mentioned parties."

Further quotations need not be made from the correspondence to show that Abbe intrusted to Creighton the duty of collecting and forwarding the money due complainant,—both the principal and interest; and it is no less clear that Creighton held himself out to the defendant Carr as one authorized to demand and receive the payments as they matured.

The following, then, are the facts in this case as established by the evidence: In January, 1880, the complainant placed in the hands of B. R. Abbe, as her agent, \$2,000, to be invested in western loans, and intrusted to him the supervision of such investments after the same had been made. B. R. Abbe applied to Creighton, at Des Moines, Iowa, to make the investments contemplated, and about January 21st the money was transferred to Creighton at Des Moines. During the months of February, March, and June, 1880, the entire sum was invested in four separate loans; one of \$700 being made to the defendant Carr, the principal being payable May 1, 1885, and the interest and principal being payable at the office of B. R. Abbe, at Hartford, Conn. The arrangement between Abbe and Creighton contemplated the collection by the latter of the principal and interest of these loans as they came due, and the forwarding of the amounts collected to Abbe, at Hartford, to be by him paid to complainant. Creighton, in pursuance of this arrangement, notified the defendant Carr and the other debtors of the time when the respective payments came due, and requested payment to be made to him. The defendant Carr and the other debtors paid the installments of interest as they came due to Creighton, and subsequently received from him the coupons that had been attached to the bonds or notes executed by them. Nine payments of interest were thus made by the defendant Carr to Creighton, the coupons being returned to him through Creighton. Shortly previous to the maturity of the principal of his loan, he received a notice from Creighton of the time it would mature, and the amount needed to discharge the debt in full, which amount the defendant in due time forwarded to Creighton. The sum thus sent was received by Creighton, but he failed to forward it to Abbe, and in fact he embezzled it. These facts justify the conclusion that Abbe was the agent of complainant, with authority to invest the \$2,000 in western loans, and to supervise the collection of the principal and interest thereof. That in the usual course of such business it would be necessary for Abbe to employ some party or parties in the west to make the loans and attend to the collection thereof, and that it must be deemed that Abbe possessed the right so to do. That Abbe in fact did employ Creighton, not only to invest the money, but to collect the same, and that the defendant was justified in paying the debt, when demand thereof was made of him by Creighton, to the latter. That such payment, when made, discharged the debt evidenced by the bond

and mortgage held by complainant. The facts of the case bring it fairly within the rules stated by the supreme court in *Bronson's Ex'r v. Chappell*, 12 Wall. 681. The defense of payment being sustained by the facts, it follows that complainant's bill must be dismissed on the merits, and that defendants recover the costs of this proceeding. Decree accordingly.

BRIGGS *et al.* v. WASH-PUK-QUA *et al.*

(Circuit Court, D. Kansas. December 26, 1888.)

INDIANS—KICKAPOO INDIANS—RIGHTS OF HEIRS—CONVEYANCE OF LAND BEFORE PATENT—ESTOPPEL.

Act Cong. Aug. 4, 1886, § 2, (24 St. at Large, 219,) provides that on the death of an allottee of land under the treaty of June 28, 1862, with the Kickapoo Indians, leaving heirs, and without having obtained patents, the secretary of the interior shall cause patents in fee-simple to issue in the name of the original allottee, and that such original allottee shall be regarded as a citizen of the United States and of the state of Kansas; the land to become a part of his estate, to be administered or descend to his heirs, etc. *Held*, that the United States holds the legal title in fee-simple in trust for the heirs of the allottee, and the latter are estopped by their warranty deed conveying the land before obtaining a patent from asserting title against the grantee.

In Equity.

Bill by Lewis M. Briggs and others against Wash-puk-qua and Wah-ka, to quiet title to certain lands conveyed to complainants by defendants.

Jackson & Royse, for complainants.

Waters, Chase & Tillotson, for defendants.

FOSTER, J. This is a bill to quiet title to the following real estate: The N. W. $\frac{1}{4}$ of section 9, township 5, of range 17, and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 8 of the same township and range, situated in Atchison county. The first-named tract was allotted to Wash-ka-ta-mo-sha-wa, a Kickapoo Indian, under and by virtue of the treaty with the Kickapoo Indians of June 28, 1862. 13 St. at Large, 623. The last-named tract was allotted to Ke-ve-nes, also a Kickapoo Indian, under the same treaty. The right of an allottee under that treaty to obtain a patent and to alienate his land depended upon his showing by proceedings in the federal court that he was competent to manage his own property, and had severed his tribal relations, adopted the habits of civilized life, and in fact should become a citizen of the United States. Both of these allottees died some time prior to August, 1886, without having obtained patents to their lands, and without having taken any steps under the treaty of 1862 to procure the same. The defendant Wash-puk-qua was the wife of the first-named allottee, and the mother of the last-named, and was the only surviving heir. She afterwards married Wah-ka, who is made co-defendant in this case. On August 28, 1886, said Wash-puk-qua, as the heir of said allottees, and her husband and co-defendant, con-

veyed to complainants said above-described land by warranty deed, for the sum of \$1,500, and the purchasers entered into possession, and made lasting and valuable improvements on said land of the value of \$1,000. At the date of said conveyance no patent for said lands had been issued under the act of 1886. Under the second section of said act of August 4, 1886, (24 St. 219,) it was made the duty of the secretary of the interior to issue patents when the allottee under the treaty of 1862 had died, or should thereafter die, leaving heirs, and without having received a patent for his land. Said section reads as follows:

"That where allottees under the aforesaid treaty shall have died, or shall hereafter de cease, leaving heirs surviving them, and without having obtained patents for lands allotted to them in accordance with the provisions of said treaty, the secretary of the interior shall cause patents in fee-simple to issue for the lands so allotted, in the names of the original allottees, and such allottees shall be regarded, for the purpose of a careful and just settlement of their estates, as citizens of the United States and of the state of Kansas; and it shall be competent for the proper courts to take charge of the settlement of their estates, under all the forms and in accordance with the laws of the state of Kansas, as in the case of other citizens deceased; and where there are children of allottees left orphans, guardians for such orphans may be appointed by the probate court of the county in which such orphans may reside, and such guardians shall give bond, to be approved by said court, for the proper care of the person and property of such orphans, as provided by law."

The patents were issued in this case some time later, and in January, 1888. The defendants now claim title to said land adverse to complainants, and aver that their deed to complainants in August, 1886, conveyed no title, and was void and of no effect, because at that time no patent had been issued by the government, and until such patent had been issued they could convey no title. It will be seen that the whole controversy rests on the construction and effect to be given to the second section of the act of August 4, 1886. It seems evident that it was the purpose of that act, on the death of the allottee having no patent for his land, and leaving heirs, that the title should, without other conditions, be perfected in the allottee and his heirs; and the land should become a part of his estate, to be administered or descend to the heirs, as the estate of any deceased citizen would under the laws of the state of Kansas. From and after the said act of 1886 became a law, the government held the legal title in trust, for the heirs of all such allottees then deceased. The right to the patent was absolute and complete, and the duty of the secretary of the interior to issue the patent was imperative. Mr. Justice FIELD, in *Stark v. Starrs*, 6 Wall. 418, says:

"The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants."

If the patent relates back to the inception of the right to it to cut off intervening claimants, with equal reason and justice it must relate back to estop the patentee from asserting title against his grantee under warranty deed made before the patent actually issued, and after his right to

it had become absolute. In *Langdeau v. Hanes*, 21 Wall. 530, the court uses the following language:

"A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectively as a grant or quitclaim from the government. * * * If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title."

The supreme court of Kansas has decided that a conveyance by the heir of a Pottawatomie Indian allottee, under a treaty similar to the Kickapoo treaty, and an act of congress for the settlement of their estates, August, 1868, was valid, although made before the patent was issued. And this decision was made on the act of 1868, which did not provide in terms, as does the act of 1886, that a patent should issue on the death of the allottee. *Oliver v. Forbes*, 17 Kan. 124. I can see nothing in the language or purpose of the act of 1886 to warrant the construction claimed for it by counsel for defendants, that the heir takes the land with the same restrictions and limitations on the right of disposing of it as existed against the allottee in his life-time. The patent is absolute and unconditional,—a fee-simple. The whole title of the government passes to the allottee and his heirs for all purposes, and without restriction. Counsel for plaintiffs has called my attention to several other cases, both in the federal and state courts, sustaining the views herein expressed, but it is not necessary to cite further authority. The plaintiffs are entitled to their decree.

BROYLES *et al.* v. BUCK, Clerk.¹

(*Circuit Court, N. D. Georgia. December 29, 1888.*)

1. COSTS—IN FEDERAL COURT—ATTORNEY'S FEE FOR DEPOSITIONS.

Under section 824, Rev. St. U. S., the prevailing party is entitled to collect for his attorney a fee of \$2.50 for the deposition of each witness "taken and admitted in evidence," to be taxed as costs, especially where the witnesses are examined and answer separately.

2. SAME.

Such fees are allowed to the party as compensation for his attorney's services in and about the depositions, and are to be taxed in addition to the fees of commissioners to take the testimony.

3. SAME—COLLECTION.

The attorney's costs, like those of the clerk and marshal, are to be collected in the name of the prevailing party.

Rule on Clerk to Tax Costs.

Malcolm Johnston, for movants.

Bacon & Rutherford and *P. L. Mynatt*, for railway company.

¹Reported by Will Haight, Esq., of the Atlanta bar.

NEWMAN, J. This is a rule against the clerk in the case of the *East Tennessee, Virginia & Georgia Railroad Company v. Watters*. The question presented is whether, under section 824, Rev. St. U. S., the clerk, in taxing costs for attorney's fees, in favor of the prevailing party to a suit should tax \$2.50 for the deposition taken and admitted in evidence of each witness, where the testimony of more than one witness is returned to court in one inclosure. The attorneys for Watters, the prevailing party, say that the testimony of each witness is "a deposition" in the meaning of the statute, especially where, as in this case, the testimony of each witness is taken separately. This view seems to be correct. It is difficult to see how any other interpretation can be given the language, "for each deposition taken," etc.

It is suggested by counsel for the railway company that the expense to it of having the commissions executed, and taking the testimony, should be deducted from the sum to be taxed as attorney's fees for depositions. As I understand this statute, the fee of \$2.50 "for each deposition taken and admitted in evidence in a cause" goes to the prevailing party for his attorney, and the expense of commissioners to take the testimony has no connection with it.

This rule was brought by Watters' attorneys, but, it being conceded on the hearing that properly it should have been brought in the name of Watters, the defendant in the case, it was allowed to proceed informally, nevertheless, to determine the question made. It is ordered, therefore, that the clerk tax in the bill of costs in this case \$2.50 for the depositions of each witness taken and admitted in evidence.

UNITED STATES *v.* BADINELLI *et al.*

(Circuit Court, W. D. Tennessee. December 20, 1883.)

1. ELECTIONS AND VOTERS—OFFENSES AGAINST ELECTION LAWS—COUNTING THE VOTE.

The United States Revised Statutes, § 5515, punishes officers of election for some violation only of their duty as prescribed by law, and not for a violation of any duty imposed by a mere moral sense of fairness and justice in counting the votes. If, therefore, they undertake to count the ballots in a manner not authorized by law, no duty as to that counting is imposed for a violation of which they may be punished under the federal statute. The offense punishable, in such a case, is the counting of the votes in the unlawful manner, no matter how fairly done.

2. SAME—PLACE OF COUNTING—EXCLUSION OF ELECTORS.

The Tennessee Code requires a free, open, and public counting of the vote at the place where the vote is polled, and nowhere else. It does not provide for a count in a private room, to which the ballot-box has been taken; protected by policemen from the intrusion of all not admitted by the election officers. It is therefore no violation of a duty punishable by the federal statute to exclude an elector from such an unlawful counting, whether he be entitled to be present at a public and lawful counting at the polling place or not; but the indictment should have charged the offense of violating their

duty in not counting the vote at the place and in the manner required by law, and in removing the ballot-box from that place, and counting the vote, unlawfully, in a private room.

3. SAME—RIGHT OF ELECTOR TO BE PRESENT.

Under the Tennessee Code those electors who have the right to vote in a precinct have also the right to be present at the counting of the vote in the free, open, and public manner required by law at the polling place appointed and registered for that purpose; and while a candidate has a right to vote in that precinct, if he has not exercised that right but has voted elsewhere, he is not an "elector" at that precinct, with the statutory right to witness the count, though he may, as any citizen may, be present at the public count provided by law, no one being prohibited from such attendance. Yet, it is no offense under the federal statute to exclude him from an unlawful count in a private room, since no such counting can be lawful in Tennessee, and no duty of admitting or excluding electors or others from such a place is imposed by law.

On Indictment for Violation of Election Laws.

At the congressional elections held at the Fourth ward in the city of Memphis on the 6th day of November, 1888, the defendants were the election officers charged with the duty of holding the election at that place. When the polls had closed they carried the ballot-box, accompanied by the clerks and federal supervisors, through the saloon in front of which the polls were held into the back yard, up a flight of steps, and through a hallway into a private room, where the counting was fairly done, according to the testimony of the federal supervisor for the republican party, the only witness examined on that point, and who helped to do the counting. The witness J. E. Bigelow, who was the republican candidate for state senator, being present at the closing of the polls, and desiring to witness the count, followed the box through the saloon and into the back room of the saloon, where he was told by two of the defendants that he could not go with them to the place where the counting was to be done. He protested that he was an elector and a candidate, that he had a right to be present at the counting, and that he proposed to exercise his legal right in that regard. He was told to go back, but persisted in following the defendants and the box into the back yard and up the flight of steps; but at the head of the stairway he was met by two policemen, who told him he could go no further; that their orders were to enforce obedience to the instructions of the election officers, and they had been directed to exclude him from following them into the room where the counting was to be done. He departed, and was not present at the count. The federal supervisor, who was examined as a witness, being appealed to by Judge Bigelow, insisted that Bigelow had the right to be present, and demanded of defendants that he should be allowed to exercise that right, but they still refused him admittance to the count. Bigelow did not reside in that ward of the city, nor in that civil district of the county, but in another civil district in the country, where he had voted previously to coming to the Fourth ward to watch the election. There was some proof as to the character of the crowd and its conduct, the inclemency of the day, and the details of the surroundings at the time of the exclusion, not necessary to mention here. The defendants were indicted under Revised Statutes, § 5515, for a failure to perform

their duty "to count the ballots cast at such election in the presence of such electors as chose to attend, in that they did willfully and unlawfully refuse to allow one J. E. Bigelow to be present and attend the counting of the ballots cast at said election, the said Bigelow then and there being an elector who chose to be present at said counting of the ballots, and was then and there requesting and demanding of said officers that he be permitted and allowed to attend said counting as such elector, contrary to the form," etc. The second count of the indictment charges an unlawful denial of the right to be present "by excluding him from the room in which the counting of said ballots was being made," contrary, etc. The duty alleged to be violated is that prescribed by the Tennessee Code, § 861, (Mill. & V. Code, § 1068,) as follows:

"When the election is finished, the returning officer and judges shall, in the presence of such of the electors as may choose to attend, open the box, and read aloud the names of the persons which shall appear in each ballot; and the clerks at the same time shall number the ballots, each clerk separately."

Other provisions of the Tennessee Code, not necessary to be set out more fully, require every one to vote in the civil district or ward in which he resides, except that certain persons, including candidates, may vote anywhere in the city or county where they happen to be on election day. When the district attorney had closed his proof, the defendants moved the court to instruct the jury to find for them upon their plea of not guilty, because the facts showed that the witness Bigelow had voted in his home precinct, and, although a candidate, that he had no right to be present at the counting of the ballots, he not being an "elector" in the Fourth ward. The defendants did not wish to demur to the evidence because, if the decision upon the questions of law to be argued should be decided against them, they wished to examine witnesses then in attendance. The court declined to adopt that practice in criminal cases, if at all in any case, and required argument as to its propriety; but the district attorney thereupon waived any objection in this case, and agreed that the motion might be considered upon its merits, as if upon demurrer to the evidence, and, if decided adversely to the defendants, that they might then put in their proof notwithstanding; to which arrangement the court assented for the purposes of this case only.

H. W. McCorry, U. S. Dist. Atty., and *H. C. Anderson*, Asst. U. S. Dist. Atty.

Luke E. Wright, *W. H. Carroll*, *Watson & Hirsch*, *E. F. Adams*, and *Zack Taylor*, for defendants.

HAMMOND, J., (after stating the facts as above.) As was well remarked by one of the learned counsel for the defendants, our election laws constitute, as a whole, a scheme for the regulation of the proceeding intended to secure to the people a free, fair, and honest election, to facilitate the right to vote, and preserve the purity of the ballot-box; and they must, in construing any part of them, be examined as a whole. As arranged in the sections of the Code of 1858 they will be found to be broken up somewhat, and disarranged from their original contexts, and, when restored,

their meaning is often made more clear. They are found in chapter 2 of article 6 of that Code pertaining to "Officers and Elections," the original basis being chapter 9 of the acts of 1796, passed at the first session of the general assembly of the state, from which the section in controversy here was taken. Code 1858, §§ 812-887; Thomp. & S. Code, §§ 812-887; Mill. & V. Code, §§ 1003-1096. There cannot be the least doubt upon reading them that the intention is to provide for a perfectly open and public counting of the vote of each precinct at the place in that precinct where the election is held. The county court is required to designate such places for each precinct at least six months before the election, and to enter the designations of record. Act 1827, c. 27, § 1; Code 1858, §§ 837, 837a; Thomp. & S. Code, § 837 *et seq.*; Mill. & V. Code, §§ 1041-1043. Then come the provisions for counting the vote and making the returns, with which we have to deal here, among the sections regulating "the proceedings at the polls," and after that those sections regulating the "proceedings after the polls are closed," which classifications, titles, and subtitles are a part of the original Code itself. From the whole scheme it is apparent that the counting must take place at the polling place, and can be had nowhere else without violating the duties imposed by these laws, and "in the presence of such of the electors as may choose to attend." Code 1858, art. 7, §§ 846-863a; Id. art. 8, §§ 864-871; Id. art. 9, §§ 872-887; Thomp. & S. Code, §§ 846-887; Mill. & V. Code, §§ 1053-1096.

If, therefore, these defendants had been indicted here for removing the ballot-box from the place designated by the county court for holding the election, including the count in the presence of such of the electors as should choose "to attend," they would, on the proof as now presented under this proceeding, be guilty under the Revised Statutes of the United States of violating their duty as election officers under the laws of the state, and subject to the penalties imposed by congress. Rev. St. § 5515. The state laws do not, evidently, contemplate such a proceeding as that shown by this proof, where the officers of election carried the ballots to another place than that designated for holding the election in the presence of such electors as "shall attend" that election, either for the purpose of casting their ballots under section 849 of the Code, or of witnessing the count under sections 860 and 861, Code 1858; Mill. & V. Code, §§ 1056, 1067, 1068,—these sections being at first parts of the same section, and even of the same sentence, of the original act of 1796. 1 Scott's Rev. 557, c. 9, § 3. This place to which they unlawfully carried the box to make the count was a small private room into which only such persons were admitted as the officers chose to admit; policemen being stationed to guard the approaches to it, and enforce their orders in that behalf. As one of the learned counsel for the defendants said in argument, it was never contemplated that in making this count the officers should be put to the peril of deciding which of the electors should possess the necessary qualifications of residence, or what not, entitling them to be present at the count. The counsel urged that the officers, in the nature of the case, could only be required to admit those who had dem-

onstrated their right to be present at the count by the acceptance of their votes and the placing of their names upon the poll-lists. The truth is, the statutes never contemplated or intended to provide that the officers of election should be put to the examination of any evidence whatever to determine that question at all; not any more of the votes as appearing on the poll-lists than of other evidence *abundant* that record. Neither of these was contemplated, because no such proceeding as a count in a closed or private room, from which the officials might exclude or admit electors, according to any evidence whatever, was within the view of the legislature. These laws do not provide for such a situation as that any more than they do for a count with military guards, and military orders for the admission or exclusion of persons desiring to be present at the count. No such proceedings are provided for at elections in the state of Tennessee, but an open, free, and fair election in the presence of the electors choosing to attend at a particular place previously designated by law and recorded, where the casting of the ballots and their counting immediately upon the closing of the polls shall take place, and neither of these functions can be performed lawfully at any other place,—not the counting any more than the casting of the ballots. Therefore there was no duty devolved upon these officers to count the votes in another place than that where they were cast, protected by policemen or themselves from improper intrusion of those not entitled to be present; and of consequence they cannot be held criminally liable for any supposed violation of duty in that regard, either by the admission of improper persons to the count or the exclusion of proper persons therefrom. The criminal offense is in resorting to such a place to do the counting, and for that these defendants are not indicted. That which they were doing being unlawful, there was no lawful way to perform the duty, and they cannot be charged by indictment for irregularities in doing it, but should have been charged for the unlawfulness of the entire performance.

If, however, the court be mistaken in this view of the law, which seems so plainly written in every feature of these election laws from the original act of 1796, and even of the laws in vogue before our state was organized, to the present day, the result must be the same if it be conceded that the count at that place was lawful; because, when we read the one sentence and the one section of the original act of 1796, from which the existing sections of the Code are taken, it is perfectly plain that the words "such of the electors as may choose to attend," used in section 861, (Mill. & V. Code, § 1068,) are meant to describe the self-same persons previously mentioned in section 849,—and likewise so in the original act,—as "every person qualified to vote, in the manner directed by the constitution, who shall attend for that purpose at any election," etc. Mill. & V. Code, § 1056. That is to say, any and all persons attending at that precinct for the purpose of voting have the statutory right to be present when the returning officer and judges shall "open the box and read aloud the names of the persons which shall appear in each ballot; and the clerks at the same time shall number the ballots, each clerk separately." Code, § 861; Mill. & V. Code, § 1068.

The meaning of the word "elector" in our constitution and laws is not uniform, but depends upon the subject-matter of the legislation and the particular context, as is shown by a careful reading of these statutes themselves. Here it means one qualified according to the constitution and laws of the state to vote at that particular precinct, and who attends there for that purpose. The court thinks the place must be the same and the "attendance" the same, under either section or under both of them; but certainly the mode and manner of the count, and the designated "electors" entitled to be present, must be the same, if the places may be different.

Now, the prosecuting witness Bigelow did not attend at that time and place, or at either place, if there may be two, to vote at that precinct. He was disqualified from voting there, because he had already voted at his home precinct; and if he had offered to vote, and had been challenged, and the authorized questions asked, he would have been excluded, because he must have answered that he had voted before at the same election. Code, § 854; Mill. & V. Code, § 1060. It is true that, being a candidate for state senator, he had the right to vote out of his civil district and at this place, and might have attended there for that purpose, but he did not exercise this option or right, but, on the contrary, chose to vote at another precinct, and was not, therefore, an "elector" at this place. It is an inevitable result, that he was not an elector entitled to be present at the count, if the count could be made on any such theory as was adopted, and as is implied by the indictment in this case. But the court does not sanction that theory or implication for the reasons already stated, that it is repugnant to the whole scheme of our election laws, and leads to inextricable confusion and disastrous consequences, as is obvious to any intelligence whatever. The judgment which we give is therefore placed upon the first ground stated, and not that just considered. It is true, these laws were made to prevent frauds, and should be construed to that end, and the construction placed upon them by the district attorney best tends to accomplish that result, no doubt; but because the legislature might and should allow all electors, and especially all candidates, to witness any count that they may wish to witness where their interests are involved, it does not follow that it has done so, if we may adopt the erroneous view of these statutes just considered. The laws, properly construed, do not prohibit anybody from attending an election precinct during the progress of the whole performance, and if the plan of holding the election which I have pointed out as the lawful one be adopted, and there be a free and open taking of the ballots, and a free and open counting of the same, as a continuous operation at the place designated by law and recorded, and all in the presence of the electors attending there for that purpose, all well-behaved persons, even strangers and electors at other precincts, and all candidates, may stand by and see the performance go on from the beginning to the end; and fraud is thus reduced to a minimum, if not made impossible. It is only when resort is had to the unlawful method of taking the ballot-box to another place, not open and free to all the electors of that precinct to attend at will, but requiring ad-

mission by permission of some one or more persons usurping and assuming the function of deciding who shall and who shall not be present at the count, that questions can arise as to the right of any one to be present, or the right of any one to exclude him. There being no such theory in the law itself, provision is not made for such a proceeding, or for deciding any questions concerning it; but, on the contrary, provision is made for the punishment of those officers of election who resort to that or any other unlawful method. The result is that these defendants, not being indicted for the offense they did commit, if the proof be true, as it is agreed we may assume it to be for the purposes of this case, but for acts not provided against by the penal statute, the verdict of this jury must be in their favor, and that they be discharged. So ordered.

Since the foregoing opinion was written it has occurred to me that, in order to avoid any possible misapprehension, it should be added that this ruling does not proceed upon the theory that it is lawful to exclude any one from such a counting of the ballots as the defendants undertook, or felt authorized to make, but solely upon the ground that the federal statute punishes only a violation of a duty imposed upon the election officers by law; and it must be confined in its operation to that offense, and cannot be extended to violations of duty imposed by a high moral sense of fairness and justice in making the count in whatever manner they may choose for convenience or comfort; nor to a violation of any supposed duty, imposed upon them by the nature of the business in hand, of adopting that plan suggested or offered to them of so conducting the count as to allay whatever of suspicion or apprehension might exist of possible fraud on their part; nor to a violation of any supposed duty on their part of conducting the count according to their own construction or apprehension of the duties imposed upon them by the statute regulating the method of the count, so that the statute, as they understand it, may be complied with. Congress might possibly have punished election officers for all such violations as these, or others that may be imagined as pertinent to the subject, growing out of that general duty to do that which is honest and fair in the performance of the function of counting the votes at an election, but it has been content to enforce a compliance with the statutory methods of making the count, whatever they be, by punishing a violation of that duty, and nothing else has been punished in that behalf. The object of the federal statute is to compel these defendants to hold the election in all things according to law, and to do the counting according to law, and not to compel them to fairly and honestly do all the things which they may do, however they proceed to do them, whether willfully or through a misapprehension of their duties under the law; just as it is the object of the law against larceny to punish the thief for the felonious taking of one's horse, and not to punish him for refusing a polite request by the owner for a return of the animal; and he should be indicted for the taking, and not the refusal to return upon request.

UNITED STATES v. WHALEY *et al.**(Circuit Court, S. D. California. December 15, 1888.)*

INDIANS—HOMICIDE—STATUTES—NOTICE.

Act Cong. March 3, 1885, provides that "immediately upon and after the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter," etc., shall be subject to the same laws, and tried in the same courts, as are all other persons. *Held*, on indictment of Indians for the killing of another Indian, in obedience to tribal resolutions, that it was no defense that defendants never had notice of the statute.

Indictment of Bill Whaley, Pancho Francisco, Salt Lake Pete, and Juan Chino, (Indians,) for murder.

George J. Davis, for the United States. *George W. Knox*, for defendants.

Ross, J. The defendants, who are Indians, are charged by the indictment in this case with the murder of one Juan Baptista, also an Indian, committed on the Tule River Indian reservation, within the state of California, all of the parties at the time sustaining the usual tribal relations. When the case was called for trial the district attorney stated that the proof would be such that a verdict of guilty of murder could not be procured, nor could he contend for it, and therefore consented that the defendants be permitted to withdraw their plea of not guilty, and enter one of guilty of manslaughter, which they desired to do. That was accordingly done. To enable the court to give proper judgment, the counsel for the respective parties then agreed upon most of the facts of the case; and as to one or two points, upon which they were not entirely agreed, witnesses were, by their joint request, heard. These proceedings developed this state of facts: The defendants were members of an Indian tribe, domiciled upon the reservation named, and the deceased was an Indian doctor, who, in the course of his treatment of the members of the tribe, had been so unsuccessful as to induce the belief on the part of its members that he had been systematically poisoning his patients. About 20 of their number had been treated by him, and under his treatment each of them had died. Finally one Indian, Hunter Jim by name, who was a favorite with the tribe, became, under the doctor's treatment, very sick. The members of the tribe held a council, and informed the doctor that if Hunter Jim died they would kill him. Jim did die. A council was held, at which it was determined to kill the doctor, and the four defendants were appointed to carry into effect that determination, which they did, upon the reservation, the following morning, by shooting him.

Had this homicide been committed prior to the passage of the act of congress of March 3, 1885, this court would have had no jurisdiction of the offense, for the government of the United States had theretofore permitted the Indians preserving their tribal relations to regulate and govern their own internal and social relations. But by the act of 1885 congress made a radical change in that policy, and therein enacted:

"That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts, and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 23 St. c. 341, p. 362, § 9, p. 385.

The case of these defendants falls within the last class of cases provided for by this law. The counsel for defendants contend with much earnestness that the law in question should not be held to apply to them, for the reason, as it is claimed, that they had no notice of it. If that view should be adopted by the court, the plea of guilty of manslaughter, entered by the defendants, could not be permitted to stand, for of course the court would not enter judgment in a case of which it had no jurisdiction. The validity of the act in both of its branches was determined by the supreme court in the case entitled *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. Rep. 1109. Its terms are plain, and clearly embrace the offense for which defendants were indicted. Congress did not see proper to provide that the law should not take effect until the Indians should be notified of its provisions, but, on the contrary, enacted that immediately upon and after the date of the passage of the act all Indians committing any of the offenses described, within the designated places, shall be subject to the laws therein prescribed. Clearly the court cannot hold the law inapplicable to any Indian who comes within its provisions. While the offense committed by the defendants would, if committed by a white man, have of course been murder, it may be, in view of the Indian nature, their customs, superstition, and ignorance, that in the circumstances attending the killing of the doctor there was wanting the malice that is essential to constitute the crime of murder. It was that view that prompted the district attorney to say that he could not contend for a verdict of guilty of murder, and to consent to the withdrawal of the plea of not guilty, and to the entry of a plea of guilty of manslaughter. And since justice should be tempered with mercy, perhaps the court may be justified, in imposing sentence, in being moved by the same considerations, and in inflicting a punishment which, under ordinary circumstances, would be considered far too light for so atrocious a crime. The judgment of the court is that the defendants Bill Whaley, Pancho Francisco, Salt Lake Pete, and Juan Chino, and each of them, be imprisoned in the State Prison at San Quentin for the period of five years from this date, and pay a fine of one dollar.

JOHNSON v. BROOKLYN & C. R. Co.

SAME v. STEINWAY & H. P. R. Co.

(Circuit Court, E. D. New York. October 24, 1888.)

PATENTS FOR INVENTIONS—INFRINGEMENT—EXPIRATION OF PATENT.

An injunction against the infringement of a patent for an invention consisting of a combination of known appliances, is not violated by using the combination after the expiration of the patent.

In Equity. On motion to punish for contempt.

Duncan, Curtis & Page, for complainant, cited:

Birdsell v. Shaliol, 112 U. S. 487, 5 Sup. Ct. Rep. 244; *Suffolk Co. v. Hayden*, 3 Wall. 315; *Root v. Railway Co.*, 105 U. S. 189; *Needham v. Oxley*, 8 Law T. (N. S.) 604; *Frearson v. Loe*, 9 Ch. Div. 48; *Boring Co. v. Marble Co.*, 2 Fed. Rep. 356; *Boring Co. v. Sheldon*, 1 Fed. Rep. 870; *Belting Co. v. Magowan*, 27 Fed. Rep. 111; *Powder Co. v. Powder Co.*, 9 Fed. Rep. 316; *Goodyear v. Mullee*, 5 Blatchf. 429; *Hamilton v. Simons*, 5 Biss. 77; *Wells v. Railway Co.*, 19 Fed. Rep. 20; *Craig v. Fisher*, 2 Sawy. 345; *McKay v. Machine Co.*, 20 O. G. 372, 12 Fed. Rep. 615; *Wetherill v. Zinc Co.*, 5 O. G. 460; *Phillips v. City of Detroit*, 16 O. G. 627; *Wilson v. Simpson*, 9 How. 109; *Chaffee v. Belting Co.*, 22 How. 217; *Farrington v. Com.*, 4 Fish. Pat. Cas. 216; *Gottfried v. Brewing Co.*, 8 Fed. Rep. 322.

Frost & Coe, for defendants, cited:

Reaper Co. v. Johnston, 24 Fed. Rep. 739; *Mershon v. Furnace Co.*, Id. 741; *Lord v. Machine Co.*, Id. 801; *Valve Co. v. Valve Co.*, 26 Fed. Rep. 319; *Safety-Valve Co. v. Gage Co.*, 113 U. S. 157, 5 Sup. Ct. Rep. 513; *Boring Co. v. Sheldons*, 2 Fed. Rep. 353; *Telephone Co. v. Kittsell*, 35 Fed. Rep. 523.

LACOMBE, J. Complainant's patent (Newman, No. 117,198, July 18, 1871) is for "the combination of an oscillating platform, arranged for operation by the weight of the draught animals (of a horse car) with a (horizontally moving) switch." In the combination only was found novelty and invention sufficient to induce the court to sustain the patent. *Johnson v. Railroad Co.*, 33 Fed. Rep. 499. Rocking or oscillating platforms generally, and as devices for automatic switches, were known to the art before the date of Newman's invention. Horizontally moving switches were also old. It was only the inventor's "ingenious assembling of known appliances" which Judge COXE, in the case above cited, recognized as patentable. In the case at bar the use of several infringing machines in defendants' tracks being shown, injunctions were granted during the life of the patent. Thereupon defendants ceased the use of the patented combination, disconnecting the oscillating tables from the switch-tongues, and employing men or boys to operate the switches. Some weeks, however, after the expiration of the patent, they substituted new switch-tongues for those in use when the injunction was granted, connected them with the oscillating tables, and are now using the combination of parts thus formed. Complainant contends that this is a violation of the injunction, and moves to punish defendants for contempt. His motion is based upon the principle that an infringing article or machine made

before the expiration of the patent cannot be used after such expiration, and that, upon sufficient cause shown, an injunction against such use will be indefinitely continued. The authorities cited sustain this proposition mainly upon the theory that the court could during the life of the patent order the destruction of the machine or article, and that the injunction forbidding its future use is merely the practical equivalent of such destruction. The contention of the defendant as to the effect upon this proposition of *Root v. Railway Co.*, 105 U. S. 189, need not be now considered. The case at bar is not within those authorities. All the parts of the patented article were old; their manufacture, sale, accumulation, or use was free to all. The patentee's monopoly extended only to their combination. The infringing article would be destroyed when the combination of its parts was broken up, and the further destruction of those parts themselves which were not covered by the patent would be an interference with defendants' property not warranted by any of the authorities cited. The combination of parts in the defendants' infringing articles, having been once *bona fide* broken up, a recombination of the old parts after the complainant's monopoly has expired will not be enjoined. Motion denied.

THE MARGARET J. SANFORD.

PARTRIDGE v. THE MARGARET J. SANFORD.

(Circuit Court, S. D. New York, December 1, 1888.)

1. COLLISION—VESSELS AT BULK-HEAD—OBSTRUCTING CHANNEL.

The ship T. moored at a bulk-head with her bow projecting about 16 feet into a canal 157 feet wide, leaving sufficient space for vessels to pass. Afterwards a bark moored at a bulk-head on the other side, with her bow projecting so far into the canal that it would be difficult for vessels to pass between. The S., with a car-float in tow, and in an unfavorable condition of the tide, attempted to pass between the vessels, and collided with the T. *Held*, that the T. was also in fault in remaining in her position after the bark moored on the other side, and the damages should be divided.

2. SAME—DAMAGES—DETENTION OF VESSEL.

The T. was a "tramp" steamer, occasionally visiting the port of New York, and was under a charter for a voyage to Bombay, under which she would have earned, above expenses, \$100 per day. The charter stipulated for demurrage at the rate of £45 per day, while it appeared that the customary allowance at the port of New York for detention of vessels the size of the T. was \$262 per day. The vessel had no engagement beyond the immediate voyage, and it was not shown that after her arrival at destination she found immediate employment. *Held*, that neither the demurrage rate specified in the charter, nor the customary demurrage rates at the port of New York, supplied a satisfactory criterion of the loss sustained by the vessel's detention during repairs; that the amount of the consequential loss was the difference between the market value for the use of the vessel or her probable net earnings during the period of detention; and one way of ascertaining this was by finding what she was earning at the time, or immediately before and after the collision; and that if at the time she was employed under a charter for a long period of time, the average daily earnings under the charter may be taken as the criterion.

In Admiralty. Libel for damages. On appeal from district court. 30 Fed. Rep. 714.

Wilhelmus Mynderse, for appellant.

R. D. Benedict, for appellee.

WALLACE, J. The steam-ship *Tantallon* was lying at a bulk-head at the Empire Oil-Works, Hunter's Point, East river, March 31, 1885, taking in a cargo of oil. Her bow projected about 16 feet across a canal 157 feet wide, which ran from the river between the premises of the Empire Oil-Works and the Standard Oil-Works. The bulk-head on the other side of the canal was 70 feet further out into the East river, and at this bulk-head lay an Italian bark, also projecting partly across the canal; her stem some 30 feet, and her bowsprit 30 feet further. The bark took her position after the *Tantallon* was moored. About noon the steamer *Margaret J. Sanford*, with a loaded car-float lashed on her port side, consigned to the Standard Oil Company, attempted to enter the canal. In doing so the port bow of the float struck the starboard bow of the *Tantallon*, inflicting injuries which were repaired at the expense of \$700, and which also necessitated a delay of seven days in the loading of the steamer, detaining her that time beyond the lay-days provided for in her charter. This suit was brought to recover for the damages thus sustained by the *Tantallon*. The district court held both the tug and the steam-ship in fault, and divided the damages, and allowed no damages for the detention of the *Tantallon* beyond the expense of wages and maintenance of her crew and wharfage. The owners of the *Tantallon* have appealed.

It is plain upon the evidence that the attempt of the tug to pass between the two vessels upon the tide as it was then, incumbered by a heavy and unwieldy float, was one which could not be made with prudence unless the tug had the extra assistance which her master called for, but was unable to obtain. Her master was aware of the risk of attempting to pass between the two vessels by which the entrance to the canal was obstructed, but preferred to encounter it, hoping doubtless to be able to avoid collision with either, rather than subject himself to the inconvenience of abandoning temporarily the undertaking in which the tug was engaged. The case, as regards contributory fault on the part of the *Tantallon*, does not turn upon the question whether she was originally culpable in taking a position in which she unnecessarily projected a few feet across the entrance of the canal. Probably, until the Italian bark took a position on the other side of the entrance, projecting still further across the entrance, there was sufficient room left for access to the canal for tugs with floats, and for all the purposes of the ordinary navigation of the place; but after that the entrance was obstructed to such an extent as would necessarily embarrass the movements of tugs with tows, and measurably interfere with their access to the canal in the usual course of traffic. When this became apparent, the *Tantallon* was not justified in remaining in her previous position, even though until then it was a proper one. There was plenty of room, and nothing in the way, to per-

mit her to be moved astern. She cannot be exonerated merely because after she had taken her position the vessel on the opposite side of the entrance ought not to have taken the position she did. It was then that the probable danger of the situation should have been foreseen, and obviated in the exercise of ordinary care; and the Tantallon cannot excuse her own omission to do this because the peril of the situation was primarily attributable to the misconduct of the other vessel. The Tantallon must be deemed in fault because at the time of the collision she was assisting in an unnecessary obstruction of the canal, which impeded and complicated the movements of the tug and float. The case falls within the rule laid down in *The Canima*, 23 Blatchf. 165, 32 Fed. Rep. 302, and many other authorities, which it is unnecessary to cite.

By the decree of the district court the libellant was allowed, besides one-half of the cost of the repairs of the steamer made necessary by the collision, one-half of \$375.55 for consequential loss. That sum represents the amount of the port expenses of the Tantallon during the seven days she was detained by repairs. Nothing was allowed by way of demurrage. The Tantallon was an English "tramp" steamer that occasionally visited the port of New York. She was under charter for a voyage to Bombay when she was injured, and was at the time being loaded for the voyage. She would have earned freight under this charter, above expenses, of about \$70 per day for the time ordinarily occupied in loading, sailing, and discharging. The charter stipulated for demurrage at the rate of £45 per day. She had no engagement beyond the immediate voyage, and there is nothing to show that after she arrived she actually found employment at Bombay within seven days. After she reached Bombay she engaged in the coasting business for a time, and then returned to England. It appears by the testimony of a witness for the libellant that "the customary and usual amount to allow for detention for steamers of the class and size of the Tantallon" at the port of New York was 20 cents a ton; being, for the Tantallon's tonnage, \$262 a day. The libellant also gave testimony to show what the Tantallon could have earned upon a return voyage from Bombay to New York, and it appears that if she could have got a cargo immediately, both at New York and Bombay, she could have earned for the time ordinarily occupied by the round trip about \$140 per day net freight.

It was held in this court by Mr. Justice NELSON (*The Hermann*, 4 Blatchf. 441) that the charge for lay-days in the charter-party under which the vessel is employed at the time of a collision furnishes no test to determine the damages for her detention during the time of her repairs. Upon this authority the stipulated rate of demurrage in the Tantallon's charter must be rejected as evidence of her actual loss by detention. It is not necessary to decide in the present case what effect should be given to the demurrage rates which prevail at a particular port, either by the regulations of a maritime exchange, or by the general recognition and acquiescence of the mercantile community, as evidence of the amount of loss by detention. In a case where that port is the place, or one of the places, at which the vessel is commonly employed,

such rates would afford a criterion, and in some cases perhaps the best practically attainable, of the value of the lost use of the vessel while she is detained there. But such evidence is certainly not conclusive, and it is so often misleading that it should not be given controlling weight when better evidence can be supplied. The present case well illustrates the unreliability of such evidence, because it appears by the testimony introduced by the libellant that under the most favorable circumstances, and with constant employment, the Tantallon could only earn about \$142 per day above expenses. The disparity is so great between any actual loss which could possibly arise by her detention, and the hypothetical loss indicated by the demurrage rates, that the latter are of no value whatever as evidence. If it had appeared that the steamer was under a charter to return to New York, her intended voyage to Bombay and the return voyage could be treated as a round trip, and an allowance for her detention upon the basis of her average daily earnings above expenses for the round trip might have been awarded. As it is, there is really no satisfactory evidence of the value of the use of the vessel during the period of her detention except such as is derived by computing her average daily earnings above expenses upon the basis of the freight by the charter under which she was employed at the time. It is a reasonable presumption that if she had not been detained seven days she would have fulfilled her engagement, and earned the freight stipulated by the charter in seven days less time. If the Tantallon could have discharged her cargo at Bombay seven days earlier than she did, she might or might not have found other employment immediately; but however this might have been, it is plain that she was obliged to devote seven days more to earning the freight than she would if she had not been detained by the collision. Her daily earnings during the period of her engagement were reduced proportionally.

Some of the authorities, and some of the decisions of this court, have commented upon the difficulty of ascertaining the consequential loss resulting from the deprivation and use of a vessel in collision cases. Thus it was said in *The Rhode Island*, 2 Blatchf. 114, that "the precise amount, or even a reasonable approximation to it, cannot be ascertained by the application of any known or fixed rule." Nevertheless it is not apparent why the same rule, and why evidence of the same character, should not be adopted in the solution of the inquiry as are resorted to when the owner of other kinds of property seeks compensation for the damages caused by the wrongful interruption of its use. If the owner of a horse, or a mill, or machinery, or a house, is temporarily deprived of his use of the property by the wrongful act of another, the law implies consequential loss as a necessary and proximate result, and allows a recovery for the value of its use as a proper item of damages, and permits the value to be shown by the opinion of witnesses conversant with the subject. *Parker v. City of Lowell*, 11 Gray, 353; *Allen v. Fox*, 51 N. Y. 562; *Satchwell v. Williams*, 40 Conn. 371. In the large commercial ports the value of the hire of a vessel can as well be ascertained as that of most other kinds of property used for business purposes. As the question is one for the

opinion of experts it is very likely to be involved in considerable contradiction of estimates, but this is an objection which applies whenever a question of market value or usable value arises. The injured party is not necessarily confined, in proving his consequential loss, to the amount of the market value of the use of his vessel during the time of detention. Even where the loss arises from breach of contract the rule is that the party injured is entitled to gains prevented, as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach, (*Railroad Co. v. Howard*, 13 How. 307; *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. Rep. 81; *Griffin v. Colver*, 16 N. Y. 489; *Waters v. Towers*, 20 Eng. Law & Eq. 410;) and the rule in torts is *restitutio in integrum*, (*The Cayuga*, 14 Wall. 270.) When the vessel is employed at the time of the collision, or when it appears that she would have been beneficially employed during the period of her detention, it is entirely clear that actual loss has attended the interruption of her engagements. *The Clarence*, 3 W. Rob. 283; *Williamson v. Barrett*, 13 How. 101; *The Rhode Island*, 2 Blatchf. 114; *The Cayuga*, 7 Blatchf. 385. In the present case, therefore, the inquiry is merely one as to the amount of the loss, and that is to be resolved by ascertaining the market value of the use of the vessel, or her probable net earnings during the period of her detention, by the best evidence attainable. One way of ascertaining this is by ascertaining what she was earning at the time, or immediately before and after the collision. This is certainly *prima facie* evidence of her earning capacity, and sufficient to require the wrong-doer to show that she was temporarily earning more than usual. As was said by Dr. LUSHINGTON in *The Gazelle*, 2 W. Rob. 279: "If the settlement of the indemnification be attended with any difficulty,—and in these cases difficulties must and will frequently occur,—the party in fault must bear the inconvenience." See, also, *The Star of India*, 35 Law T. (N. S.) 407. When there is no other satisfactory evidence of her earning capacity than is shown by the charter under which she was employed at the time, and that charter contemplates her employment for a long period, the average daily earnings under the charter may be taken as the criterion. The general subject is well considered upon authority and principle in the opinion of Judge LONGYEAR in *The Mayflower*, 1 Brown, Adm. 376. For these reasons \$70 per day would seem to be a fair equivalent for the actual loss. It follows that an allowance for demurrage in the sum of \$490, besides the amount of the port expenses, should be included in the damages to be divided. A decree is ordered for the libellant conformably with these views. The libellant is entitled to interest on the damages from April 7, 1885, and to the costs taxed by him in the district court. The costs of this appeal are awarded to the libellant.

SERVISS v. THE CHATTAHOOCHEE.*

(District Court, E. D. New York. November 30, 1888.)

SHIPPING—LIABILITY OF VESSEL—NEGLIGENCE OF STEVEDORE.

A stevedore, who had finished loading coal on a steam-ship from a canal-boat along-side, took the canal-boat's line to a steam-winch on the steamer to draw the canal-boat astern of the steamer. The latter's propeller was in motion, and the stevedore gave no orders to have it stopped, nor did he direct the men on the canal-boat to keep her away by poles. The propeller drew in the canal-boat, cut a hole in her, and sank her. The stevedore was an employe of the steamer. *Held*, that when the stevedore undertook to move the canal-boat up the slip, he assumed the responsibility of her navigation, at least until she was fully clear of the steamer's side, and for his negligence the steamer was liable.

In Admiralty.

Libel by Deborah A. Serviss against the steam-ship Chattahoochee, for damages in sinking libellant's canal-boat.

Hyland & Zabriskie, for libellant.

Rice & Bijur, for claimant.

BENEDICT, J. The libellant's canal-boat, having on board coal for the steamer Chattahoochee, was along-side that steamer as she lay in the slip, about to sail, and delivered coal into her tubs until she was supplied. The canal-boat lay stern out, her bow being about 100 feet forward of the steamer's stern. The stevedore of the steamer Chattahoochee, as soon as he had taken from the canal-boat all the coal required, took down his hoisting apparatus, and, notifying the master of the canal-boat that he was going to haul the boat up the slip, cast off the lines to the canal-boat, and carried the canal-boat's bow line aft to a steam-winch on the steamer's deck, aft, and there, by starting the steam-winch, put the canal-boat in motion towards the bulk-head. At the time the canal-boat was thus put in motion towards the stern of the steamer, the propeller of the steamer was revolving. When the canal-boat, under the impetus given her by the steam-winch, reached the steamer's stern, the action of the steamer's propeller drew her onto the revolving blades, by which she was cut open and sunk.

The question to be decided is whether the steamer is liable for the sinking of the canal-boat. The stevedore was an employe of the steamer, and as such it was part of his duty to move the canal-boat away from the steamer's side as soon as the steamer was supplied with coal. He undertook to haul the canal-boat up the slip by starting her towards the bulk-head, using the power of the steam-winch for that purpose. There is evidence that the boat could have passed the revolving propeller in safety if poles had been used by those on board of her to bear her from the propeller in passing. In this instance no poles were used, and in consequence the boat was sucked in by the propeller, and sunk in the manner stated. The contention on the part of the claimant is that it was the duty of the master of the canal-boat to observe that his boat was ap-

* Reported by Edward G. Benedict, Esq., of the New York bar.

proaching the revolving blade and to keep her off the screw as she passed, and that the failure of the master to discharge this duty was the cause of the damage that ensued. But I incline to the opinion that when the stevedore undertook to move the canal-boat up the slip, he assumed the responsibility of her navigation, if not until she reached the bulk-head, at least until she was fully clear of the steamer's side. It was therefore, in my opinion, his duty, before starting the canal-boat, to stop the steamer's screw, or, by giving proper directions to the men on the canal-boat, insure her being kept off the propeller when she passed it. He did neither of these things, and this omission, in my opinion, rendered the steamer liable for the damages that ensued. Let a decree be entered in favor of the libellant, with an order of reference to ascertain the amount of the damage.

GATES v. RYAN *et al.*¹

(District Court, S. D. New York. December 18, 1888.)

1. DEMURRAGE—LUMBER TRADE—CUSTOM—IDLE DAYS.

There is no well-established rule in the port of New York as to the discharge of eastern lumber. By the custom of the port three "idle days" are allowed the consignee after the vessel reports arrival within which to send her to a berth. Hence, where a lumber schooner from Nova Scotia arrived on Wednesday, was sent to a wharf on Saturday, and began her discharge on the following Wednesday, Sunday and Labor Day (first Monday in September) intervening, *held*, that she was entitled to one day's demurrage.

2. SAME—LIABILITY OF CONSIGNEE.

The consignee of cargo and holder of the bill of lading, though but an agent to sell, is liable for both freight and demurrage.

In Admiralty. Action for freight and demurrage.

R. D. Benedict, for libellant.

A. J. Heath, for respondents.

BROWN, J. There is no dispute about the amount of freight due, namely, \$556.37, after deducting all the defendant's alleged offsets. The defendant offered to pay freight, but refused to pay any demurrage. In the offer of payment, however, a receipt in full of all claims was demanded, which the defendant had no right to require. There has been no payment of freight into court.

The charter provided for discharge with customary dispatch. The vessel was loaded with lumber from New Brunswick, N. S. There is no perfectly established rule as respects the rate of discharge of eastern lumber. Several large dealers testified that a discharge of 30,000 feet per day, board measure, had long been considered a reasonable rate of discharge. On the other hand, there is evidence that indicates that that ought now to be considered an unreasonably slow rate of discharge after the vessel is ready to begin; from 40,000 to 70,000 feet being a quite common rate of discharge per day. Three days are allowed by custom,

¹Reported by Edward G. Benedict, Esq., of the New York bar.

after the vessel reports arrival, within which to send her to a berth where she can unload her cargo at once. This vessel had 232,000 feet. Three days were consumed before she was directed to her wharf at Harlem. She arrived there some time on Saturday. Sunday and Labor Day (the Monday following) intervened, both of which are holidays. She began the discharge on Wednesday and finished on Saturday, discharging at the rate of 70,000 feet per day. Under the custom, which I think established, to allow three days to find a discharging berth, and the intervening holidays, I cannot hold the respondent bound to commence the discharge before Tuesday morning. The vessel was then in readiness; but the discharge was delayed till Wednesday, when it should have begun on Tuesday. She is therefore entitled to demurrage for one day's detention. *Bowen v. Decker*, 18 Fed. Rep. 751; *The Z. L. Adams*, 26 Fed. Rep. 655; *Paquette v. Cargo of Lumber*, 23 Fed. Rep. 301.

The respondents were the New York agents of the shippers, and the consignees and holders of the bill of lading; and after arrival they sold the cargo and directed its delivery. They were interested in it to the extent of their commissions on the sale, and were the persons who were to pay the freight, and who in fact offered to pay it, without demurrage. Such a consignee, receiving and disposing of the cargo, is liable for both freight and demurrage. *Irzo v. Perkins*, 10 Fed. Rep. 779; *Neilsen v. Jesup*, 30 Fed. Rep. 138; *Reed v. Weld*, 6 Fed. Rep. 304; *Sprague v. West*, Abb. Adm. 548.

The libelant is entitled to a decree for \$556.37 freight, and \$25, the stipulated rate of demurrage for one day, with interest and costs.

UNITED STATES v. THE FRANK SYLVIA.

(District Court, N. D. California. December 24, 1883.)

1. SHIPPING—CARRIAGE OF PASSENGERS ON FREIGHT-BOAT.

A libel against a vessel for a violation of law alleged to have been committed in using or navigating a freight-boat for the carrying of passengers without having been inspected as a passenger steamer, and obtaining a certificate specifying the number of passengers she can carry with prudence and safety, is not properly brought under Rev. St. U. S. § 4465, which forbids the taking on board of any steamer a greater number of passengers than is "stated in the certificate of inspection."

2. SAME.

Nor under section 4466, which provides for special permits to be issued to "passenger steamers" engaged in excursions, allowing them to take on board an additional number of passengers over and above the number specified in the certificate.

3. SAME.

But is properly brought under section 4490, which subjects to a penalty all steamers "navigated without complying with the terms of this title."

In Admiralty. On exceptions to libel filed against the steamer Frank Sylvia, a freight-boat, for carrying passengers contrary to law.

John T. Carey, U. S. Dist. Atty.
Milton Andros, for defendant.

HOFFMAN, J. The steamer libeled in this case was provided with a certificate of inspection duly issued according to law. By the certificate she was permitted to navigate, as a freight steamer, the bay of San Francisco or its tributaries, for the period of one year; but she was not allowed to carry passengers. The libel alleges, in substance, that on November 6, 1887, she took on board and carried four passengers, she being then employed as a freight steamer on a voyage from San Francisco. There are great, and in my judgment insuperable, difficulties in bringing this offense within the provisions of either section 4465 or section 4466. The first of these sections forbids the taking on board of any steamer a greater number of passengers than is allowed by the certificate of inspection. Section 4466 provides for special permits to be issued to passenger steamers engaged in excursions, allowing them to take on board an additional number of passengers over and above the number specified in the certificate. No penalty is denounced for carrying passengers on excursions in excess of the number allowed by the certificate and the special permit. For carrying passengers in excess of the number allowed by the certificate, the master and owner are, by section 4465, made liable to any person suing for the same, to forfeit the amount of the passage money and \$10 for each passenger beyond the number allowed. In the case at bar the certificate licensed the vessel as a freight steamer, and no passengers were allowed to be carried. The libel is founded on section 4499. This section imposes on the master and owners a penalty of \$500 for navigating a "steamer" without complying "with the terms of this title." It is argued that the master and owner should have been sued under the provisions of section 4465. But the steamers referred to in this and nearly every other section of chapter 2, tit. 52, Rev. St., are steamers "carrying passengers," or "passenger steamers." They seem to be treated as a class distinct from freight steamers, tugs, towing-boats, and yachts. The certificate issued to a vessel of the former class of steamers, other than a ferry-boat, is required to specify the number of passengers she can prudently and safely carry; and for taking on board a greater number of passengers than is stated in the certificate the penalties imposed by section 4465 are incurred. But the certificates of inspection granted to a freight-boat, tug-boat, etc., do not specify any number of passengers they may lawfully carry. The violation of law alleged to have been committed in this case consists in using or navigating a freight-boat for the carrying of passengers, which had not been inspected as a passenger steamer, or obtained a certificate specifying the number of passengers she can carry with prudence and safety. The offense denounced in section 4465 is the taking on board of such steamer passengers in excess of the number "stated in the certificate of inspection." It is plain that she has not committed this offense. If the penalty imposed by section 4465 for a violation of its provisions had been imprisonment of the master, would it be contended that an indictment against him for taking on board pas-

sengers in excess of the number stated in his certificate could be sustained upon proof that he had no certificate authorizing him to carry any passengers whatever, and that he therefore could not have carried passengers in excess of any number "stated" in the certificate of inspection? If the language of the section had been, "a greater number of passengers than allowed by law," it might with more plausibility have been applied to the facts alleged in this case. But the language is "a greater number of passengers than is stated in the certificate of inspection." It seems clear, therefore, that some number must be so stated before the number actually carried can be deemed to be in excess of it. My opinion, therefore, is that the libel is properly brought under section 4499, which subjects to a penalty of \$500 all steamers "navigated without complying with the terms of this title, for which sum the vessel navigated shall be liable, and may be seized and proceeded against in any district court of the United States having jurisdiction of the offense." A direct and primary liability of the vessel for the penalty imposed is thus created, and the seizure and proceeding *in rem* are expressly authorized by the statute.

I do not feel called upon, nor hardly at liberty, to consider the very important question raised at the bar as to the constitutional right of congress to require the inspection of steamers, or in any way regulate the use of vessels employed on the navigable waters of the United States, but not engaged in foreign or interstate commerce. The validity of the laws regulating the use, equipment, and navigation of vessels used on the navigable waters of the United States, as well as those engaged in foreign or interstate commerce, has long and almost universally been acquiesced in. They are in their object and effect salutary, and, in some particulars, indispensable, to the safety of the foreign and interstate commerce, which congress has the unquestioned right to regulate, and the effect of a decision adverse to their validity would be so momentous and far-reaching, that I consider it to be my duty, as district judge of the United States, to assume their constitutionality, and to leave the question of their validity, in whole or in part, under the constitution, to be passed upon by a higher tribunal.

DE COLANGE v. THE CHATEAU MARGAUX.¹

(District Court, S. D. New York. December 18, 1888.)

CARRIERS—OF PASSENGERS—DEVIATION—DAMAGES.

Libelant purchased a passage ticket on steamer Chateau Margaux from New York to Bordeaux. The ticket, like the company's prospectus, expressly stated that the passage would be direct. After the sale of the ticket, the steamer took cargo for Santander, Spain, and sailed direct for that port, without notice to libelant, and was consequently six days longer in reaching Bordeaux. Libelant proved no special damage arising from the delay, except loss of time and the annoyance incident thereto. *Held*, on suit brought to recover damages for the delay, that the deviation was a breach of the contract, and that libelant should recover the amount of passage money paid.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. Libel for damages for deviation of vessel.
Newell Martin, for libelant.
Wing, Shoudy & Putnam, for claimants.

BROWN, J. The libelant, a gentleman of 70 years of age, with his wife, and two children between 4 and 12 years old, purchased from the claimants on the 12th of April, 1886, a ticket for himself and family for a passage from New York to Bordeaux on board the steamer *Chateau Margaux*. The ticket expressly stated that the voyage was to be direct; and the prospectuses of the company stated the same thing, emphasizing the shortness and directness of their route, as inducements for invalids to travel by their line. The vessel sailed on the 24th of April. A few days before sailing she took a quantity of cargo to deliver at Santander, and, though notice of this fact was published in a maritime newspaper, the intended deviation was not made known to the libelant, though the company had his address; and he did not learn that the vessel was to go to Santander until a few days out. The steamer would naturally have arrived at Bordeaux a little sooner than at Santander. She remained three days at the latter place, and was three days more in proceeding from Santander to Bordeaux. The libelant claims \$2,000 special damages for the detention and the annoyances arising from it. He had written to a gentleman at Turin to meet him at Paris on the 6th of May on business, who attended at the time, and, after waiting, departed before the steamer reached Bordeaux, which was on the 12th of May.

There is no sufficient proof of special damage. The appointment was not kept, but no pecuniary loss thereby is proved. The deviation was, however, a breach of contract, and the libelant is entitled to reasonable compensation for the loss of time, and the inconvenience and annoyance directly and naturally arising from the violation of the contract. When it was determined to send the vessel to Santander, there was plenty of time to apprise the libelant of the fact before sailing; and he would have been entitled to a return of his passage money, had he chosen to demand it. At Santander, the master, by authority of the owners at Bordeaux, offered transportation to the libelant and his family by rail, or by one of the transatlantic steamers, which was to leave Santander the day after the libelant's arrival there, which would have saved two or three days of the delay. The libelant preferred to remain on board his vessel, rather than suffer the inconveniences incident to such a change; and he did not telegraph or write to the person whom he expected to meet at Paris. The comfort, and even the pleasures, of the libelant and of his family were ministered to with marked consideration by the master of the vessel while at Santander; and the proof does not show any actual pecuniary damage. But the defendants had no right, contrary to their contract, to take the libelant upon a route to which he never assented. I therefore allow as damages the amount of the passage money paid, viz., \$200, with interest, for which a decree may be taken, with costs.

NEPTUNE STEAM NAV. CO. v. SULLIVAN TIMBER CO.

(District Court, S. D. New York. November 26, 1888.)

ADMIRALTY — JURISDICTION — SUITS BETWEEN NON-RESIDENTS — SERVICE ON AGENT OF CORPORATION.

Admiralty courts have a discretion as to entertaining suits between foreigners; and a transaction taking place in Florida, where all the officers of defendant corporation resided, and the libellant being an English corporation, held, that no comity or reasons of justice or of superior convenience, so far as appeared, demanded relief in this district, and service on a limited agent here was set aside.

In Admiralty. Motion to set aside service of process on an alleged agent of a Florida corporation.

Seward, Da Costa & Guthrie, for libellant.

L. Laflin Kellogg, for defendant.

BROWN, J. Upon the language of the marshal's return, stating service only on Bailey, as well as upon the affidavits of Bailey and Carlan, I cannot find that the citation was served upon Carlan. Mr. Elliott's affidavit says it has always been understood that Carlan was the defendant's "managing agent." The directory does not indicate Bailey as agent, and the card attached to the affidavit does not so represent him. I cannot, therefore, find service on Bailey sufficient.

Had Carlan been served the question would have been more embarrassing. Under the New York Code (section 1780) it would seem that no action would lie in the present case in the state courts, for both parties are non-resident, the cause of action did not arise here, and the defendant has no property here. Courts of admiralty have a discretion as to entertaining suits between foreigners. This whole dealing being in Florida, where all the officers reside, and the libellant being an English corporation, no comity, or reasons of justice or of superior convenience, are shown to demand relief here, when full relief is easy within the jurisdiction where the transaction was had. Besides that, I doubt if an agent whose authority is limited to a distinct branch of business here, represents the corporation as to matters wholly outside of that branch of business, so that, as respects the latter business done elsewhere, he can be held to be in any sense such a "managing agent" as to make the corporation "found" in his person within this state. Admiralty Rules; 2, 3, 25. See *St. Clair v. Cox*, 106 U. S. 350, 356, 359, 1 Sup. Ct. Rep. 354; *Hat Sweat Co. v. Davis*, 31 Fed. Rep. 294.

Reported by Edward G. Benedict, Esq., of the New York bar.

MANHATTAN TRANSP. CO., Limited, v. MAYOR, etc.¹

(District Court, S. D. New York. December 11, 1888.)

WHARVES—CONCEALED OBSTRUCTION.

A wharf-owner is liable for damage caused to a vessel by concealed obstructions which might have been ascertained by the owner with reasonable diligence.

In Admiralty. Libel for damages.

Wilcox, Adams & Macklin, for libellant.

Henry R. Beekman, for respondent.

BROWN, J. The liability of the owner of a wharf for damages caused to a vessel by concealed obstructions which might have been ascertained by the owner by reasonable diligence has been frequently declared as a rule of law. *Christian v. Van Tassel*, 12 Fed. Rep. 884. The case of *Smith v. Havemeyer*, 32 Fed. Rep. 844, has been recently affirmed in the circuit court, reasserting the same doctrine. 36 Fed. Rep. 927. See, also, *The Moorcock*, 13 Prob. Div. 157.

The libellant's canal-boat was moored on March 10, 1888, along the bulk-head between the piers off Sixty-First and Sixty-Second streets, East river, heading up. On the following morning she was found sunk. An examination showed that two or three of her planks were broken on the port side, not far from her keel, and the adjoining planks chafed and rubbed up to the bilge. This was from 15 to 20 feet aft of the stem. Her captain estimates that she was moored with her stem about 45 feet below the Sixty-Second street pier. When found sunk, her stem-lines were broken, and her bow swung off a considerable distance into the deep water. Other evidence shows that she sank about 3 o'clock A. M., about the time of low water there. Subsequent examination of the bottom showed a bowlder at a point about 75 feet below the Sixty-Second street pier, and from 6 to 8 feet off the bulk-head. This corresponds as nearly as is to be expected with mere estimates of the position of the boat; and as no other probable or adequate cause appears for the wound in the bottom of the boat, or for her sinking, I must find it to have been caused by the bowlder above referred to. That was 7.3 feet below the surface at low water. The canal-boat drew between 8 and 9 feet. If she had first sunk from leaking, and then slid down the incline against some bowlders in the deeper water outside, the wound would have been on the starboard side. No cause for her leaking before striking the bowlder appears, the allegation that she was previously in leaky condition not being sustained.

The master of the boat had no notice of any obstruction in that locality, though he was cautioned to keep away from the upper corner, and for that reason, as he says, moved his boat considerably downward. The obstruction being one that was discoverable by reasonable care on the defendant's part, the libellant, not being in fault, is entitled to a decree, and to an order of reference to compute the damages.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

MILLER v. SHARP *et al.**(Circuit Court, N. D. Iowa, E. D. January 9, 1889.)*

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

A lessee is interested in the controversy in a suit to set aside his lessor's title to the leased premises as fraudulent, and to quiet title in complainant; and when he, being a resident of the same state as complainant, is made a party defendant, though the lessor is a resident of another state, the controversy is not wholly between citizens of different states, and is not removable.

In Equity. On motion to remand.

Bill by Andrew Miller against John C. Sharp and others to set aside a conveyance of realty, and to quiet title.

Blair, Norris & Dunham, for complainant.

Fouke & Lyon, for defendants.

SHIRAS, J. This suit was brought in the district court of Delaware county, Iowa, and in the bill herein filed the complainant avers that the defendant John C. Sharp, through fraud, procured the conveyance by complainant to Sharp of certain realty, situated in Delaware county; that thereupon Sharp and wife conveyed the same to John Utter by a quitclaim deed, knowledge of the alleged fraud being charged upon Utter, and that C. B. Eaton is in possession of the premises as a tenant of said Sharp. The prayer is that the conveyances to Sharp, and from Sharp to Utter, be declared fraudulent and void; that complainant be decreed to be the owner of the realty in fee-simple; that the lease to Eaton be declared void, and that complainant's title be quieted as against all the defendants. The defendants Sharp and Utter filed a petition for the removal of the cause into the federal court, averring therein that the complainant is a citizen of the state of Iowa; that the defendants Sharp and Utter are citizens of the state of Wisconsin; and that C. B. Eaton is a citizen of the state of Iowa; that he is merely a nominal party; and that there is a separable controversy in the suit, to which Eaton was not a proper or necessary party. The transcript of the record having been filed in this court, the complainant now moves for an order remanding the cause, on the ground that the complainant, Miller, and the defendant Eaton are shown upon the face of the record to be citizens of the same state.

To sustain the jurisdiction of this court it is urged that there is in the suit a controversy which is wholly between the complainant and the defendants Sharp and Utter, and therefore the cause is removable under the provisions of section 2 of the act of August 13, 1888. The contention is that the question of the fraud which is alleged to have been practiced by Sharp upon complainant, and by which the latter was induced to convey the realty in question to Sharp, constitutes a separate controversy, which is wholly between the parties named. In one sense this is true, in that, according to the allegations of the bill, Sharp alone made the fraudulent representations which formed the inducement for the conveyance of the property; and therefore it may be said that as to the fraud

in the original transfer the issue is wholly between the complainant and the defendant Sharp. This issue, however, does not constitute the whole of the controversy, nor can it be properly said to be separable from the other issues in the cause. Viewed with relation to the complainant, the cause of action is the alleged fact that he has been fraudulently deprived of his property, and the relief sought is a decree setting aside the conveyance procured by fraud, and an adjudication that he is the owner of the property, and entitled thereto. Viewed with relation to the defendants, the cause of action is the procuring by Sharp of the conveyance of the realty through false and fraudulent representations, and the participation by the defendant Utter in such fraud by taking a quitclaim deed thereto with knowledge of the fraud, and without paying a consideration therefor, and a participation in such alleged fraud by the defendant Eaton, in that it is averred that he is a pretended tenant of said Sharp, and holds possession of the property as a tenant of said Sharp; the relief sought being a decree declaring void the deed from complainant to Sharp, the deed from Sharp to Utter, and the lease from Sharp to Eaton. According to the allegations of the bill, all the right and title which Eaton has in and to the premises are as a tenant holding under Sharp, and he therefore has a direct interest in the question of the validity of the conveyance to Sharp. The right of complainant to attack the leasehold interest and possession of Eaton is primarily dependent upon the question of the validity or invalidity of the deed to Sharp, and conversely the right of Eaton to hold possession of the premises as a tenant of Sharp is primarily dependent upon the validity of Sharp's title under the conveyance from complainant. While it may be true, as suggested, that further issues may arise in the cause between complainant and the defendant Eaton, these would constitute a controversy between citizens of the same state, and could not therefore be made the foundation for the removal of the cause into the federal court. The jurisdiction of this court depends upon the question whether Eaton is interested in the controversy touching the validity of the conveyance from complainant to Sharp, and is properly made a party thereto; for if such interest exists, then such controversy is not wholly between citizens of different states. As this controversy directly involves the validity of the conveyance which is the source of Eaton's rights in the premises, he is certainly interested therein, and the complainant had the right to make him a party defendant to the proceeding in order that the entire controversy might be settled in the one suit. In fact there is but one controversy presented by the allegations of the bill, to-wit: Has the complainant been deprived of his property by such fraudulent means as that a court of equity will set aside the conveyance executed by complainant, and the other conveyances based thereon, and quiet the title in the complainant? In this controversy all the defendants have an interest, and are properly made parties thereto. If this court should retain the cause, and upon the hearing upon the merits should adjudge the conveyance from complainant to Sharp to be void for fraud practiced upon complainant, such adjudication would be binding upon the defendant Eaton, not only in the further progress of the present suit, but in any other pro-

ceedings that might be hereafter brought to enforce complainant's rights; and this for the reason that, being a party to this suit, he not only has the right to be heard upon the question of the validity of the deed to Sharp, the same being the foundation of his own right as tenant, but he is now called upon once for all to defend the source of his rights against the attack made thereon. He must now meet this attack, or be forever barred; and it is clear, therefore, that he has an interest in the controversy touching the validity of the deed from complainant to Sharp. This being so, it cannot be said that there is a controversy in the cause wholly between citizens of different states within the meaning of the statute; but, on the contrary, it appears that there is but one controversy; and in that Eaton has an interest adverse to complainant. Both being citizens of the state of Iowa, this court cannot take jurisdiction, and the motion to remand must therefore be granted, at cost of defendants Sharp and Utter.

FULLER *et al.* v. METROPOLITAN LIFE INS. CO. *et al.*

(Circuit Court, S. D. New York. January 7, 1889.)

1. COURTS—FEDERAL JURISDICTION—AMOUNT—DISMISSAL.

Act Cong. March 3, 1875, § 5, providing that a cause in the circuit court must be dismissed if at any time during its progress the court discovers it has no jurisdiction, does not mean that a suit, properly brought, must be dismissed because defendant by admissions or failure to deny reduces the amount in dispute to less than the statutory sum.

2. INSURANCE—POLICY—CONSTRUCTION.

Defendant company issued a life insurance policy, reciting that it was upon the "reserve dividend plan," and that, if the stipulated premiums were paid for 10 years, the company would pay to the designee of the policy its equitable proportion of the "reserve dividend fund." *Held*, that the meaning of the parties by the use of the terms quoted must be ascertained by recourse to contemporaneous insurance literature; and, it appearing that the only reserve dividend plan known at that time was the one devised and copyrighted by W. P. Stewart, and that defendant company had engaged him as actuary, secured the right to use his plan, and used his "key" in explaining to policy-holders the meaning of the plan, the company's liability must be ascertained by the principles of that plan.

In Equity.

Bill for a discovery and an accounting, brought by Harriet A. Fuller and Austin B. Fuller against the Metropolitan Life Insurance Company of the city of New York, and Joseph F. Knapp. Many of the leading facts appear in *Fuller v. Knapp*, 24 Fed. Rep. 100. See, also, 31 Fed. Rep. 696. The complainants seek to ascertain the amount due under certain stipulations of a policy of life insurance, which provide that the policy is issued upon the "reserve dividend plan." The defendants insist that the complainants confided to the board of directors of the insurance company an absolute discretion to apportion the reserve dividend, and that their determination as to the amount is conclusive. The complainants not only deny that this proposition contains a correct exposi-

tion of the law, but they contend, further, that it has no application to a cause like this where, by reason of the ambiguity of the contract, it is necessary to ascertain what is the meaning of its terms; that the court must at the outset determine the principles by which the defendants shall be governed and guided in making up the account. The bill has been attacked at various times, and its sufficiency upheld by this court. The cause now comes on for final hearing.

Levi A. Fuller, for complainants.

William H. Arnoux, William B. Hornblower, and Haley Fiske, for defendants.

COXE, J. The first proposition argued by the defendants is that the court has no jurisdiction, for the reason that the amount involved does not exceed \$500. Act March 3, 1875. The bill alleges that \$1,231 is due the complainants from the reserve endowment fund. The defendants insist that this sum must be disregarded in fixing the jurisdictional amount, for the reason that they admit it to be due, and offer to pay it, in their answers, and therefore it is not in controversy. The soundness of this proposition may well be doubted. If it can be maintained, the defendant in a vast number of actions, both at law and in equity, both *ex contractu* and *ex delicto*, will have it in his power to oust the court of jurisdiction by admitting that the whole or a part of the plaintiff's demand is due. If, for instance, this suit were to recover the \$1,231 alone, can it be said that the court has no jurisdiction to enter judgment because of the defendants' admission that the amount sued for is due? The amount actually due at the time the action is commenced is the amount in controversy. To recover that sum it is necessary for the plaintiff to bring the defendant into court; and, having been legally brought there, he cannot defeat the jurisdiction by an offer to pay. If the court has jurisdiction when the suit is commenced, it has it for all time. This rule is well-nigh universal, and it is not necessary to consider the exceptions to it here. The defendant cannot change the character of the suit in this regard.

It is true that under section 5 of the act of 1875 the cause should be dismissed if, at any time during its progress, the court discovers that it has no jurisdiction. The discovery, though not made until the end of a suit, relates back to the lack of jurisdiction at the beginning. If the court had no jurisdiction when the suit was begun, there must be a dismissal, even though the fact was not ascertained until the close of the litigation. Surely this section does not mean that a suit, properly brought, may be dismissed because the defendant by admissions or failure to deny reduces the amount in dispute to less than the statutory sum. If this be the true construction, the stronger the plaintiff makes his case the greater danger he will incur of being turned out of court. If, for instance, on the trial, he proves his case so conclusively that the defendant can offer nothing in reply, and in open court concedes the justice of the plaintiff's demand, it will be the duty of the court at that very moment to dismiss the cause, for the reason that there is nothing in controversy between the parties. This was not the intention of the law-makers. There

is, however, sufficient upon the other branch of the case to give the court jurisdiction. The complainants seek to recover under the reserve dividend clause of the policy. The defendants concede that there is due \$387. The complainants insist that it is four times that amount. This controversy cannot be settled finally until a master has taken the account. Should it then be determined that there is more than \$500 involved, the wisdom of retaining the cause will be apparent. On the other hand, should the master find that there is less involved, the defendants' point will be as available then as now. Clearly, at this stage of the litigation, the objection should be overruled. The defendants dispute the jurisdiction of the court upon other grounds, but it seems that they are all covered by former adjudications of this court, and should not be considered again. It would be an intolerable hardship to the complainants, after having informed them that their bill was properly brought, to turn them out of court at this late period, and after a tedious and expensive investigation, for want of equity.

The main question arises upon the interpretation to be placed upon the policy of insurance. On the 2d of March, 1874, the defendant the Metropolitan Life Insurance Company issued its policy of insurance for \$10,000 upon the life of Austin B. Fuller, for the benefit of Harriet A. Fuller, for the term of 10 years. The policy contains this provision:

"At the request of the assured, this policy is insured upon the 'Reserve Dividend Plan,' and the said company agree that, should the premiums be paid as herein stipulated for ten full years from the date hereof, and that, should the life insured survive said period of ten full years, that said company will pay to the designee of this policy, at the expiration of said period of ten years, its equitable proportion of the reserve dividend fund in cash, the same to be receipted for to said company."

These words, "reserve dividend plan," and "reserve dividend fund," standing by themselves, are meaningless. In order properly to construe them it is necessary to have recourse to contemporaneous insurance literature. Without such explanation it will be impossible to render judgment upon the contract. What was the agreement between the parties? Upon what proposition did their minds meet? Fuller paid \$2,834 in premiums. The obligation resting upon him was fully performed. This is conceded. What did the defendant, the insurance company, undertake in consideration of this money? What obligation did it assume? When this question is answered, when the contract which was actually entered into is ascertained, the defendants must be held to its stipulations. It is not necessary to consider whether the contract was a wise and prudent one, for that is immaterial. The cause differs from *Uhlman v. Insurance Co.*, 109 N. Y. 421, 17 N. E. Rep. 363, and *Pierce v. Society*, 145 Mass. 56, 12 N. E. Rep. 858. These cases represent with great clearness the opposing views upon the question whether a policyholder can compel an insurance company to account. In both, the terms of the contract were clear. In the case at bar the defendants insist, not only that they have the right to apportion the account, but, as a preliminary step, that they shall be permitted to place their own interpreta-

tion upon an ambiguous and disputed contract. This position is not sustained by the *Uhlman Case*. On the contrary, it is disaffirmed. At page 432 the court say:

"The plaintiff and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial, and make proof of such allegations, and, if proved, the court will declare the proper principles upon which the apportionment is to be made, so as to become an equitable apportionment."

The complainants seek to explain a written instrument by parol, not to change or enlarge it. The only reserve dividend plan of which the public had knowledge prior to the date of the policy was that devised and copyrighted by W. P. Stewart and explained by him in the little volume entitled "Key to Reserve Dividend Plan." The parties are presumed to have contracted in the light of what was known by them in March, 1874. A person desiring information on the subject would have sought for it in this book, or from those who were familiar with its contents. Stewart maintained that he, and he alone, under his copyright of January 1, 1871, had the right to use this plan, and confer that right upon others. In August, 1872, the defendant, the insurance company, entered into a contract with Stewart, by which it purchased the right to use the "reserve dividend or reserve endowment plans," and agreed to employ him as its actuary. His principal occupation was, under this contract, to instruct agents as to the peculiar features of these plans. Thereafter the company advertised to the world that the reserve dividend plan originated with its actuary, and belonged to it. In short, the defendants clearly and emphatically adopted Stewart's reserve dividend plan as their plan, and commenced operating under it, having proclaimed their exclusive right so to do. From 1869 to the date of the complainants' policy this plan was being operated by the Widows' and Orphans' Company, and subsequently by the Metropolitan Company, and explained by the agents of both. The proof is convincing that during this period it was never explained otherwise than as stated by Stewart, and that it was never practiced in any other way. An applicant, in March, 1874, about to accept a policy containing this vague and technical language, would most surely have appealed for information to the insurance literature of the day, or to those having knowledge of the subject. But one answer would have been given: "We know of no plan by that name but Stewart's." His plan was the reserved dividend plan. There was no other. Nowhere could the applicant have been informed as to the details of the plan which is now advanced by the defendants. If at that time the company had adopted another and a different plan, or had materially modified Stewart's plan, they should have so stated in the policy, or published it in some form to the world. They contracted with reference to the reserve dividend plan, and it will hardly do for them to say now that what they meant was a reserve dividend plan. Having left the policy in this lax and uncertain form, when they had the power to make it definite and certain, they should not be surprised that Fuller gave the words used their general,

open, and public meaning, and not a secret and unusual one. Fuller testifies that the plan was carefully explained to him by the company's general agent in great detail from the "key" above referred to. But even were the defendants in a position to show that the words in the policy referred to their own particular plan,—the plan under which they have computed the dividend at \$387,—and not the plan as it was generally and publicly understood, it is thought that the proof fails to establish the adoption of such a plan by them at and prior to the date of the policy. If the book intended for the exclusive use of their agents can be said to contain a plan, it is not, when taken in its entirety, inconsistent, but rather in line, with Stewart's plan. The reserve dividend, which they there assert will, upon a "conservative assumption," amount to 60 per cent. and upwards, could hardly be arrived at by a plan which yields a dividend of about 13½ per cent.

It is unnecessary to discuss the evidence further. Suffice it to say that I am convinced that the parties to this contract stipulated for a reserve dividend upon a plan then well known to the public, and understood by those versed in insurance matters as Stewart's plan, the details of which are explained by him at pages 10 and 11 of the book above referred to. It was upon this proposition that the minds of the parties met. It was in consideration of a dividend upon this plan that Fuller paid his premiums for 10 years. It is in accordance with the terms of this contract that the complainants are entitled to an account. There should be a decree in favor of the complainants for an accounting.

FECHHEIMER *et al.* v. BAUM *et al.*

(Circuit Court, S. D. Georgia, W. D. January 3, 1889.)

1. COURTS—FEDERAL JURISDICTION—FOLLOWING STATE PRACTICE—EQUITY.

The courts of the United States sitting in equity may administer, in suits of which they have jurisdiction, equitable rights peculiar to the laws of a state where the courts are held.

2. SAME—INSOLVENCY—RECEIVERS—RIGHTS OF CREDITORS.

The fact that the local statute provides that a creditor of an insolvent trader, or firm of traders, whose debt is mature, unpaid, demanded, and payment refused, may ask for a receiver, is an exception to the rule making the existence of a lien a prerequisite to such an application.

3. SALES—FRAUD—RESCISSION.

A person not intending to pay, by inducing one to sell him goods on credit through the fraudulent concealment of his insolvency, is guilty of a fraud which entitles the vendor to disaffirm the contract, if no innocent third party has acquired an interest in the property.¹

4. SAME—FRAUDULENT REPRESENTATIONS.

Where a firm of traders in May make a statement to a commercial news agency, (Bradstreet's,) showing entire solvency, which statement is intended

¹Where a purchaser obtains goods on credit by false and fraudulent representations as to his financial ability, and not intending to pay for the goods, the seller may rescind the sale and retake the goods within a reasonable time after discovering the fraud. *Lee v. Simmons*, (Wis.) 27 N. W. Rep. 174, and note; *Taylor v. Mississippi Mills*, (Ark.) 1 S. W. Rep. 283, and note; *Doane v. Lockwood*, (Ill.) 4 N. E. Rep. 500, and note. See, also, *Wollner v. Lehman*, (Ala.) 4 South. Rep. 643, and note.

to be circulated among merchants selling goods upon credit, and which states that there are no liens or mortgages upon their assets, and that they give no security for borrowed money, except farmers' notes as collateral, and in December it appears that they are in debt more than \$150,000, and utterly insolvent, and that at the time of their statement they had made a written promise to execute mortgages to a favored creditor upon their entire assets, which promise was withheld from the news agency, and that their entire stock was subsequently conveyed by mortgage to such favored creditor, the entire transaction is fraudulent as to creditors who gave them credit on the faith of said statement.

5. SAME.

If the traders were insolvent at the time of their statement to Bradstreet, their statement of complete solvency, made "willfully with the intent to deceive, or recklessly without knowledge," is fraudulent, under the law of Georgia, as to parties who were misled thereby.

6. RECEIVERS—APPOINTMENT.

The facts stated by the bill and affidavits make this a proper case for the chancellor to grant the injunction sought, and to appoint a receiver

(*Syllabus by the Court.*)

In Equity. Motion for an injunction and appointment of a receiver.

The bill before the chancellor was filed by the plaintiffs, residents and citizens of Ohio, against Baum & Bro., a firm doing business at Toomsboro, Irwington, and Dublin, in this district, to assert the right to an injunction and the appointment of a receiver given by the law of Georgia. Code, § 3149a. This section provides:

"In case any corporation, not municipal, or any trader or firm of traders, shall fail to pay at maturity any one or more matured debts, payment of which has been properly demanded of such debtor and by him refused, and shall be insolvent, it shall be in the power of a court of equity, under a creditors' bill, to which one or more of the creditors who have matured debts unpaid shall be necessary parties, to proceed to collect the assets, real and personal, including choses in action and money, and appropriate the same to the creditors of such traders, firm of traders, or corporation."

The averments of the bill made and sworn to conform to the requirements of the statute in all respects, and so far as they indicate the existence of matured debts due by the defendants to the plaintiffs, the demand for payment, its refusal, and the insolvency of the defendants, the averments are not denied. In addition, the bill alleges other facts not less important to the jurisdiction in equity. They are that on May 21, 1888, the defendants, Baum & Bro., made a statement to Bradstreet's Mercantile Agency, which showed a condition of prosperous solvency upon their part, which statement is appended as an exhibit to the bill; that plaintiffs, in the usual course of business, had knowledge of that statement, believed it to be true, and knew this before their merchandise was sold to the defendants; that the defendants owe \$160,000; have made many fraudulent assignments and preferences; that some of these are given to favored creditors, upon the goods of the plaintiffs not yet paid for; that the plaintiffs' debts were created for a large stock of clothing, part of which is yet in possession of the defendants; that the purchase was made by the defendants with the deliberate intention not to pay therefor, and with no reasonable expectation that the defendants would be able to pay;

that the sales are void, and that the title did not pass; that the statement made to the Bradstreet's Mercantile Agency as to the standing and condition of the firm was made with intent to deceive the public, and especially the plaintiffs, and was a part of a scheme to defraud creditors who would extend credit; that the fraudulent preferences amount to \$70,000, which is larger than the annual amount handled in business by the defendants.

The prayer is for an injunction and receiver, and that goods purchased by defendants from plaintiffs be kept separate for the benefit of plaintiffs, and for a general judgment, and for general relief. The temporary injunction was granted upon consideration of plaintiffs' bill, and thereupon plaintiffs filed an amendment thereto. This prayed that H. M. Comer & Co., a firm of cotton factors of this district, be made parties; that the preferences to Comer & Co. are void, (they consist of certain mortgages to secure an alleged indebtedness of \$35,000, given upon stock worth \$43,000;) that in addition to these mortgages the defendants have transferred and assigned to H. M. Comer & Co. notes and accounts in a sum largely in excess of Comer's demand; that on August 22d these accounts were worth \$50,000, and plaintiffs charge on information and belief that these transferred choses in action have been increased by other transfers to \$75,000; that since the mortgage and preferences were given, the defendants, Baum & Bro., have paid to Comer & Co. \$18,000, which reduces their demand to \$17,000, and yet Comer & Co. hold as collateral and otherwise in mortgages on real and personal property the full sum of \$100,000 to secure this debt. This was stated on the hearing, without objection, to be \$24,600, and the chancellor, for the present, assumes that to be correct.

The bill alleges that the transactions between Comer & Co. and the defendants were the result of a fraudulent confederacy to hinder and delay creditors, and to compel them to accept a small pittance in full satisfaction of large debts; that the demands of Comer & Co. should not be paid by the proceeds arising from the sale of the merchandise of plaintiffs and other creditors, not yet paid for; that Comer & Co. had actual notice of the defendants insolvent condition at the time of certain payments made to them from such proceeds. The amendment further alleges that, prior to the insolvency of the defendants, or at some other time, Comer & Co. obtained from the defendants an agreement in writing that when the defendants should become weak or insolvent that they would execute and make to Comer & Co. a mortgage covering their entire property, and should assign to them all of their notes, accounts, and choses in action; that said mortgages and preferences were given in pursuance of said agreement; that Comer & Co. permitted the defendants to retain possession of the notes and accounts and choses in action transferred to him; that the large amount of assets in the hands of Comer & Co., over and above their lawful demand, will be sacrificed to the injury of plaintiffs; that the defendants bought a large stock of goods on credit, with the intention not to pay for them, and to defraud creditors. The prayer is that Comer & Co. be required to produce the said agreement on the

hearing, and that they be enjoined from proceeding to foreclose the mortgage or mortgages, and that they be enjoined from collecting the notes and accounts, or from any way interfering with the assets of the defendants, and that a receiver be appointed to take charge of all such assets for the benefit of the creditors. The bill expressly waives discovery.

In reply to the motion for injunction, etc., the defendants Baum & Bro. deny, in their answers, that plaintiffs' debt was contracted after the financial statement was made; that they gave the statement of the 21st of May, yielding to the solicitation of the Bradstreet Company; that that there were no mortgages or liens at the time the statement was made; that the statement appended to the bill itself is erroneous; that their dealings have been honorable and successful up to the time of this failure; that their failure is a thoroughly honest failure; they have not made any preference upon which, suspicion or doubt can be cast as to its entire good faith; that their creditors have given uniform evidence of their entire and unalated confidence in the defendants' integrity; that they have paid large amounts to their creditors, and have drawn out nothing from their business except for the necessary support of their families; that the mortgages were given to secure *bona fide* debts; and that, if a receiver is appointed, the loss in winding up the business will be so great that the creditors will get nothing.

H. M. Comer makes answer by affidavit. He states that on the 10th day of March, 1888, he took the agreement to the court shown, which was referred to in the bill. This had been done every year previously. It was taken in entire good faith, to protect the advances that deponent made. He gave the creditors knowledge of it on the 3d of December, and never attempted to conceal it. He denies utterly fraud and confederacy. That in his preferences defendants reserved no right or benefit to themselves. He never had any reason to suspect fraud on the part of the defendants. That in the spring and summer of 1888, before he knew defendants were embarrassed, they sent to him notes and accounts of the face value of \$43,263.45, as collateral for about \$27,000 then due. These notes and accounts he sent to the defendants to collect for him. This collateral was more valuable than that obtained in November. Then the debt was increased, and Comer & Co. took by transfer the notes and accounts referred to. Another affidavit was presented by H. M. Comer. It recites that his firm are cotton factors and commission merchants in the city of Savannah; that they have been the factors of Baum & Bro. and Baum & Co., the defendants, for five years; that they would make advancements in the spring and summer with the understanding that they were to be paid off in the fall and winter; that the business has been large, and the statement taken from his books is attached. It shows an indebtedness of \$43,078.23, subject to credits from Baum & Bro.; also amounts due by the concerns at Dublin and Irwington, all subject to a credit of 521 bales of cotton, which, estimated at \$38 per bale, leaves Baum & Bro. indebted to H. M. Comer & Co. \$24,661.07. This indebtedness is secured by a mortgage on real and personal property, dated November 13, 1888, by a mortgage on the per-

sonalty, dated November 17, 1888, by certain notes and accounts transferred by the Baums to deponent's firm. This security was given for the sole purpose of securing the debt. He denies that the charges of the bill were true.

Upon the hearing, several creditors were made parties plaintiffs by intervention, among them, H. P. Claffin & Co., New York, whose debt is \$11,986.16; A. Gibian, about \$1,600; S. Waxelbaum; Culver, Moore & Culver and others. On the hearing plaintiffs put in evidence this statement of Baum & Bro. to their creditors, made December 3d, which is as follows:

STATEMENT.

		<i>Liabilities.</i>	
Amount secured claims,	-	-	\$69,625 80
Amount unsecured claims,	-	-	81,277 64
Total liabilities,		-	\$150,903 44
		<i>Assets.</i>	
Merchandise at Toomsboro,	-	-	\$18,095 36
Merchandise at Dublin,	-	-	17,900 45
Merchandise at Irwinton,	-	-	6,540 00
Real estate, mules, horses, etc.,	-	-	7,165 00
Total notes and accounts	-	\$105,150 92	
Deduct for worthless and doubtful claims,	-	72,310 54	
Notes and accounts at actual value,		-	\$32,840 38
Cash on hand,	-	-	1,385 00
Total available assets,		-	\$83,926 19
		<i>Recapitulation.</i>	
Total available assets,	-	-	\$83,926 19
Deduct for secured claims,	-	-	69,625 80
Leaving balance,		-	\$14,300 39
Amount of unsecured claims,	-	-	81,277 64

Also the affidavit of Albert M. Holstein, agent of plaintiffs, which proves the account and demand of the plaintiffs, and states that it was made on the faith of the statement to Bradstreet, made by the defendants. This showed that the defendants were entirely solvent. The statement is as follows:

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EXHIBIT A.

[Late Report.]

EXECUTIVE OFFICES, 279, 281, 283, BROADWAY, NEW YORK.

BRADSTREET'S

No. 82 West Third Street,

CINCINNATI, July 19, 1888.

The Bradstreet Company.

Give us in confidence, for our exclusive use and benefit in our business, under our agreement with you, such information as you may have or may be

able to obtain concerning the responsibility, character, reputation, credit, etc., of

Name—N. B. Baum & Bros.

Business—Gen. Store. { July 20, }

Street and No. ——— } 1888. }


City (or P. O. Address)—Toombsboro.

County—Wilkinson.

State—Ga.

Signature of M. & L. S. F. & Co., Subscriber.

2402—P. O. Address.

 Information will be furnished upon the proper filling up of this blank and the signature of the subscriber.

2-13-8-10m.

EXHIBIT B.

Baum, N. B. & Bro., Toombsboro, Ga., Wilkinson county.

A. W. Baum, aged 36 years, and married.

N. B. Baum, aged 39 years, and married.

States: Began business in 1875 in a small way, and have been quite successful. As per inventory taken January 15, 1888, our *status* is as follows: Stock of merchandise, nineteen thousand dols.; bonds and stocks, par value, twenty-one thousand dollars; market value, twelve thousand dollars; notes and accounts, thirty-five thousand dollars; real estate, town property and lands, ten thousand dollars; making total assets of the firm, seventy-six thousand dollars. Liabilities: Borrowed money for the year 1888, twenty-four thousand dollars; mercantile and other indebtedness, twelve thousand dollars; total liabilities, thirty-six thousand dollars. Net: Forty thousand dollars. We have a branch store at Irwinton, Ga. The business there is run under the style of "Baum & Co." Stock on hand there, two thousand dollars; notes and accounts, four thousand dollars; cash, five hundred dollars; total, six thousand five hundred dollars; and owe three thousand dollars. After allowing for shrinkages, bad debts, etc., consider ourselves worth fully thirty thousand dollars, over liabilities. There are no mortgages or liens on any of our property, either real or personal. Our stock is insured for thirteen thousand dollars; fixtures, two thousand dollars. When we borrow money from banks we deposit our bonds and stocks as security. From our cotton factors we borrow on farmers' notes as collateral, give no other security. Do an annual business of seventy-five to eighty-five thousand dollars. In addition to the above we sell 5 or 6 hundred tons of fertilizers per annum, which we buy outright. Give notes for the same, payable in fall. To only one company do we give farmers' notes as collateral. At this point we cleared ten thousand dollars on guano alone.

The Mercantile News Agency states: We learn they carry an average stock of about fifteen thousand dollars, and do a large business, sell largely on credit, and consequently have considerable due them. Said to borrow considerable money to use in their business, and generally put up planters' notes as collateral. They are reputed to own real estate worth five to eight thousand dols. Would be difficult to give correct estimate of their net worth, but it is the general belief that the firm is estimated worth fully twenty thousand dollars, or more. They are of good character, and steady habits, and of fine business ability. Appear to do nearly all the business that is done at this point, and are generally prompt in meeting their obligations, and are quoted in good credit.

May 21st, 1888.

[Indorsed:] Bradstreet's. 10-19-1888. To M. & L. S. Fechheimer & Co. The correctness of this report is not guaranteed; but having been obtained by

us in good faith—from authorities deemed reliable—it is transmitted to you in strict confidence for your exclusive use and benefit, and in accordance with the terms of the contract existing between us. Respectfully,

THE BRADSTREET CO.

State of Ohio, Hamilton County, ss.: Before me personally appeared Levi C. Goodale, who, being duly sworn, says that he is the superintendent of the Bradstreet Co. Mercantile Agency, office at 82 West Third street, Cincinnati, Ohio. That on July 19, 1888, they received a ticket of inquiry from M. & L. S. Fechheimer & Co., of Cincinnati, Ohio, asking for information concerning the responsibility, character, reputation, credit, etc., of N. B. Baum & Bro., whose post-office address was Toombsboro, Ga. Said ticket of inquiry is attached hereto, made part hereof, marked "Exhibit A." That on the 20th day of July, 1888, we made a report in answer to said inquiry, an exact copy of which answer is attached hereto, made part hereof, marked 'Exhibit B.' We obtained this information in the regular course of our business, and for our company in that section of Georgia in which the business of N. B. Baum & Bro. is located.

LEVI C. GOODALE.

Sworn to before me, and subscribed in my presence, this 19th day of December, 1888.

WILLIAM S. LITTLE,

Notary Public, Hamilton county, Ohio.

R. W. Patterson, one of the solicitors for the plaintiffs, testifies that he was present at the meeting of defendants' creditors on December 3, 1888. Baum offered to unsecured creditors $12\frac{1}{2}$ per cent. of their claims in 30 days' time, and $12\frac{1}{2}$ per cent. additional in 12 months, neither secured. Subsequently inquiry was made by Mr. H. M. Comer if the offer would be accepted if he (Comer) would guaranty the first $12\frac{1}{2}$ per cent. Some of the creditors, and among them the plaintiffs, declined to accept. C. H. Cohen, attorney for H. P. Claflin, testified that on November 23d he called on the defendants at Toombsboro; that N. B. Baum told him that he had been under contract to Mr. Comer for some time to give the Comers a mortgage whenever they demanded it, and he felt compelled to do as he had previously agreed, which deponent understood was to give the mortgage upon all his assets, including the goods that deponent's clients had but recently sold him. This witness proves the account of H. P. Claflin & Co. in the sum of \$11,986.16.

R. W. Patterson, J. W. Lindsay, and C. H. Cohen testify that they heard H. M. Comer state before the meeting of creditors that he had an agreement with N. B. Baum, of the defendants, to the effect that Baum would execute a mortgage to him upon whatever assets he had, and that on this agreement Comer had made him advances, and that the agreement had been in force for as much as a year prior to that time. Deponents further say that they heard N. B. Baum, at the creditors' meeting, state that he was insolvent at the time he made his statement to Bradstreet's agency, in May of the present year, although he did not know it at the time.

C. A. Turner testified by affidavit that, after the deputy-marshal had closed the store of the defendants at Toombsboro, he heard N. B. Baum say in a conversation with deponent that he had in his possession the notes, accounts, and assets of Baum & Bro. and Baum & Co., which

had prior to that time been turned over to H. M. Comer & Co., of Savannah. The bills for most of the plaintiffs' goods sold to Baum were dated on August 6th, August 10th, August 13th, and a renewal note was taken on October 9, 1888. It was shown by the evidence that this was the manner in which the goods were sold: The traveling agent of the plaintiff took the order in July, subject to ratification by the house, on inquiry as to solvency. This inquiry was made to Bradstreet. The goods were not shipped unless the reply was satisfactory. The sales were not completed until the goods were sent.

For the defendants the following evidence was submitted: The agreement entered into between N. B. Baum & Bro. and Baum & Co. and H. M. Comer & Co., dated March 10, 1888. It recites that for and in consideration of certain advances to the amount of \$18,000, as evidenced by five promissory notes for \$3,200 each, signed by N. B. Baum & Bro., and indorsed by Baum & Co., and payable at the office of Comer & Co., as follows, respectively, on September 15th, October 1st, November 1st, and November 10th; and one note for \$2,000, signed by Baum & Co., and indorsed by Baum & Bro., due October 20th next.

"Now, in order to secure these and any other sum that may hereafter be due them, we agree to deposit with them as collateral security, notes and mortgages of good planters and others to whom we sell goods, in amount equal to at least two dollars for every one dollar due by us to the said Comer & Co. We also agree to transfer to them as additional security our insurance policies on our buildings and stocks of goods; and we further obligate and bind ourselves to give said H. M. Comer & Co. a first lien or mortgage upon all our stocks of goods and real estate, in case we shall at any time become financially embarrassed while indebted in any way to them, or in case our said notes above described are not paid promptly at maturity. It is also understood and agreed that all drafts drawn, or money advanced upon account or otherwise, over and above the eighteen thousand dollars herein named, shall be paid out of the proceeds of cotton shipments first and before said proceeds are to be applied to said notes; in other words, only credit balances as may appear from open account are to be paid on said note unless by consent of said H. M. Comer & Co. in writing. It is understood and agreed that 8 per cent. per annum will be charged on all advances, etc.

[Signed] N. B. BAUM & BRO., and
"N. B. BAUM & Co."

The mortgage dated the 17th day of November, to secure the payment of \$38,000, including the five notes before mentioned and three other notes for \$5,000 each, dated October 12, 1888, and due at various dates until December 10, 1888, and one note for \$5,000, due January 12, 1889, and one note dated March 10, 1888, for \$2,000, signed by Baum & Co., indorsed by Baum & Bro., payable October 20, 1888, upon 150 half rolls of bagging, 100 bundles cotton ties, 100 sakes salt, all in the planters' warehouse at Dublin; and also all goods, merchandise, dry goods, groceries, etc., stored in the store of L. C. Perry & Co., at Dublin, Ga.; also, a mortgage made 13th of November, 1888, to secure \$30,000, being apparently the same notes just mentioned, and given upon certain lots of land situated in Toombsboro, and upon which is erected store-houses; and also certain stocks of general merchandise in said store, de-

scribing them particularly; and also all such articles and things as may be hereafter placed in such stocks; also the stock in the store at Dublin, more particularly describing it, with the same provision as to future acquisitions; also a lot of land, one-half acre in Irwington, with store-house thereon, and also the stock of goods therein contained. The mortgages comprehend all the safes, show-cases, and fixtures of every kind in said three stores. Numerous affidavits were presented as to the policy or impolicy of granting the prayer of the bill for the appointment of a receiver, and an affidavit to sustain the good character of H. M. Comer,—in the opinion of the court a deposition altogether superfluous. Other portions of the testimony are not material or necessary to the proper determination of the cause. After a full hearing and exhaustive argument on Friday last the court took time to consider, and has reached the following conclusions:

Patterson & Hodges, for plaintiffs.

Hill & Harris and *Denmark & Adams*, for defendants.

SPEER, J., (*after stating the facts as above.*) Baum & Bro. and Baum & Co., two firms composed of the same individuals, are traders, in the meaning of the statute of this state quoted above. That they are insolvent it is conceded. The plaintiffs are creditors, whose demands, as the court is at present advised, are within the class provided for in the statute above quoted, (Code Ga. § 3149a,) giving, in certain cases, the equitable right to the extraordinary remedies applied for. This right of the creditor to put the debtor's assets, when the latter is an insolvent trader, in the hands of a receiver, is peculiar to the law of this state. It has no existence in the general jurisprudence of equity which obtain in these courts. It is now settled, however, that the courts of the United States may administer an equitable right granted by the law of the state in suits of which, from other reasons, they have jurisdiction. It was urged in argument for the defendant that the creditors, without a judgment at law, have no right to apply in equity for the appointment of a receiver. That this is a general rule is undeniable, but there are exceptions to it, and one of these exceptions of apparently clear distinctness is where the law-making power has enacted in terms that the debt need only be mature, with payment demanded and refused, as is the law in Georgia. It is true, also,—as held in this circuit, in *Jaffrey v. Brown*, 29 Fed. Rep. 477,—that a party not intending to pay, by inducing one to sell him goods on credit through the fraudulent concealment of his insolvency and of his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract, and recover the goods. See, also, *Crittenden v. Coleman*, 70 Ga. 295; *Donaldson v. Farwell*, 93 U. S. 633; note to *Jaffrey v. Brown*, 29 Fed. Rep. 485, and authorities cited. The remedy at law must be quite as complete as that in equity to defeat the power of equity to proceed. *Id.*

The demurrer filed to the bill, while not finally overruled, is not deemed sufficient, as the court is at present advised, to defeat the relief

sought by the bill, should that relief be granted. The chancellor has given very anxious thought and careful inquiry to the ascertainment of his duty in the premises. It is true that the prayers of the bill seek to obtain perhaps the most vigorous and far-reaching action in the power of the court—action which should not be taken in cases of this character, except in the presence of plain fraud or irreparable injury. On the other hand, the statements of the defendants themselves show the most utter insolvency, and a failure to comply with their duty to their creditors, which evinces either negligence of the most flagrant character, or fraud scarcely less marked and decided. Upon the 21st of May, whatever may have been the motive which led to the publication, it is undeniable that the defendants gave to the mercantile community, by means of a usual and widely known commercial news agency, a statement which shows remarkable solvency, and indeed prosperity, for their section of the country. "Our total assets," they said, "are seventy-six thousand dollars; our liabilities, thirty-six thousand dollars, net. After allowing for shrinkages, bad debts, and so forth, we consider ourselves worth fully thirty thousand dollars over liabilities, etc. There are no mortgages or liens on our property, either real or personal. Our stock is insured for thirteen thousand dollars. When we borrow money from bank we deposit our bonds and stocks as security. When we borrow money from our factors we give farmers' notes as collateral; give no other security." In a little more than six months we find this firm in debt \$150,903.44, with total assets of \$83,926.19, leaving debts to the amount \$66,976.25, altogether hopeless. In other words, in a half year there had been a change for the worse in their condition of nearly \$100,000,—if their respective statements to Bradstreet's and to their creditors is reliable. For this startling transformation of their condition they offer neither explanation nor excuse. There had been no disaster from flood or fire, no epidemic, none of those extraordinary circumstances which at times cause the stoutest business houses to tremble. In May there is an indebtedness of thirty-six thousand, in December a debt of one hundred and fifty thousand. In May there are neither liens nor mortgages, in December they approximate seventy thousand dollars. In the spring creditors were assured of prompt payment, in the fall they are met by hopeless insolvency; and yet the court is asked to consider this an innocent and unavoidable failure, and this, too, in the absence of a syllable of proof to account for it. What makes it more remarkable is that the business was conducted in quiet villages, and among a rural population, where all legitimate trade was marked by careful purchases and conservative transactions; where every purchaser is personally known to the merchant,—his solvency and disposition or ability to pay debts as familiar as household words. But this is not all. In the proclamation of Baum & Bro. to the business community of the country, they say "there are no mortgages or liens upon our property." At that moment it was all incumbered with a secret obligation which a court of equity in a proper case would declare to have all the effect of a mortgage. In less than six months every cent's worth of their stock or other assets, whether paid

for or not, is shingled with mortgages, made in pursuance of that covert stipulation. In the presence of such facts as these it would seem futile to urge upon the court the considerations of business capacity and business integrity and mercantile popularity, which form so large a part of the defendants' showing. "We give to our factors no security save farmers' notes." As that public pledge was being made their contract was in existence, not only to give two dollars for one, in notes and choses in action, for every dollar obtained from their factors, but to give mortgages which are undeniably other and very different security. "Our stock is insured for \$13,000," said they to Bradstreet's,—they did not say the policies had been pledged to H. M. Comer & Co., and out of the reach of other creditors.

It would seem superfluous to analyze the widely variant statements of the defendants, and it requires no elaborate inquiry to ascertain the law controlling the rights of the parties with such facts before the court. The statutes of the state are sufficiently explicit. Suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties, or the peculiar circumstances of the case. Code Ga. § 3175. Can it be doubted that the fact that the defendants were under a written obligation to execute mortgages upon their entire stock and all their other property, was "material to be known" by those giving them credit? Can it be doubted that when the Baums undertook to give to Bradstreet's, for the information of the business world, a statement of their assets, liabilities, and methods of borrowing money, that the obligation was upon them to communicate the truth? Will the most credulous believe for a moment that Fechheimer & Co. would have given them credit for \$4,000; that Claflin & Co. would have given them credit for \$11,000,—had they known the existence and the nature of their obligation to Comer? We think not. The statements of such mercantile agencies as Bradstreet's are intended to influence the action of merchants and others who give credit. It is well understood that the mercantile community relies largely upon such statements, and the persons giving them are under the weightiest obligation, which will be enforced *in foro conscientiarum*, to speak the truth. If there has been deliberate suppression of a vital fact in a statement of this character, which does mislead, it is a fraud upon the person misled, which a court of equity will redress, if possible. Again, "misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or, if made by mistake, and innocently, and acted on by the opposite party, constitutes legal fraud." Code Ga. § 3174. See, also, section 2634.

Now, it appears from the evidence of Messrs. Patterson, Lindsay, and Cohen that N. B. Baum admitted in their presence and hearing that he was insolvent at the time the statement to Bradstreet was made, although he there asserted a net worth, above all liabilities and doubtful assets, of fully \$30,000, but that he did not then know his insolvent condition. Conceding, therefore, that this statement was honest, it is none

the less fraudulent in contemplation of these provisions of the Code. It follows that, even in the absence of the insolvent traders' act, before quoted, the plaintiffs would be entitled to the relief they seek if it can be made to appear that there is a prospect of redressing their wrongs thereby. Much more, then, are they so entitled under the provisions of that act. It is said, however, for the defendants, that the liens created by Baum & Bro. to Comer and others will exhaust the assets, and that the unsecured creditors can get nothing through the action of a receiver, however vigilant he may be. But the defendants themselves admit that the assets amount to about \$86,000 more than the preferences he has given. It is true that he states that \$72,310.54 of notes and accounts are worthless and doubtful, but the court is not inclined to accept this statement as final. It would be very remarkable if his doubtful debts in December should be as much as his total assets in May. A diligent receiver will collect many of those claims, or the court will know the reason why. Besides, by the same statement there is a balance of \$14,300.39 to be divided among the unsecured creditors. This is itself no mere bagatelle. We have known original suits to be brought for less. But perhaps more important than either of these is the fact that Comer & Co., who only claim \$24,671.07 as the sum of their demands against the Baums, have now in their possession \$50,000 worth of good notes and accounts, and mortgages on \$49,000 worth of property consisting of merchandise and other personalty and certain realty. However valid may be the demand of Comer & Co., when it is paid they will not be permitted to retain a dollar in excess of their proven claims. It is true that by the law of Georgia, section 1953, "a debtor may prefer one creditor to another, and to that end he may *bona fide* give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer negotiable papers as collateral security, the surplus in such cases not to be reserved for his own benefit or that of any other favored creditor, to the exclusion of other creditors." The large surplus conveyed to Comer & Co. to secure their debt they hold as trustees for the creditors of the defendants, the Baums. Besides, the balance which Comer & Co. present is ascertained by estimating more than 500 bales of cotton shipped to them at \$38 a bale. They have turned over notes and accounts of the insolvent firm to one of its members for collection. This will not be permitted. The insolvent debtor who has failed under such circumstances is not the best custodian for convertible assets of this character.

This investigation has satisfied the court that this is a suit where it is manifestly the duty of the chancellor to make the orders prayed for. A receiver will be appointed, and an injunction granted. Comer & Co., who are now formally made parties defendant to the bill, will be required to make proof of their account, and if found just and true and a valid lien, as it now appears to be, it will be paid in full if the funds are sufficient. This is true of other debts of superior dignity, and the remainder of the fund in the hands of Comer & Co. and elsewhere within the reach of the court will be apportioned to the creditors. The court will appoint receivers of undoubted qualifications, who will at once take possession of

the assets of the insolvent firm, and as fast as collected pay the funds into the registry of the court, and the cause will proceed with the utmost expedition

UNION PAC. RY. CO. v. DENVER & R. G. R. CO. *et al.*

(Circuit Court, D. Colorado. January 5, 1889.)

COURTS—FEDERAL COURTS—INJUNCTION—AGAINST STATE COURT.

A circuit court will not restrain the exercise of a right, acquired by regular condemnation proceedings in a state court, to extend one railroad across another, where the complaining company, citizen of another state, has the possession and management of the road over which the right of way was condemned, by virtue of its ownership of a majority of the stock, since, if not bound, as a stockholder, by the decree of the state court, it could have made itself a party to those proceedings for the protection of its rights.

In Equity. On motion to discharge preliminary injunction.

Teller & Orahood, for complainant.

Wolcott & Vaile, for defendants.

Before BREWER and HALLETT, JJ.

BREWER, J. In reference to the case of the Union Pacific Railway Company against the Denver & Rio Grande Railroad Company, and the Denver, Clear Creek & Western Railway Company, which was argued before us yesterday, we are both of the opinion that the restraining order must be set aside. The Union Pacific Railway Company is not a lessee of the South Park road; probably could not, under your statutes, be one. It is a stockholder, owns a majority of the stock, and by virtue of that ownership controls the South Park, and has obtained for itself the possession and management of the latter's line of railway. As stockholder it is absolutely concluded by the proceedings in the state court. Whether that does not conclude it altogether as to all its rights or claims, may be doubtful; but, assuming that it does not, and that as a party in possession it might properly be made a party to these condemnation proceedings, then we have a case in which the Denver, Clear Creek & Western Railway Company has proceeded in the state court in full compliance with all the requirements of the state statute, making all parties whose interests appear of record parties to that proceeding, and has obtained a decree of condemnation. Now, this condemnation of a right of way is an act of sovereignty, and the proceedings for it are, in a certain sense, *quasi in rem*,—at least, until you come to the question of the assessment of damages,—and while it may be that this court would have jurisdiction in case a party, citizen of another state, whose rights were not apparent of record, was grossly wronged by condemnation proceedings,—I do not say it would or would not have such jurisdiction,—but if it does, it should be a very clear case, one in which the substantial rights of such party are seriously threatened, before this court should interfere when proceed-

ings have been carried to consummation in the state court. It would be unfortunate if proceedings could run in two courts,—in the one court a right of surface crossing being awarded, and in the other a decree forbidding surface crossing,—two independent and contradictory decrees of different tribunals in reference to the same matter; that is, the matter of crossing. And as the state court has unquestionable jurisdiction, as the proceedings have been in strict compliance with the statute, as they have passed into decree, as the Union Pacific Company could have made itself a party to that record, and have insisted upon its rights, even if it was not absolutely bound by that decree by virtue of its being a stockholder, we think it would not be proper for this court to continue the restraining order. We therefore set it aside.

HALLETT, J., concurring.

UNITED STATES *v.* TRINIDAD COAL & COKING CO.

(*Circuit Court, D. Colorado.* January 10, 1889.)

PUBLIC LANDS—RIGHT TO PURCHASE—PRIOR CONVEYANCE.

A purchase of coal lands from the United States, made by one authorized by law to buy such lands, for the benefit and at the expense of a corporation, under a previous agreement that the land should be conveyed to the corporation when the patent should issue, is legal, though the corporation could not by law have purchased the land, some of its members having already exercised their full rights to buy such public lands, as such previous contract is not prohibited under the statute relative to coal lands.

In Equity. On demurrer to bill.

Bill by the United States against the Trinidad Coal & Coking Company to set aside certain patents to coal lands.

H. W. Hobson, for complainant.

Chas. E. Gast, for defendant.

BREWER, J. The bill charges that defendant holds the title to six quarter sections of coal lands; that the entries were made and patents issued to six individuals, naming them, who immediately conveyed to the defendant. The purchase price and all expenses were paid by the defendant. It could not of itself purchase by reason of the fact that some of its members had exercised their full right to purchase. As it could not purchase directly, the contention is that it could not do indirectly that which it could not do directly, and that it could not through the instrumentality of these six individuals thus acquire title to these lands. There is nothing to show that these six individuals did not have the right to purchase; and the act of congress gives a right to purchase to persons possessing certain qualifications, upon the payment of a certain amount of money, the maximum being \$20 per acre, which was paid in

this case. So that the parties who entered (the patentees) had the right to purchase, and the government has received full pay,—the highest fixed price for the lands it has conveyed. While it may be true as a general proposition that a party may not do indirectly what he cannot do directly, yet when a new factor enters into any transaction it is limited thereby. Now, the right to purchase existed in these six individuals. They exercised that right, and it has gone; because, once exercised, it ceases. That is a new factor which enters into this transaction. Again, this is not one of those entries of land in which the party must by the statute act in his own behalf alone, and file an affidavit that he is not doing so for the benefit of others. No such provision exists in respect to the purchase of coal lands. A party purchasing may contract before his purchase to sell, and that contract may be enforced; and I know no reason why he may not contract away his right to purchase, it being a valuable right given by congress, having some of the elements of property, and with no prohibition upon its sale. So that it amounts to this: that while the ultimate purchaser—the party who paid the money—is this defendant, which could not purchase directly, it is true that the government has obtained full price for the lands, and also true that the parties in whose names the purchase was made lost by their purchase this property right given by the act of congress. There is therefore a new factor in the transaction. Under these circumstances the government cannot claim that it has been defrauded or wronged by the purchase of these coal lands. The demurrer to the bill will be sustained.

KINSLEY v. BUFFALO, N. Y. & P. R. Co.

(Circuit Court, W. D. Pennsylvania. November 20, 1888.)

1. CARRIERS—OF FREIGHT—DISCRIMINATION.

The doctrine of *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309, that discriminations by railroad companies in freight rates, based solely on the amount of freight shipped, are unwarrantable, approved.

2. SAME.

The larger proportionate expense attending the handling and transportation of a smaller shipment of freight does not, of itself, warrant a railroad company, or a receiver operating the railroad, in charging a higher rate thereon than was charged for a larger shipment.

3. SAME.

Such increased proportionate expense does not differentiate the service performed for the several shippers, nor the conditions or circumstances under which it was performed.

In Equity.

In the matter of the petition of A. L. Couper, alleging that G. Clinton Gardner, receiver of the Buffalo, New York & Philadelphia Railroad Company, (appointed by the court,) had made undue and unreasonable discrimination between himself and other persons in freight charges for the transportation of oil, etc.

R. F. Glenn, for petitioner.

James D. Hancock, for the receiver.

Before McKENNAN and ACHESON, JJ.

PER CURIAM. The petitioner seeks to obtain reimbursement from the receiver of the sum of \$478.44, with interest from April 3, 1887, which he alleges was unlawfully exacted from him as and for freights for the transportation of oil upon the railroad in the custody of the receiver. The exaction of this sum is admitted, as is also the fact that a less rate was charged to another shipper of oil upon the railroad. This charge is justified by the master upon the ground that the quantity of oil shipped by another shipper was much larger than that shipped by the petitioner, and hence that the larger proportionate expense attending the handling and transportation of the smaller shipment warranted a higher rate than was charged for the larger shipment. In this conclusion we do not agree with the learned master. It does not differentiate the service performed for the several shippers, nor the conditions or circumstances under which it was performed. The only difference is that in one case the quantity shipped was larger, and in the other case it was smaller. This has been repeatedly held to be an insufficient and unwarrantable reason for discriminating rates of charge. See *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309. In the statement of the law by Judge BAXTER we concur, and for this reason we cannot approve the master's finding that the petition ought to be dismissed. We agree with the master that the petitioner's claim for hire of cars ought to be disallowed. We therefore direct that a decree be entered in favor of the petitioner for the sum of \$478.44, with interest from April 3, 1887, and costs against the Buffalo, New York & Philadelphia Railroad Company.

GOODRIDGE *et al.* v. UNION PAC. RY. CO. *et al.*

(Circuit Court, D. Colorado. January 9, 1889.)

1. CARRIERS—OF GOODS—DISCRIMINATION—CONSIDERATION.

To a complaint by dealers in coal against a railroad company for discrimination in allowing freight rates to a rival coal company lower than schedule rates, defendant alleged that defendant had become liable to the favored company for trespass on its mines; that defendant had given up the working of certain coal mines, and had procured the favored company to take said mines off defendant's hands; and in order to procure the coal needed for defendant's consumption, and to settle the claim for trespass, and to get rid of the operation of the mines, defendant entered into a contract by which the favored company was to supply all defendant's coal at a low figure, and defendant was to carry said company's coal at a low figure; and that by reason of said facts it was believed when said contract was made that the amount to be paid by said favored company would be equal to the schedule rates. *He'd*, that the answer set up considerations received by defendant from the favored company, for which less rates were given to the latter, on which no estimate could be made to ascertain the amount of the charge, and such answer was insufficient.

2. SAME.

Where plaintiffs and the favored company are both dealers in coal in the same market, the direct effect of a reduced rate to the favored company is to reduce the plaintiffs' profits to the extent of such reduction, making an unjust or undue discrimination within the meaning of Const. Colo. art. 15, § 6.

3. PLEADING—GENERAL DENIAL.

A general denial of all material allegations in the complaint is authorized by Code Colo. 1887.

At Law. On demurrer to answer.

Action by Henry Goodridge and another against the Union Pacific Railway Company and others for discrimination in freight rates. The first count in the complaint was for a penalty; the second, for unlawful discrimination and to recover overcharges; the third, for money had and received to plaintiff's use.

Sampson & Millett, for plaintiffs.

Teller & Orahood, for defendants.

HALLETT, J. In the second defense the discrimination of which plaintiffs complain is justified on the ground that defendant has become liable to the Marshall Consolidated Coal Mining Company (the favored company) in respect to a claim for damages against the Denver, Western & Pacific Railway Company for a trespass committed on the lands now owned by the Marshall Company, in building the road on and across such lands. It is alleged that the Denver & Western Company broke into the mine and set fire to it, from which great damage resulted to the owners of the property. This claim for damages has been acquired by the Marshall Company, and may be enforced against the road, built by the Denver, Western & Pacific Company, now owned by defendant. The amount of the claim, and the extent to which it became the consideration of the contract with the Marshall Company to carry for that company at a less rate than for others, is not shown. It is also alleged in this defense that before the time of making the contract with the Marshall Company for giving to that company less rates than to others, and in the year 1878, the defendant made a contract with the Union Coal Company, the details of which need not be stated. But defendant in the year 1885 was convinced that it would be expedient and necessary to cancel the contract with the Union Coal Company, and make the contract with the Marshall Company, which is set out in the answer. On that point the answer reads as follows:

"That at said date, on account of the complaints that had theretofore been made by the owners of the Marshall Coal Mining Company, and the owners of other mines in Boulder county, this defendant concluded that it was for the best interest of the said Union Pacific Railway Company to discontinue its connections with the said Union Coal Company, and to discontinue the actual working of any mines through said company; that thereupon and for that purpose, it entered into negotiations with the said Marshall Consolidated Coal Mining Company for the purpose of procuring the said company to take off its hands, or off the hands of the Union Coal Company, controlled and operated by it, the said mines as above stated, and that it was further induced to make said contract from the fact that the former owners of the Marshall coal mine

had always been complaining of the rates, and giving to the defendant great trouble and annoyance in respect to said complaints about said rates. That it was further induced to enter into said contract for the reason that said Marshall Consolidated Coal Mining Company had succeeded to the rights of the former owners of the Marshall coal mine, together with the right to demand from the Denver, Western and Pacific Railway Company, or its assignees, damages as were claimed at that time; the said lands of the Denver, Western and Pacific having already at that time been conveyed to the Denver, Marshall and Boulder Railway Company, subject to said claim; and therefore, for the purpose both of getting rid of the operation of said mines formerly operated by the Union Coal Company, and for the purpose of providing this defendant with some source upon which it could rely for the coal needed by it for consumption on its locomotives, and for the further purpose of settling the said claim so made by the former owners of the said Marshall Coal Mining Company and assigned to the Marshall Consolidated Coal Mining Company, it made and entered into an agreement, in words and figures following, to-wit:—

And in the contract with the Marshall Company the prior agreement with the Union Coal Company, and the desire of the parties to discontinue business under it referred to, is included in the terms of the contract; and the Marshall Company agrees to furnish coal at the mine for defendants' use at the cost of mining and loading on cars, not to exceed \$1.25 per ton, and to have all its coal carried on defendants' lines, so far as they may extend. Defendant agrees to carry the coal for one dollar per ton, "unless two hundred thousand tons shall be mined and furnished for transportation * * * yearly, in which case a rate of sixty cents per ton shall be given, for all coal transported." If coal is ordered by defendant "for commercial uses," it shall be furnished at the cost of mining and delivery on board cars, with 50 cents per ton added. And if within two years from the date of the contract the Marshall Company shall desire to sell its capital stock, defendant shall have the right to buy "in preference to any other purchaser." The contract is to remain in force five years. Further on, and concluding, the answer reads as follows:

"This defendant further says that the sole and only variation from the schedule rates made by this defendant in respect to the carriage of coal by any parties over the Denver, Marshall and Boulder Valley road is that made by and between this defendant to the said Marshall Consolidated Coal Mining Company, and that it was made for the reasons above given, and for no other reasons whatever. And this defendant further says that it is informed, and believes that it costs to the said Marshall Consolidated Coal Mining Company, and would have cost to this defendant had it continued to mine the Louisville Mine through the Union Coal Company, the sum of at least \$1.60 per ton to mine coal from the said Marshall Consolidated Company Mine, and to get the same in cars upon the track, as provided for in this contract; and that it would have cost this defendant the same to mine from the Louisville and Erie mines had it continued to mine for its own use in said mines. And this defendant further says that on account of the settlement of the claims made against it by the said Marshall Consolidated Mining Company, which said claims were settled and provided for in the said contract above set forth, and on account of the coal necessarily used by it, the defendant, and furnished to it by the said Marshall Consolidated Coal Mining Company under the terms of the contract above set forth, the said Marshall Consolidated Mining Com-

pany have paid to this defendant, and this defendant has received of the Marshall Consolidated Coal Mining Company, a higher rate as a matter of fact than one dollar per ton, although it was not intended that the rate should exceed the schedule price; that at the time of the making of said contract it was believed that the price at which the coal was to be furnished to this defendant for its use on locomotives, and on account of the settlement of the claims as aforesaid, and on account of the benefits accruing to this defendant by reason of the Marshall Consolidated Mining Company taking and operating the said Louisville and Erie Mines, this defendant would receive from the said Marshall Consolidated Coal Mining Company, for the said period of five years, during which said contract was to operate, the same price as that fixed in the schedule price."

From all this it is apparent that the answer sets up certain considerations received by defendant from the Marshall Company, upon which less rates are given to the latter than to other shippers. And these considerations are not in the way of a charge for carrying coal upon which any estimate can be made to ascertain the amount of such charge. Whether we refer to the claim for damages against the Denver & Western Company, or to the matter of furnishing coal for defendant's use, or to any other consideration for the contract, it is plain that there is no basis of calculation other than the rate fixed in the contract itself. It is not possible to say how much, if anything, should be added to the contract price for carrying coal on account of the claim for damages against the Denver & Western Company, or on account of canceling the contract with the Union Coal Company, or on account of furnishing coal at cost for defendant's use, or on account of furnishing coal for sale at a reduced price, or on account of any other matter mentioned in the answer. The whole answer amounts only to this: that the Marshall Company is allowed less rates than other shippers are required to pay upon considerations which are satisfactory to defendant. And it is obvious that this is no answer to a complaint of unlawful discrimination.

The constitution of the state provides that "no undue or unreasonable discrimination shall be made in charges * * * for transportation of freight * * * within the state;" and the law enacted to enforce that provision is that "no railroad company shall * * * charge, demand, or receive from any person, company, or corporation for the transportation of persons or property, or for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, charge, demand, or receive from any other person, company, or corporation for a like service from the same place, or upon like conditions and under similar circumstances; and all concessions or rates, drawbacks, and contracts for special rates shall be open to and allowed all persons, companies, and corporations alike, at the same rate per ton per mile, upon like conditions, and under similar circumstances." This law cannot be controlled or defeated by any agreement between the railroad company and the favored shipper. It is true that when the consideration paid for reduced rates by the favored shipper is obviously equal to the discount allowed him, the law does not apply. Whenever that fact appears, since it matters not in what form the shipper pays the usual

rates, the alleged discrimination disappears, and the contract is no longer obnoxious to the law. If, to illustrate, the damages due from the Denver & Western Company had been liquidated, and the agreement was to carry a certain quantity of coal for the amount so fixed, the question would be different. As it stands, the agreement is to give to the Marshall Company a reduced rate for certain considerations which defendant says are sufficient to make up the discount from the schedule rate; and as to that matter, the fact cannot be ascertained from the contract or otherwise. So understood it is clear that the contract affords no protection to defendant for the discrimination in rates to which plaintiffs and other shippers of coal over defendant's road are subjected. In this case no difficulty arises as to the meaning of the words "unjust or undue discrimination" in the law. Plaintiffs and the Marshall Company are dealers in coal in the same market, depending largely on the same rates of transportation for the profits of their business. The direct effect of a reduced rate to the Marshall Company is to reduce the profits on plaintiff's coal to the extent of such reduction. The demurrer to the second defense will be sustained.

A general denial of all material allegations in the complaint was not allowed under the Code of 1877; but it is authorized by the New Code of 1887, § 56, and the demurrer to the first defense will be overruled.

REED *et al.* v. RAYMOND.

(Circuit Court, W. D. Pennsylvania. October 23, 1888.)

1. PLEADING—AFFIDAVIT OF DEFENSE.

An affidavit of defense is insufficient unless it sets forth explicitly all the facts necessary to constitute a substantial defense.

2. VENDOR AND VENDEE—PURCHASE-MONEY MORTGAGE—FORECLOSURE.

In a suit on a purchase-money mortgage the affidavit of defense set forth that the plaintiffs knew that defendant purchased the mortgaged premises to manufacture thereon iron and steel by a new process, and "the purchase was made upon the direct assurance, condition, and representation that natural gas would be immediately and continuously carried to and supplied to said premises in sufficient quantities for manufacturing purposes," by C. company, with which some of the plaintiffs were connected, and plaintiffs "knew that without the supply of such gas said purchase would not have been made;" but that natural gas had not been so furnished by C. company, or by any one, although said company had completed its lines, and was supplying gas to other manufacturing concerns. *Held*, that the affidavit of defense was insufficient to prevent judgment.

Sci. Fa. sur Mortgage. On rule for judgment for want of a sufficient affidavit of defense.

John P. Vincent, for rule.

S. Schoyer, Jr., *contra*.

ACHESON, J. This is a *scire facias* upon a mortgage given by the defendant to his vendors, the legal plaintiffs, for the balance of purchase

money of certain lands (having a manufacturing establishment thereon) which the latter sold and conveyed to the former. It appears from the affidavit of defense that the mortgage was assigned by the legal plaintiffs to the use plaintiffs, in consideration of the satisfaction by the latter of paramount liens which they held against the premises, the defendant executing a certificate of no defense. Whether the affidavit of defense states such facts as entitle the defendant, in the face of his said certificate, to defend upon the grounds set up against the assignees of the mortgage, for whose use the suit is prosecuted, I will not stop to inquire, but will proceed at once to consider whether the affidavit discloses any sufficient ground of defense. It is well settled that an affidavit of defense is insufficient unless it sets forth all the facts necessary to constitute a substantial defense. *Bryar v. Harrison*, 37 Pa. St. 233; *Marsh v. Marshall*, 53 Pa. St. 396. General averments amounting to legal conclusions will not do; the facts must be stated in order that the court may draw the proper conclusion. *Id.* For example, general allegations of fraud or of undue influence in procuring an agreement are not enough. *Sterling v. Insurance Co.*, 32 Pa. St. 75; *Matthews v. Sharp*, 99 Pa. St. 560. Nothing should be left to inference, for what is not stated in the affidavit must be taken not to exist. *Brick v. Coster*, 4 Watts & S. 494; *Peck v. Jones*, 70 Pa. St. 83; *Asay v. Lieber*, 92 Pa. St. 377. An affidavit of defense to a portion of a claim must state the amount admitted to be due. *Griel v. Buckius*, 114 Pa. St. 187, 6 Atl. Rep. 153. In an affidavit of defense setting up a breach of warranty of the quality of goods sold, the mere averment of a warranty, without more, is bad. The affidavit should disclose whether the warranty was express or implied, and should set forth its terms; and state when, by whom, and by what authority it was made. *Gould v. Gage*, 118 Pa. St. 559-565, 12 Atl. Rep. 476. Here the material portions of the affidavit of defense are in the words following:

"That the legal plaintiffs and the use plaintiffs knew that affiant was making said purchase for the purpose of carrying on therein the business of manufacturing iron and steel by a new process, and such purchase was made upon the direct assurance, condition, and representation that natural gas would be immediately and continuously carried to and supplied to said premises in sufficient quantities for manufacturing purposes; and that the Columbia Gas-Light & Fuel Company, then constructing its line, and with which the said Wheeler, or others of the plaintiffs, was connected, would so furnish and supply said gas; and said legal and use plaintiffs well knew that without the supply of such gas said purchase would not have been made. * * * But notwithstanding said condition and representation upon which affiant made such purchase, gas was not furnished to said property at any time, either by the Columbia Gas-Light & Fuel Company, or any other company or person, although said Columbia Gas-Light & Fuel Company have long since completed their said lines, and have been furnishing gas to other manufacturing concerns in Sharon and Middlesex."

Now, certain it is that the "direct assurance, condition, and representation" referred to are not contained in the mortgage sued on, and it is not alleged or pretended that they are to be found in the deed conveying the property to the defendant. Were they, then, verbal, or embodied in

some collateral writing? When were they made? Who gave the "direct assurance," or entered into the "condition," or made the "representation?" Was it one or other of the legal plaintiffs, or one of the use plaintiffs, or the attorney, referred to in another part of the affidavit, who acted both for the defendant and the use plaintiffs, or was it some different person altogether? Was the "condition" express or implied? What were its terms? If natural gas was not furnished, was the defendant to be recompensed, or was the sale to be rescinded at his election? Upon all these material points the affidavit of defense is wholly silent. As was said in *Marsh v. Marshall*, *supra*, so may it be said here, that "upon such a loose and inconclusive statement of part of the facts of a case no court would deem it prudent to base a judgment."

Again, according to the averment of the affidavit the natural gas was to be furnished and supplied not by the plaintiffs, or any of them, but by the Columbia Gas-Light & Fuel Company, "then constructing its line, and with which said Wheeler, or others of the plaintiffs, was connected." What this connection was, is not disclosed. It will be perceived, however, that no bad faith or misrepresentation is imputed to any of the plaintiffs. Indeed, the alleged "assurance," etc., (by whomsoever made,) related to something to be done in the future by the Columbia Gas-Light & Fuel Company. At the very utmost, then, the plaintiffs were only answerable for the refusal of that company to furnish and supply the needed gas. Now, the defendant contents himself with the cautious statement that no gas was supplied to him, although said company completed its lines, and has furnished natural gas to other manufacturing concerns. But he avoids saying that he put his manufacturing establishment in proper condition to receive natural gas, and he carefully refrains from averring that he ever notified or requested said company to furnish such supply, or that the company refused to furnish it.

Furthermore, the affidavit of defense does not allege that the defendant has sustained any damages whatever by reason of the non-supply of natural gas. Giving the utmost allowable effect to the averments of the defendant's affidavit, it shows only a partial failure of consideration susceptible of compensation in damages, if any loss was sustained. *Yard v. Patton*, 13 Pa. St. 278-282. But the defendant does not allege that he has suffered any actual damage. Certainly the affidavit of defense presents no case for the rescission of an executed contract. No agreement to rescind is set out, and no grounds are laid upon which a court would base a decree of rescission. *Stephen's Appeal*, 87 Pa. St. 202. In the opinion of the court, the affidavit of defense is incomplete, vague, and evasive in its statement of facts, and, under the authorities, altogether insufficient to prevent judgment. *City of Erie v. Butler*, 14 Atl. Rep. 153. And now, October 23, 1888, the rule to show cause why judgment should not be entered for want of a sufficient affidavit of defense, is made absolute; and it is ordered that judgment be entered in favor of the plaintiffs for the amount of their claim, etc., as set forth in their statement.

MEALMAN v. UNION PAC. RY. CO.

(Circuit Court, D. Colorado. January 10, 1889.)

MASTER AND SERVANT—NEGLIGENCE OF VICE-PRINCIPAL—PLEADING.

In an action against a railroad company for the alleged negligent killing of an engineer in defendant's employ, by decedent's engine colliding with another in the yard, a complaint which avers that engineers were authorized by a rule of the company to move their engines only on the signal of the "helpers," and that decedent saw the "helper" of the other engine, who gave no signal, but that the other engine was moved in obedience to a signal of the "master mechanic, having sole control of the yard," is demurrable, as not showing that such master mechanic occupied a position rendering defendant liable for his negligence.

At Law. On demurrer to complaint.

Browne & Putnam, for plaintiff.

Teller & Orahood, for defendant.

BREWER, J. In the case of Mealman against the Union Pacific Railway Company there is a demurrer to the complaint. The complaint charges that Mealman, the deceased, was an engineer in the employment of the defendant in its yards, running a switch-engine; that, driving that engine towards the round-house, there was a collision between it and another engine driven by another employe of the defendant, the collision resulting in the death of Mealman. His widow is the plaintiff in this suit. The complaint avers that engineers were authorized to move their engines only at the direction of the helpers, and upon their signals, and that such was the rule of the company; that Mealman saw the helper of the other engine, and saw no signal, and that in fact he gave no signal, but the engineer of that engine started his engine onto the track upon which Mealman was in obedience to the signal of some other party. Now, if it stopped there, it would be a case where there would be the negligence of one engineer causing injury to another engineer in the operation of two engines at the same point. Within the rule laid down in *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, and within the case of *Howard v. Railroad Co.*, in which I wrote an opinion, 26 Fed. Rep. 837, there would be no liability on the part of the defendant, it being one employe's negligence causing injury to another. Beyond that the complaint goes on to aver that the party who gave the signal in obedience to which the engineer of the other engine started his engine and brought on the collision was the master mechanic, having sole control of the yard; so the case presented is, where one having sole control of a yard issues an order in disregard of the rules of the company, whether that act is negligence imputable to the company. There is a line of cases, and there is a doctrine which was recognized by my predecessor, Judge McCrary, to the effect that the mere matter of subordination determines the liability of the employer; that wherever one party stands subject to the orders of another party whom the company employs, the negligence of the latter is the negligence of the company; so that, if a section boss is guilty of

negligence whereby a section hand working under him is injured, the company is responsible. In the case of *Ross v. Railroad Co.*,¹ he laid down that doctrine in so many words. The case went to the supreme court, and, while the judgment was affirmed, that court declined to commit itself to that doctrine; and, while it sustained the judgment, did it upon the theory that the party guilty of negligence in that case was the conductor,—one having the sole control and management of a moving train; and said that by virtue of the large control and great responsibility vested in him it was proper to hold him as a representative of the company, its *alter ego*, a sort of vice-principal, and his negligence the negligence of the company. The other proposition has never yet been decided by that court. I know that intentionally it declined to pass upon it in that case. I do not believe the proposition as laid down by my Brother McCrary is law. I think it is necessary, not merely that there should be subordination, but that the party in control should have such a departmental control—such an extended authority—that the court may justly say that he represents the principal, that he is a vice-principal: the general superintendent, the superintendent of a division, superintendent of roads and bridges, any party who has a department under his control; and the supreme court says that a conductor stands in the category.

It does not appear from the allegations of this complaint further than that this master mechanic had sole control of this yard. Whether it was a yard with one switch or two, a side track or two; whether it was a trifling matter or a large and extensive responsibility; whether this sole control was limited to the repairs of engines or things of that kind; or whether it went to the entire business of a yard of such size and with so extensive works and duties that the company is bound to put in charge some man of experience, information and character,—one for whose acts in all respects it should be held responsible,—is not sufficiently disclosed by a mere statement that the party was a master mechanic, having sole control of this yard. The size of the yard, the amount of responsibility or vastness of the business intrusted to him, the extent of his control, is not disclosed. I do not mean to say that he does occupy such a position that he cannot properly be considered as in control of a department, so that the company may be responsible. I simply hold that the complaint as it stands is defective in that respect, and the demurrer will be sustained.

¹8 Fed. Rep. 544.

BLISS v. UNITED STATES.

*(Circuit Court, E. D. Missouri, E. D. January 2, 1889.)***1. UNITED STATES DISTRICT ATTORNEYS—COMPENSATION—RES ADJUDICATA.**

A decree by consent in an action brought by the government, taxing the district attorney's fees at a given sum, is not conclusive that the district attorney is entitled to the amount taxed as against the government.

2. SAME—RIGHT TO COMPENSATION—INTERNAL REVENUE TAX—ENFORCEMENT OF LIEN.

An action to enforce the statutory lien for internal revenue taxes alleged to have been evaded by defendant is "a civil action in which the United States are concerned," and which it is the duty of the district attorney to prosecute under Rev. St. § 771.

3. SAME—AMOUNT OF COMPENSATION.

For prosecuting such action the district attorney is entitled to 2 per centum of the amount collected or realized, as provided by section 825.

4. SAME—EXCESSIVE ALLOWANCE—AUTHORITY.

Authority to settle the case on payment of a given sum and all costs is not authority to the district attorney to retain, as against the government, the excess of his fees, as taxed, over the amount allowed to him by statute.

5. SAME—CONSENT OF COMMISSIONER OF INTERNAL REVENUE.

By consenting to the taxation of a greater fee in favor of the district attorney than the statute allows, the commissioner of internal revenue cannot preclude the government from claiming the excess.

6. SAME—RIGHT OF THE UNITED STATES.

The excess of fees taxed and received by the district attorney over the amount allowed by statute may be treated by the government as moneys in his hands belonging to it.

7. SAME—SET-OFF AND COUNTER-CLAIM.

In a suit by the district attorney for compensation for other prosecutions, the government may set off such excess under the act of March 3, 1887, providing for bringing suits against the United States; section 1 giving jurisdiction to determine set-offs on the part of the government, and section 6 requiring a notice of set-off to be filed.

At Law.

Action by William H. Bliss against the United States for compensation for services in prosecuting certain "land fraud cases." 24 St. at Large, p. 505, § 1, provides "that the court of claims shall have jurisdiction to hear and determine the following matters: * * * All set-offs, counter-claims, claims for damages, * * * or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court. * * *" Section 2 confers jurisdiction on the district and circuit courts, and by section 6 "it shall be the duty of the district attorney * * * to file a plea, answer, or demurrer on the part of the government, and to file a notice of any counter-claim, set-off," etc.

W. H. Bliss, pro se, and Cochran, Dickson & Smith, for plaintiff.

Thomas P. Bashaw, U. S. Dist. Atty., for defendant.

THAYER, J. The seventh section of "An act to provide for bringing suits against the government of the United States," approved March 3, 1887, under which this suit is brought, makes it the duty of the court

in this class of cases to file a written opinion "setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case. * * *" 24 St. at Large, 505, 506. In accordance with the statute the facts are stated as follows:

Plaintiff was United States district attorney for the Eastern district of Missouri from about the year 1876 until about November, 1886, and in that capacity, during his term of office, filed two bills in equity in the name of the United States against the Pacific Railroad of Missouri *et al.*, to enforce against certain property, theretofore owned by the Pacific Railroad of Missouri, the statutory lien for internal revenue taxes alleged to have accrued against and to have been evaded by that company from the year 1864 to 1871, inclusive. Various steps were taken by plaintiff herein and various services were rendered by him in the prosecution of said suits in the United States circuit court for the Eastern district of Missouri, from the date of their institution therein in the years 1876 and 1879, respectively, until the termination of the litigation on September 21, 1881. On the day last named the litigation was concluded by an entry of the following nature:

"This day comes the district attorney, on behalf of the United States, and also comes the defendant, by Thomas J. Portis, Esquire, its attorney, and by consent it is ordered that these causes be, and they are hereby, dismissed on the payment by defendant of the sum of one thousand dollars, and the following fees and costs. * * *"

"Case No. 842, in United States circuit court. *United States vs. Pacific R. R. et al.* Marshal's costs, \$31.44; clerk's costs, \$310.90; U. S. commissioner, 50 cts.; district attorney's fee, \$1,500.00; costs of engrossing bill, \$78.00; costs of appeal to U. S. supreme court, \$97.95."

"Case No. 1510, in United States circuit court. *United States vs. Pacific Railway et al.* Clerk's costs, \$60.05; marshal's costs, \$3.24; copy, \$50.00; attorney, John P. Ellis, \$500; district attorney, \$1,044.92."

"And thereupon said district attorney, in open court, acknowledges satisfaction of the above judgment, fees, and costs."

Prior to the entry of the foregoing decree an offer had been made to (and accepted by) the commissioner of internal revenue to compromise and settle the suits on payment by the defendant of \$1,000, and "all costs in both suits." From the decree aforesaid no appeal was taken, nor was it subsequently vacated or modified. In his emolument return for the six months ending December 31, 1881, required to be made by section 833, Rev. St. U. S., the plaintiff, at the request of the department of justice, charged against himself on account of the fees allowed to the district attorney by the foregoing decree the sum of \$2,500. Including said item, his aggregate fees and emoluments for the year 1881 amounted to \$6,735, leaving him, by virtue of sections 835, 844, Rev. St. U. S., indebted to the government in the sum of \$735, for excess of fees and emoluments over the maximum compensation allowed him by law. On April 12, 1881, plaintiff was retained by the attorney general of the United States as special assistant attorney to the attorney general, to aid in the prosecution of certain criminal cases pending in the

state courts of Missouri, Ohio, Pennsylvania, and other states, which cases grew out of alleged frauds perpetrated under the land laws of the United States, and are commonly designated as "land fraud cases," and in the due prosecution of which the government was interested, or deemed itself interested. Plaintiff was duly commissioned as such assistant attorney, and took the oath on April 25, 1881, and did thereafter, between the last date and April 15, 1883, prosecute in the courts of the states above named a large number of the cases above referred to. For services so rendered plaintiff presented to the attorney general on April 21, 1883, an account in the sum of \$4,890, giving credit thereon for the sum of \$1,000 theretofore paid, and claiming a balance of \$3,890. On April 23, 1883, the attorney general approved the claim for the sum of \$2,500, and referred the same to the first auditor of the treasury, to be paid from the United States attorneys' fund for the year 1883. To the claim in question was appended a certificate of the attorney general that the services embraced in the claim had been rendered, and that the same could not be rendered by the attorney general, or solicitor general, or officers of the department of justice, or district attorneys. Said account in the sum of \$2,500 was adjusted by the first auditor on May 3, 1883, and found to be due the plaintiff, and was certified to the first comptroller of the treasury for his decision thereon. Said comptroller also approved the claim in the sum of \$2,500, but declined to certify the same to the attorney general, so that a requisition for a treasury warrant might be drawn, and the claim duly paid. The reasons assigned by the comptroller for his action in that behalf are stated at length in *Extra Fee Case*, 4 Lawr. Comp. Dec. 422-430. In substance it may be said that, while conceding that the sum of \$2,500 was justly due and properly allowed to the plaintiff for services rendered, he ruled that the fees allowed to the plaintiff by the decree of the United States circuit court for the Eastern district of Missouri, in the suits for internal revenue taxes, hereinbefore referred to, were not fees and emoluments of his office, although allowed as such by the court, and so returned by direction of the department of justice, as before stated; but that the sum so allowed, aggregating \$2,544.92, was money belonging to the United States, and was had and received by plaintiff to its use. The comptroller accordingly directed the sum of \$2,500, found to be due to the plaintiff as a fee in the "land fraud cases," to be appropriated and "carried to the credit of the internal revenue collections," to make good the sum of \$2,500 allowed to and collected by plaintiff as a fee in the internal revenue suits. In this case plaintiff sues to recover the fee of \$2,500 allowed him as aforesaid for services in the "land fraud cases." By way of set-off the government pleads that "plaintiff is indebted to it in the sum of \$2,500 for money had and received to its use," meaning, of course, the money that had been paid to him as a fee in the internal revenue cases before mentioned. The court records do not show that the district attorney's fee allowed in the internal revenue cases was paid into the registry of the court. The same appears to have been paid directly to the plaintiff. Plaintiff's right to sue under the act of March 3, 1887, for

what is due to him on a claim that has been duly audited and allowed against the United States, but not actually paid, was heretofore affirmed on a plea to the jurisdiction. *Bliss v. U. S.*, 34 Fed. Rep. 781.

CONCLUSIONS OF LAW.

1. The government is legally indebted to plaintiff in the sum of \$2,500 for services rendered in prosecuting the "land fraud cases."

2. The decree in the revenue cases, above recited, determines conclusively, as between the United States and the Pacific Railroad Company of Missouri *et al.*, that the fees taxed in favor of the district attorney in those suits were properly taxable. The court had jurisdiction of the parties and the subject-matter, including therein the matter of the taxation of fees and costs. It may have erred in making the allowance in question to the district attorney, but if there was a mistake in that respect the judgment is not on that account void, but is merely erroneous. As between the parties to the suits the allowance in favor of the district attorney is no longer open to question. But the decree entered by consent in those cases does not conclusively establish, as between the United States and the district attorney, that the latter officer is entitled to the entire fee allowed him therein. The district attorney was not a party to those suits, and a judgment or decree is only conclusive as between parties to the record and privies. If the district attorney could be regarded as in any sense a party to those suits, his position was not adverse to the government, as he was its attorney. It is generally held that parties to a judgment are not bound by it in a subsequent controversy between each other, unless they were adversary parties. Thus, if a judgment is recovered against two or more defendants, they may, as between themselves, litigate the question as to the proportion of the judgment that each ought to pay; and, in like manner, if a judgment is recovered by several plaintiffs, they are not debarred from determining by further litigation among themselves in what manner the recovery ought to be divided. *Cox v. Hill*, 3 Ohio, 412; *Duncan v. Holcomb*, 26 Ind. 378; *Lloyd v. Barr*, 11 Pa. St. 41; *Wilson v. Mower*, 5 Mass. 407; *Freem. Judgm.* § 158. I conclude, therefore, that the question as to the amount of the fee which the district attorney is entitled to claim of the United States for prosecuting the revenue suits was not litigated in those suits as between the government and the district attorney, and that it is a question still open for consideration, notwithstanding the decree therein.

3. There can be no doubt that it was the plaintiff's duty to prosecute the revenue suits in question, by virtue of section 771, Rev. St. U. S. They were "civil actions in which the United States were concerned," within the meaning of that section. It is also apparent that there is no provision of law fixing the district attorney's fee for services in those cases, unless it be section 825, Rev. St. U. S., or section 824, immediately preceding. I am of the opinion that by virtue of the general language employed in section 825, allowing district attorneys "two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, conducted by them, in which the United

States is a party," the plaintiff may rightfully claim (as he appears to do) that his fee in the suits against the Pacific Railroad of Missouri *et al.*; so far as the government is concerned, is determined by that section.

4. The next question to be determined is whether plaintiff can retain, as against the United States, a larger fee than the law allows; such larger fee having been taxed in his favor in the manner before stated; and already paid to him. This would be a simple question if the relation existing between the plaintiff and the government was that which exists between an ordinary client and attorney. In that event, the fee collected of the adverse party under the decree entered by consent could be retained by the attorney only in the event that the agreement of compromise, contemplating the taxation and payment of such fee by the adverse party, had been fully and fairly explained to the client, and assented to by him in advance of the compromise. It is familiar law that the relation existing between client and attorney is in the highest degree of a confidential and fiduciary character. *Valentine v. Stewart*, 15 Cal. 401; 1 Perry, Trusts, § 202, and cases cited; 1 Story, Eq. Jur. §§ 310-313. The utmost good faith (*uberrima fides*) must govern all of the attorney's dealings with his client. If a plaintiff in a suit merely authorizes his attorney to compromise the same on the payment by the defendant of a given sum "and all costs," and thereupon the money is paid, and by agreement with the defendant a larger sum than the law permits is taxed against the defendant as a fee in favor of plaintiff's attorney, undoubtedly the plaintiff, when he learns of the transaction, may claim as his own whatever his attorney has received from the opposing party in excess of taxable fees. The right of the client to recover money received by his attorney under the circumstances last stated is not dependent to any extent upon the motives which may have actuated the attorney, nor upon the question whether the amount taxed in his favor is a reasonable fee, or otherwise. The law does not allow an attorney to stipulate with an opposing party for the payment of his fees, in whole or in part, unless he acts with the knowledge and assent of his client. Hence, if an attorney, without the knowledge of his client, by arrangement with an opposing party, secures from him any fees in excess of what are legally taxable in his favor, the law regards him as holding what is so obtained in trust for his client, and it is optional with the client to demand the same as a part of the fruits of the litigation. 1 Perry, Trusts, § 206, and cases cited; Story, Ag. (8th Ed.) § 211. In the case under consideration plaintiff was not only attorney for the government in the revenue cases, but he was at the same time a public officer, whose fees were regulated by statute, and not by private contract. This fact renders it more difficult for him to maintain his right to the fees taxed in his favor, since a public officer cannot lawfully demand or receive greater compensation for official services than the law allows. *Freeman v. Henry Co.*, 32 Mo. 446. By accepting office, a public officer impliedly agrees to discharge all the duties incident thereto, for such compensation as the law prescribes. More he cannot lawfully demand, no matter how inadequate the compensation may be. It was at least incumbent on the plaintiff to

show that the commissioner of internal revenue (in whom was vested the power to compromise the revenue suits) was advised, before the compromise was consummated by a dismissal of the suits, that the compromise agreement contemplated the taxation of fees in favor of the district attorney in the sum of \$2,544.92, to be paid by defendants, and that he assented to such arrangement. Proof to that effect would be requisite, as before shown, to enable plaintiff to retain the fee, if the commissioner of internal revenue had been, as to the suits in question, a merely private litigant, and the plaintiff his attorney in the prosecution of the same. But the evidence fails to show such notice and assent on the part of the commissioner. It merely shows that he authorized a settlement on the payment to the government of \$1,000 "and all costs in both cases." This means, of course, legal costs. I do not base my decision, however, on the ground last indicated. I presume that the plaintiff could show that the commissioner of internal revenue assented to the taxation of the fees in question before the compromise was fully effected, or that he subsequently ratified the action of the district attorney. According to my view of the law, however, the commissioner of internal revenue could not, by consenting to the taxation of a greater fee in favor of the district attorney than the law allowed him, thereby preclude the government from asserting its right to so much of the fee as was excessive. I conclude that, as soon as the fee was paid to the district attorney by the defendant in the revenue suits, so much of it as was in excess of what the law allowed for his services inured to the benefit of the United States. The government was forthwith at liberty to treat what was so paid to its attorney in excess of his lawful fees as money in his hands belonging to the government.

5. The right of the government to set off what is due to it from the plaintiff against his fee in the "land fraud cases," is clearly recognized in the first and sixth sections of the act under which this suit is brought. 24 St. at Large, *supra*. The amount due on the set-off is not \$2,500, however, as pleaded. Plaintiff is entitled to a credit thereon in the sum of \$70.89, being 2 per cent. on \$3,544.92, the total amount realized by the government in the revenue suits. If he has already paid to the government the sum of \$735, shown to be due by his emolument return for the year 1881, on account of fees received for that year in excess of the maximum compensation allowed him by law, he is also entitled to a further credit in that amount. Additional proof will be received as to whether the sum of \$735 has been paid to the government, and judgment will then be entered in accordance with the foregoing views.

JUNGE v. HEDDEN.

(Circuit Court, S. D. New York. January 9, 1889.)

1. CUSTOMS DUTIES—CLASSIFICATION—DENTAL RUBBER.

The article known as "Dental Rubber," and used for making the plates in which false teeth are set, is dutiable at 25 per cent. *ad valorem* under Schedule N of the tariff act of March 3, 1883.

2. SAME—CONSTRUCTION OF TARIFF ACTS—"ARTICLE."

The word "article," as used in tariff acts, is not to be restricted to articles put in a condition for final use, but is used in a broad sense, and covers equally things manufactured, things unmanufactured, and things partially manufactured.

(Syllabus by the Court.)

At Law. Action to recover back customs duties.

The plaintiff in 1885 imported into the port of New York certain goods composed of India rubber with an admixture of sulphur and coloring matter, and known as "Dental Rubber," and used for the manufacture of the plates in which false teeth are set. The defendant, as collector of customs, classified them for duty at 25 per cent. *ad valorem* under the clause in Schedule N of the act of March 3, 1883, imposing that rate of duty upon "articles composed of India rubber, not specially enumerated or provided for in this act." Paragraph 454, Tariff Index, new. The plaintiff, by an alternative protest, claimed that the importations were free, either actually or by similitude, as "India rubber, crude, and milk of," or that they should pay only 20 per cent. *ad valorem* as a non-enumerated manufacture by virtue of section 2513 of the act of March 3, 1883. The testimony on one side and the other was substantially to the same effect, to-wit, that the articles in question were known in trade and commerce of this country at the time of the passage of the act and since as "Dental Rubber," and used exclusively by dentists for the uses above indicated; that there was prior to and on March 3, 1883, and has been since, an article known in trade and commerce of this country under the name of "Crude Rubber" which is not this article; that crude rubber is put to many uses other than those of dentists; that the importations in question, in the condition imported, are ready to go to the dentist for manipulation by him; that, commercially speaking, it has been spoiled for any other use; and that any further manipulation or manufacture prior to that applied to it by the dentists would unfit it for their purposes.

Stephen G. Clarke and Charles Currie, for plaintiff.

Stephen A. Walker, U. S. Atty., and Macgrane Cox, Asst. U. S. Atty.

LACOMBE, J., (orally, after stating the facts as above.) Descriptive terms applied to articles of commerce are of course to be understood according to the acceptance given to them by commercial men in our own ports at the time of the passage of the act in which they are found. Under the testimony, therefore, these importations are not "crude rubber," or

"milk of rubber," enumerated on the free list, (paragraph 724;) and in fact the plaintiff, as I understand him, does not contend that they are. He claims, however, that under the similitude clause they are to be classified with crude rubber, and should thus pass free of duty. In order to entitle them to the provisions of the similitude clause, (section 2499,) they must be non-enumerated. Defendant contends that they will be found enumerated in paragraph 454: "Articles composed of India rubber, not specially enumerated or provided for in this act, twenty-five per centum *ad valorem*." It was at this rate that the collector assessed and collected duty. If they are within the provisions of this paragraph, then they are not non-enumerated, and the similitude clause does not apply. Plaintiff contends that the paragraph last quoted should be restricted to manufactured articles, to materials which are put in such condition that they are ready for final use. The word with which the paragraph is begun is "articles," and this word we find repeatedly used in the statute, if not in contradistinction to, at least not as synonymous with, "manufactures." In the very schedule in which paragraph 454 appears we find paragraph 441: "Gutta-percha manufactures, and all articles of gutta-percha," and in paragraph 463 we find "all manufactures and articles of leather." What, then, does the word "article" mean? Is it to be restricted to manufactures, to articles put in condition for final use, or is it not? The ordinary definition of the word "article" is an extremely comprehensive one. In the primary meaning, as given in the dictionaries, it designates one thing of many, one item of several, a portion of complex whole. The best source, however, to which we should apply to determine the definition of a word used in a statute is the statute itself. It is not to be assumed that the same word is used in the statute with two different meanings, unless that is made clearly apparent by the connection in which the word is used. In section 2500 of the Revised Statutes, which is part of the tariff law, the word "article" is used as comprehending a growth, a product, or a manufacture. Section 2502, which prescribes duties, begins: "There shall be levied, collected, and paid upon all articles imported from foreign countries," and then follows an enumeration from the crudest raw material to the most finished work of human industry. The free list, section 2503, also begins: "The following articles, when imported, shall be free from duty." It seems, then, from the act itself, that the word "articles" is used in a broad sense; that it covers equally things manufactured, things unmanufactured, and things partially manufactured. That being so, I find nothing in the context of this paragraph to qualify the meaning which is indicated by its use elsewhere in the act, and am of the opinion, therefore, that the word "articles" at the beginning of the paragraph is sufficiently broad to cover the goods in question, if they are composed of India rubber. It appears that there is an admixture here of sulphur and of coloring matter, and to a considerable extent; but it has not changed the character of the article. It is still rubber; and in view of the fact that the act of 1883 changed the former paragraph, as it stood in the Revised Statutes, by striking out the word "wholly" between the word "composed" and

the words "of rubber," I am of the opinion that the articles in suit are fairly within the enumeration of paragraph 454. Being enumerated, they are not within the operation of the similitude clause. For that reason, I shall direct a verdict for the defendant. Exception to the plaintiff.

MORRIS v. ROBERTSON.

(Circuit Court, S. D. New York. November 26, 1888.)

CUSTOMS DUTIES—EXCESS OF APPRAISEMENT OVER ENTRY VALUE—PENALTY.

Although the articles composing an invoice may be dissimilar and known by different trade names, still, if they belong to the same class, and are grouped together in the tariff acts as dutiable under their class name at the same rate, and are valued in the entry only at a lump sum for the entire importation, the penalty imposed by section 2900 of the Revised Statutes is not incurred unless the appraisement of the importation as a whole exceeds by 10 per cent. or more the value declared on the entry. *Schmeider v. Barney*, 6 Fed. Rep. 150, distinguished.

(Syllabus by the Court.)

At Law. Action to recover back customs duties.

In July, 1882, the plaintiff made an importation into the port of New York, as part of which there was a "packed package" containing nine lots of precious stones, which were described upon the invoice as follows: (1) 125 k. common cat's-eyes, lot star stones, 2 lots fancy stones, 1 King topaz, 6 King topazes; (2) lot matrix opals; (3) 6 Labrador heads; (4) 4 lots wood cat's-eyes; (5) 1 ruby; (6) 110 k. spinels; (7) 113 $\frac{1}{4}$ k. spinels; (8) 51 k. sapphire and Siam rubies; (9) 20 $\frac{1}{4}$ k. sapphires. These goods were classified for duty by the defendant as collector of customs at 10 per cent. *ad valorem* as "precious stones," under the paragraph beginning with those words in Schedule M of section 2504 of the Revised Statutes. The correctness of this classification was not questioned. A reappraisement was ordered by the collector, on which it was found that three of the above nine lots were undervalued more than 10 per cent.; lot 1 being undervalued 14 per cent., and lots 6 and 7 each 20 per cent. The aggregate undervaluation of all the lots taken as a whole was but 8 and 2-10 per cent. On the three lots found to be undervalued more than 10 per cent. the defendant, as collector, assessed an additional duty of 20 per cent., acting under authority of section 2900 of the Revised Statutes, whereas the plaintiff, protesting, claimed that this additional duty was not properly assessed, for the reason that the aggregate undervaluation of the invoice did not amount to 10 per cent. The value, as declared upon the entry, was a lump sum, being the aggregate value as it appears upon the invoice; and, as compared with this lump sum, the undervaluation as above stated was but 8 and 2-10 per cent. The testimony was uncontradicted that, whereas all the items mentioned in the invoice were placed commercially in the class of pre-

cious stones, still that they were known in trade and commerce in this country each by its specific trade name, as it appears upon the invoice; that they were of different colors and appearances, and varied much in price.

Stephen G. Clarke and Charles Curie, for plaintiff.

Stephen A. Walker, U. S. Atty., and Macgrane Coze, Asst. U. S. Atty., cited Schneider v. Barney, 6 Fed. Rep. 150.

LACOMBE, J., (*orally, after stating the facts as above.*) Whether or not the penalty provided for in section 2900, Rev. St., is to be exacted from an importer is to be determined by a comparison of the value declared in the entry with the value found upon appraisement. Although articles may be dissimilar, and known by different trade names, still, if they belong to the same class, and are grouped together in the tariff acts as dutiable under their class name at the same rate, and are valued in the entry only at a lump sum for the entire importation, the penalty is not incurred unless the appraisement of the importation as a whole exceeds by 10 per cent. or more the value so declared on the entry. The case decided by Judge SHIPMAN, and referred to on the argument (*Schneider v. Barney, 6 Fed. Rep. 150,*) does not apply to the case at bar, because in that case the different varieties were apparently separately valued upon the amended entry, so that comparison of the declared value of each variety with the appraiser's report was practicable. Verdict must be directed for the plaintiff.

UNITED STATES v. TAYLOR.

(*District Court, E. D. Michigan. December 31, 1883.*)

POST-OFFICE—EMBEZZLEMENT OF LETTER.

An employe of the post-office department can only be convicted of embezzling such letters as are, at the time, a proper subject of deposit in the mail; and where a postmaster received \$15 in paper money and \$3 in silver, which were handed to him in his office, with a request that he send it in a registered letter, and he took the money, put it in an envelope, which he addressed, wrote a letter to accompany the remittance, delivered to the sender the usual receipt for a registered letter, received the fee for registration, and said it would be all right; but there was no evidence that the silver money had been exchanged for paper, or that the letter was ever stamped or sealed, or put in the special envelope used for registered letters.—it was held that his conviction for embezzling a "letter" should be set aside.

(*Syllabus by the Court.*)

On Motion for New Trial. Indictment for embezzlement of a letter. Defendant, who was postmaster at Reese, a small office in Tuscola county, was convicted of the embezzlement of a letter, and the stealing of its contents, under the following circumstances: The sender of the letter brought the defendant \$15 in paper money and \$3 in silver, and

handed it to him in his office, with the request that he send it in a registered letter to one Williams in Rochester, N. Y. He took the \$18, put it in an envelope, which he addressed, wrote a letter to accompany the remittance, and delivered the sender the usual receipt for a registered letter, received the fee for registration, and told her it would be all right. The money disappeared. The testimony indicated that the letter was never sent, and the jury found that the defendant had embezzled it, and convicted him. His counsel moved for a new trial, upon the ground that he was guilty only of a breach of trust, and not of a violation of the federal statute.

Charles T. Wilkins, Asst. U. S. Dist. Atty.

Thomas Hislop, for defendant.

BROWN, J. The indictment charges the prisoner with taking and embezzling a certain letter which came into his possession as postmaster, was intended to be conveyed by mail, and which contained \$18 in money, with intent to steal and appropriate the same to his own use. The question raised by the motion is whether the admitted facts show that defendant was guilty under Rev. St. § 5467, of embezzling the letter, or simply of embezzling money intrusted to him as the agent of Mary Bauer, the witness, for the purpose of being sent in a letter; in other words, whether the federal jurisdiction had attached when the embezzlement took place. Upon the trial I held, *pro forma*, that the delivery of the receipt and payment of the registration fee were sufficient evidence that the thing embezzled was a registered letter.

Upon reflection, however, I am satisfied that the defendant ought not to have been convicted under this statute. It is true that the money was delivered to him and placed by him in an envelope, which he addressed to Williams, and that he gave a receipt, and was paid the usual fee, as for a registered letter. But a portion of the money was in silver coin, and it was evidently contemplated that he should exchange it for paper money, and there is no evidence that the letter was ever stamped or sealed, or put in the special envelope used for registered letters. So long as anything remained to be done to render the envelope mailable matter,—that is, a proper subject of deposit in the mail,—the postmaster was acting merely as the agent of the sender, and the envelope was not a letter within the meaning of the statute. In placing the money in the envelope, and in exchanging the silver for paper money, which would be necessary before the envelope could be mailed, the postmaster was clearly acting as the agent of the sender, and the package was not such a one as he could properly receive in the discharge of his official duty. The execution of the receipt, and the payment of the registry fee, were undoubtedly *prima facie* evidence of the delivery of a registered letter, but a receipt is never conclusive, and may be explained by parol evidence. I am satisfied the jurisdiction of the federal court had not attached when the money was embezzled, and that the conviction should be set aside, and defendant discharged.

FALK v. T. P. HOWELL & Co.

(Circuit Court, S. D. New York. December 20, 1888.)

COPYRIGHT—PHOTOGRAPHS—INFRINGEMENT.

A copyright of a photograph artistically designed to illustrate a musical composition is infringed by stamping an imitation in raised figure on leathern chair bottoms and backs.

In Equity.

Bill by Benjamin J. Falk against T. P. Howell & Co., a corporation, to restrain the infringement of a copyrighted photograph. The plaintiff is a photographer, and has copyrighted a picture of Geraldine Ulmer as "Yum Yum," in which she is represented as sitting upon the horn of the moon, while uttering the words, "We're very wide awake, the moon and I," it being intended thereby to illustrate a song sung by Miss Ulmer in the "Mikado." Defendant is engaged in the manufacture of chairs, and stamped a raised figure, like the picture, on the leather of which the bottoms and backs of chairs are made. The picture was illustrative of the song, not only by the combination of the figure of the girl with that of the moon, but also by the representation of the moon as a face, the features of both bearing an expression appropriate to the words of the song.

Isaac N. Falk, for complainant.

William C. Wallace, for defendants.

COXE, J. Since the decision of the supreme court in *Burrow-Giles Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. Rep. 279, there can be no doubt that a photograph which has the artistic merits possessed by the complainant's photograph is the subject of a copyright. The only question is, do the defendants infringe? That their design is copied directly from the copyrighted photograph is not denied, but it is urged that infringement is avoided, because it is larger than the photograph, and is stamped on leather, and is intended for the bottom or back of a chair. It is thought that this proposition cannot be maintained. Differences which relate merely to size and material are not important. They may affect the question of damages, but not the question of infringement. The complainant is entitled to the usual decree.

YOUNG *et al.* v. FOERSTER.

(Circuit Court, S. D. New York. January 8, 1889.)

1. PATENTS FOR INVENTIONS—WHO ARE INFRINGERS.

One who acts solely as employe, and has no pecuniary interest in the product of his labor, and is simply employed by the owner to supervise the work of general repair, cannot be charged as an infringer on account of his connection with the machine so repaired.

2. SAME—REPAIRS BY LICENSEE.

The licensee of a patented machine has the right to replace parts which wear out, and, so long as the identity of the machine is not destroyed, to discard useless parts and add new ones to improve its action.

In Equity.

Bill for infringement of patent, brought by Hugh Young and the Young & Farrel Diamond Stone-Sawing Company against Emanuel Foerster. On final hearing.

Edwin H. Brown, for complainants.

Arthur v. Briesen, for defendant.

COXE, J. This is an action of infringement, based upon letters patent No. 224,760, granted to Hugh Young, February 17, 1880, for an improvement in machines for sawing stones. In August, 1879, John R. Smith purchased of Young, for \$4,700, a machine embodying the patented features, and received a license to operate it under patents then owned by Young, and under all patents for improvements on the same which thereafter might be owned by him. On the 8th of July, 1882, Smith entered into another agreement whereby, for the additional sum of \$300, he received a license to use the machine according to the patent in suit, which had been granted since the purchase, and to embody any improvement covered by that patent or any other patent owned or controlled by Young. During the period in controversy Smith was the owner of the machine. The defendant was in Smith's employ, receiving \$3.50 daily wages. He never used the machine, except as an employe of Smith. He had no interest in or control over it. Soon after it was purchased, it broke down, and since that time has been frequently repaired. No machine similarly constructed can run for more than a month without undergoing repair, which involves putting in new parts and changing old ones. In the spring and summer of 1886, on account of the removal of Smith's place of business, a more thorough overhauling was necessary. At that time new feed-screws, fly-wheels, and sash-heads were put in; the old ones being worn out. The crank-shaft and some little bolts, pins, and nuts were worn out also, and new ones were substituted. The slides on which the saw-sash runs were lowered about two feet, and all the attachments for imparting a lift or push motion to the blade were left off. Lift motion is now imparted to the sash by an incline at each end of the guide bars. The defendant had supervision of this work as employe of Smith. The complainants contend that what

was done in 1886 constitutes an infringement. Many of the parts just mentioned, namely, "the large screws at the sides, the nuts thereon, the sash and crank-shaft," had been renewed from time to time prior to 1886, with the knowledge of the patentee. The defenses are: *First*, that in doing the acts of which infringement is predicated the defendant acted merely as the agent of John R. Smith; *second*, that Smith had a right to use and repair the machine, and that the work done by the defendant was necessary to put it in order; *third*, that the patent is void for lack of novelty.

The defendant did not use or vend the patented machine, and it can hardly be said, upon this evidence, that he made it, assuming now that an entirely new machine was constructed. The defendant acted solely as agent for Smith. He received his daily wages only. He made nothing by the transaction. The complainants expressly waive an accounting. The parts renewed were purchased of outside dealers, and put into the machine by their workmen. Very little of the manual labor was done by the defendant. He acted simply as superintendent. All that he did was done for Smith's benefit, and under Smith's directions. He was there to protect Smith's interests, and see that the work was properly done. This was all. The proof fails to establish infringement, and brings the case within the following authorities: *Hussey v. McCormick*, 1 Fish. Pat. Cas. 509; *Estes v. Worthington*, 30 Fed. Rep. 465; *Nickel Co. v. Worthington*, 13 Fed. Rep. 393; *Delano v. Scott*, Gilp. 498.

But is any one responsible as an infringer? Had not the owner a right to repair and improve the machine in the manner stated? The machine had a capacity to saw a stone 12 feet long and 5 feet high. It was bulky and expensive. Smith paid the patentee \$5,000 for it, and the right to operate it with all the improvements covered by all the patents controlled by the complainants. When the machine broke down, as it frequently did, Smith was not required to abandon it, and procure a new one. He was at liberty to repair and improve it within the limits of his contracts. These repairs, which were often necessary, were made with the consent of the patentee. The repairs complained of consisted, principally, in restoring portions which were worn out. True, other portions were taken off, or their use discontinued. But one who has a license to use the whole of a machine does not become an infringer because he uses a part only. So long as the identity of the machine is not destroyed, its owner has a right to repair it,—to discard useless parts, and add new ones, which may improve its action. These alterations, though they changed somewhat the mode of operation, were rendered necessary, because equivalent parts had become worn out. Their addition did not make it a new machine. By putting the old machine in working order its owner did what he had a right to do. *Gottfried v. Brewing Co.*, 8 Fed. Rep. 322; *Chaffee v. Belting Co.*, 22 How. 217, 223; *Wilson v. Simpson*, 9 How. 109; *Cartridge Co. v. Cartridge Co.*, 2 Ban. & A. 595; *Plow Co. v. Robinson*, 35 Fed. Rep. 502; *Manufacturing Co. v. Foundry Co.*, 34 Fed. Rep. 393; *Aiken v. Print Works*, 2 Cliff. 435. It is, of course, unnecessary to pass upon the defense which disputes the validity of the patent. The bill is dismissed.

TIMKEN v. OLIN *et al.**(Circuit Court, S. D. Ohio, W. D. June 15, 1888.)*

1. PATENTS FOR INVENTIONS—VALIDITY—CARRIAGE SPRINGS.

Letters patent No. 197,689, issued November 27, 1877, to Henry Timken, for an improvement in carriage springs, which consist in the attachment of springs to the bottom of the body of a buggy or wagon, at the sides and crossing the bottom of the body, and connecting with the side-bars on the opposite sides of the body, are not void for want of novelty.

2. SAME.

Letters patent No. 239,850, issued April 1, 1881, to Cyrus W. Saladee, for improvements in road-wagons, which consist of a spring platform of flexion springs arranged in pairs,—the inner, heavier ends of each pair being connected side by side to the central portion of the body or object supported, and the flexion portion of each spring curving downward from the center, and then upward to its connection with the spring,—are valid.

3. SAME—REISSUE.

Letters patent No. 157,480, issued December 1, 1874, described an improvement in vehicles, consisting in the employment of two independent crossed leaf metal springs, the ends of which were rigidly secured to the opposite ends of a cross-piece attached to the body, each spring being formed or provided with a socket, and the two sockets meeting each other at the center of the cross-piece, so as to enable the axis or pivot-bolt to be passed through both sockets, etc. Reissued letters patent, January 25, 1881, described each spring as "preferably" formed with a socket, and added a claim for two springs, in combination with the body and side-bars, crossing each other side by side, and attached to the cross-piece. *Held*, that the reissue was not an enlargement.

4. SAME—ANTICIPATION—PRESIDENT WASHINGTON'S COACH.

The foregoing patents are not anticipated by the compound couplings supporting the driver's seat, shown in President Washington's coach, as that was nothing more than an old-fashioned thorough-brace, intended "to prevent as much as possible the side, end, and upward pitching of the seat," which it failed to accomplish, and which complainant's inventions do accomplish more effectually than anything that preceded them.

In Equity.

Wm. M. Eccles and William Hubbell Fisher, for complainant.

Wm. H. Doolittle and Geo. J. Murray, for defendants.

SAGE, J. The complainant's suit for infringement is based upon three patents.

(1) No. 197,689, to Henry Timken, for improvement in carriage springs, dated November 27, 1877, application filed October 27, 1877. The invention consists, as stated in the specification, in the attachment of springs to the bottom of the body of a buggy or wagon, at the sides, and crossing the bottom of the body, and connecting with the side-bars on the opposite sides of the body. The claim is:

"In combination with the side-bars, C, C, and body, D, the springs, G, G, attached to the under side of the body at opposite sides, then crossing each other, and connected to the side-bars, at opposite sides, substantially as herein set forth."

(2) No. 239,850, to Cyrus W. Saladee, for improvements in road wagon, dated April 1, 1881, application filed February 7, 1881. This invention

consists, according to the specification, of flexion springs, the inner ends of which terminate at and are attached to the bottom of the body, seat, or other object which they are to support, at or near its center, and their outer ends are connected to the side-bars or frame on opposite sides. The claim is as follows:

"A spring platform consisting of flexion springs arranged in pairs, the inner, heavier ends of each pair being connected side by side to the central portion of the body or object supported, and the flexion portion of each spring curving downward from the center, and then upward to its connection with the frame, all substantially as set forth."

(3) No. 9,542, reissue to Joseph Tilton, Jan. 25, 1881, upon application dated Nov. 27, 1880, (original No. 157,430, dated Dec. 1, 1874,) for spring for vehicles. The patentee sets forth in his specification that his invention consists in the employment of two independent crossed leaf metal springs, the ends of which are rigidly secured to the opposite ends of a cross-piece attached to the body, each spring preferably being formed or provided with a socket, and the two sockets meeting each other at the center of the cross-piece attached to the body, so as to enable an axis or pivot bolt to be passed through both sockets for enabling the springs to turn thereon when the body is elevated or depressed. A further feature of the invention consists in securing a bearing and re-enforcing plate of metal to the under side of the cross-piece attached to the body, said plate being provided with pendent flanges at both ends, to serve as bearing points for the ends of the springs, in order to prevent any lateral movement of the same, and to serve, in connection with fastening bolts, to securely hold the springs in place. The claims are as follows:

"(1) The combination of two springs, each composed of one or more leaves, and hinged together at their crossing points, and provided with an eye at one end to connect with the side-sills of the running gear, and at the other end connected with a cross-piece attached to the body of the vehicle, substantially as described. (2) The two leaf springs, each provided with a socket at their crossing point, in combination with a pivot or axis bolt, substantially as described. (3) The combination of two springs, side by side, and connected together, with the side sills, and cross-piece, for supporting the body in a horizontal position between the side-sills, substantially as described. (4) The re-enforcing bearing plate, 1, having end flanges, in combination with the cross-piece attached to the body, and the connected cross-springs, substantially as described. (5) In combination with the body of a vehicle and the side-sills or bars, the two springs crossing each other side by side, and attached to a cross-piece, substantially as described."

The Tilton and Saladee patents became, by assignment, the property of the complainant; the Tilton patent on the 22d March, 1881, and the Saladee on the 8th of December, 1884. A careful examination of the record has confirmed the impression made by the very full and complete argument at the hearing, and has brought the court to the following conclusions:

1. The combination patented to Timken displays invention. It is not anticipated by any of the devices in evidence for the defendants. This view is strongly re-enforced by the fact, found from the record, of the

general recognition of the invention by the trade, and the large and long continued demand for it.

2. The Saladee patent displays invention and is valid.

3. The Tilton reissued patent is valid. The introduction of the word "preferably" in the specification did not invalidate the reissue, nor did the addition of the fifth claim.

4. The defendant infringes the Timken patent, the Saladee patent, and the second, third, and fifth claims of the Tilton reissue patent.

The decree will be accordingly, for an injunction and account, with costs.

ON APPLICATION FOR REHEARING.

(October 2, 1888.)

SAGE, J. This is not a case for rehearing. Because the court, responding to the request of counsel for an early decision, limited the opinion to a statement of conclusions, counsel for defendants erroneously infer that the state of the art preceding the inventions and patents sued upon, and the patents introduced in evidence as anticipating the complainants, were overlooked, and therefore proceed to reargue the points which they argued at length orally on the hearing, and also in their printed briefs.

As to the proposition that "the defendants were led to believe from the testimony introduced by complainant in rebuttal that the Tilton and Saladee patents would not be relied upon at the hearing, and were therefore taken by surprise," there are two answers: *First*. They were bound to anticipate and be prepared for every point that could be made upon the evidence; and, *second*, upon their request they were given time to prepare, and were allowed to file an additional brief after the hearing, thereby having ample opportunity to recover from the surprise, to which they cannot now be allowed to appeal for a rehearing.

The court is not disposed to respond favorably to the appeal of counsel that it will, in passing upon the petition for rehearing, enter into the details of the record, and prepare a full opinion. That would be in the line of establishing a bad and mischievous precedent, and in view of the brief filed by counsel for defendant, rearguing the entire cause, it would be, in effect, granting the rehearing, while in terms denying it. The court will, however, say that it rejected the testimony of the witness Priest as altogether unreliable, the record making it clear, not only that he contradicted himself on material points, under circumstances causing his contradictory statements to amount to impeachment, but also that in a prior litigation between complainant and parties other than these defendants, and involving the patents in suit in this cause, he was in the market as a witness for sale to either side.

Since the filing of the petition for rehearing, the court has, upon defendants' application, opened the testimony, and permitted them to offer a stipulation and exhibits relating to a device which they claim anticipates, or at least limits, each of the patents in suit. This is President

Washington's coach, which was sold to a relic collector of New York city at some time between the date of the death of President Washington and the year 1870, as a coach which he used in his life-time. It was exhibited as a relic at Wood's Museum in Philadelphia, in 1855, at the Centennial Exposition at Philadelphia in 1876, and at the Centennial Exposition at Columbus, Ohio, in the fall of 1888. The complainant visited the Centennial Exposition at Philadelphia, but he testifies that he did not see or hear of this coach then, nor at any other time until the fall of 1888. The defendants insist that the compound couplings supporting the driver's seat, and the frame-work to which their light ends connect, anticipate, or at least limit, each of the patents sued upon. Each of these couplings is composed of two steel leaves, the lower one of which is slightly curved up at the end, and of a long leather strap. The curve of the lower steel leaf, at its end, is to prevent its cutting into the leather strap in its action. There is also near the end of the lower steel leaf a metal loop, fastened to and passing over the steel, and then down under and around the leather strap, loosely enough to permit its play back and forth, and to permit the leaves also to move back and forth when the coupling was in action. The leather strap, which is long and heavy, is attached to the driver's seat, at the same points where the steel parts of the coupling are attached. At the other or outer end it is attached to the side of the frame-work already referred to, by passing around its end, and forming a loop. Doubling back on itself, it is confined or held together by bolts provided with thumb-nuts and metal washers. The strap is provided with holes adapted to receive the bolts, and so located as to permit tightening, whenever that might be necessary, as it is stated in the stipulation, "to prevent, as much as possible, the side, end, and upward pitching of the seat." Without entering further into details, the last expression quoted above from the stipulation is the key to the radical difference between this coupling and the invention covered by complainant's patents. They are surprisingly alike in appearance, as shown by photographs, but the coupling is nothing more than an old-fashioned thorough-brace, long since out of date, and discarded from general use. The trouble with it is, or was, that it would not prevent the pitching of the seat upwards and sideways and endways. The complainant's inventions do prevent that very thing, and that, too, more effectually than anything that preceded them. They have been for many years recognized as valuable and patentable inventions by practically the entire body of carriage makers in the United States, who have paid in royalties to the complainant for their use more than \$800,000. What better confirmation is needed of the proposition that there is something more than skill or mere adaptation in the complainant's improvements? The decree as indicated by the opinion on file will be entered for an injunction and account, excepting that by mistake the second, third, and fifth claims of the Tilton reissued patent are specified as the claims infringed, instead of the third, fourth, and fifth claims, which are those infringed. The decree will be accordingly.

THE GILBERT KNAPP.

MYGATT *et al.* v. THE GILBERT KNAPP.

(District Court, E. D. Wisconsin. January 7, 1889.)

1. ADMIRALTY—JURISDICTION—CONTRACT WITH STEVEDORE.

A claim for services rendered by a stevedore in loading or unloading a vessel is a maritime contract, within the principles of admiralty jurisdiction.

2. MARITIME LIEN—SERVICES OF STEVEDORE IN HOME PORT.

But no lien on the vessel is allowed in admiralty for such services rendered in the home port.

3. SAME—BREACH OF CONTRACT.

The breach of an executory contract with a stevedore to unload a vessel at her home port is within Rev. St. Wis. § 3348, subd. 8, giving a lien on vessels "for all demands or damages accruing from the non-performance or mal-performance of * * * any contract touching the transportation of persons or property," etc.

4. SAME—WAIVER OF CONTRACT.

Libelants claimed a contract to unload four cargoes. The making of such contract was denied. When about to unload the third, they were prevented by respondents, who had hired another gang for that purpose. All parties finally went to the managing owner, where it was agreed, as a peace measure, that libelants should unload that cargo, and that the rival gang should be allowed to unload the fourth. *Held* that, if libelants had any contract to unload all four cargoes, they waived it by the new agreement.

In Admiralty. Libel by Beauregard Mygatt and Ellis Leas against the schooner Gilbert Knapp, for damages for breach of contract to unload cargo.

O. T. Williams, for libelants.

Charles Quarles, for respondents.

JENKINS, J. In the noted case of *De Lovio v. Boit*, 2 Gall. 398, an action *in personam* upon a marine policy of insurance, decided in 1815, that eminent jurist, Judge STORY, delivered an elaborate opinion concerning the jurisdiction of the admiralty. In a masterly review of the decisions of the English common-law courts seeking to restrict that jurisdiction, he showed them to be irreconcilable with any just conception of the admiralty jurisdiction. He challenged the limitation applied by those courts that jurisdiction extended only to causes of action arising "from things done upon the sea," and asserted the true limitation to be "to things pertaining to the sea." He held that the delegation by the constitution to the judicial power of the United States of all cases of admiralty and maritime jurisdiction "comprehended all marine contracts, whether made or to be executed on land or sea, which relate to the navigation, business, or commerce of the sea." This doctrine was not finally established by the ultimate judicial authority without conflict. It encountered censure and opposition from both bench and bar. Chancellor Kent, (1 Kent. Comm. 370, note,) indeed, refers to insurance as a thing of settled admiralty jurisdiction; but no less an authority than Chief Justice TANEY, in *Taylor v. Carryl*, 20 How. 615, decided in 1857, characterized the

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statement as too broad for the reason that the question of jurisdiction as asserted had never been brought to the supreme court for adjudication. Judge CURTIS, in *Insurance Co. v. Younger*, 2 Curt. 332, decided in 1855, follows Judge STORY, but intimates that from want of confidence felt by the bar in the ultimate establishment of the jurisdiction by the supreme court, the principles asserted had infrequently been called into action. He likewise suggested that *Cutler v. Rae*, 7 How. 729, decided in 1848, went far towards overruling the decision in *De Lovio v. Boit*, and was irreconcilable with some of its provisions. Mr. Justice CAMPBELL in *The Magnolia*, 20 How. 335, decided in 1857, speaks of Judge STORY's decision as a "broad pretension for the admiralty, under which the legal profession and this court staggered for thirty years before being able to maintain it." It was not until 1870, after 55 years of contention, that the precise question was presented to the supreme court in *Insurance Co. v. Dunham*, 11 Wall. 1. Then, by the unanimous concurrence of the judges, the position of Judge STORY was fully sustained as declaring the correct principle of admiralty jurisdiction. It was then finally determined that the true criterion of admiralty jurisdiction as to contracts "is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions;" and the court observes that whether contracts are maritime or not depends, not on the place where made, but upon their subject-matter. This, says the court, is to be regarded as established doctrine.

Within the principle so recognized, and now beyond contention, can a claim for the services rendered by a stevedore in lading the ship or discharging cargo be deemed a maritime contract? The service was formerly done by and as part of the duties of mariners. The necessities of a developed and swelling commerce have superseded old methods, and have substituted a trained and skilled body of laborers, with a view to safe storage and prompt delivery of cargo, and the speedy dispatch of the ship. The service is essential to enable the ship to earn freight,—the sole object for which the ship is constructed and navigated. The contract of affreightment is confessedly maritime. Why are not services performed in fulfillment of the maritime contract equally maritime? The lading of the vessel or delivery of cargo upon the wharf is as essential an element of the contract as the carriage by sea. Freight cannot be earned without delivery. *Ex parte Easton*, 95 U. S. 75. It is well said by Mr. Benedict (Ben. Adm. § 285) that delivery is the "crowning act of maritime commerce, for which all others labor, and to which all other acts are subordinate, on which the right to freight depends, and which is in fact the great purpose, and the only ultimate purpose, of a ship." All acts, therefore, proper to be done in fulfillment of maritime contracts, must be of a maritime nature, because done with respect to "things pertaining to the sea," and constituting part of the service contemplated by the maritime contract. They "have reference to maritime service and to maritime transactions." They are services "touching rights and duties appertaining to commerce and navigation." The admiralty has cog-

nizance of matters on land, if they are incidents to those at sea. *The Fanny*, 2 Pet. Adm. 309, 324. It has been supposed that the weight of authority was in antagonism to the maritime nature of the service under consideration. This, at the present time, cannot be conceded. A careful scrutiny of the cases opposed will disclose that the decisions were based upon grounds in conflict with subsequent rulings of the court of last resort. Some of them are in opposition to the expressed views of the judges who rendered the decisions; others are bottomed solely on precedent now deemed obsolete, and in conflict with modern principles, and must fall with the authority cited to sustain. The dates of these decisions, with reference to the date of the ruling in *Insurance Co. v. Dunham*, it is essential to observe. The cases denying the maritime character of the stevedores' services are: *The Amstel*, Blatchf. & H. 215, decided in 1831; *The Joseph Cunard*, Olcott, 120, decided in 1831; *Cox v. Murray*, 1 Abb. Adm. 341, decided in 1848,—these three decisions being by Judge BETTS of the Southern district of New York; *The S. G. Owens*, 1 Wall. Jr. 370, decided in 1849; *The Circassian*, 1 Ben. 209, decided in 1867; *The A. R. Dunlap*, 1 Low. 361, decided in 1869; *The Ilex*, 2 Woods, 229, decided in 1876; *Hubbard v. Roach*, 2 Fed. Rep. 393, decided in 1880; *The E. A. Barnard*, Id. 712, decided in 1880; and *The Ole Oleson*, 20 Fed. Rep. 384, decided in 1884. In *The Circassian*, Judge BENEDICT expressed a decided opinion in favor of the maritime nature of the contract for such services rendered, but, counter to his own judgment, felt himself bound by the ruling of Judge BETTS in *The Amstel*, *The Joseph Cunard*, and *Cox v. Murray*. *The A. R. Dunlap* likewise followed the ruling of Judge BETTS, although his reasoning was pronounced unsatisfactory by Judge LOWELL in deciding the case. Judge LOWELL subsequently, in *The George T. Kemp*, 2 Low. 477, decided in 1876, expressly overruled *The A. R. Dunlap*, refused longer to follow the doctrine of Judge BETTS, and asserted the maritime nature of the contract. *Hubbard v. Roach*, and *The Ole Oleson*, were ruled by my learned predecessor contrary to his own convictions, as he declares in the last-named case, and in obedience to supposed weight of authority. *The S. G. Owens* was decided by Mr. Justice GRIER, at the circuit, in 1849, pending the conflict touching the correctness of the principles asserted by Judge STORY. Mr. Justice GRIER considers that the service of a stevedore is in no sense maritime, being done before or after the completion of a voyage; and therefore follows the rulings of Judge BETTS. It is important to observe, as indicative of the general views of admiralty jurisdiction then entertained by Mr. Justice GRIER, that he dissented from the opinion of the supreme court in *Navigation Co. v. Bunk*, 6 How. 344, holding that contracts of affreightment are maritime. If contracts of affreightment are not maritime, it would follow logically that services rendered in fulfillment of such contracts were also not maritime. The decision in *The S. G. Owens* was therefore a logical result of the mistaken views then held by that distinguished jurist. It is gratifying, however, to know that in the subsequent case of *Morewood v. Enequist*, 23 How. 493, decided in 1859, Mr. Justice GRIER affirmed in vigorous language the maritime

nature of contracts of affreightment, and, as is said by Mr. Justice BRADLEY in *Insurance Co. v. Dunham*, *supra*, appeared to have changed his views on the whole subject. It may well be doubted if Mr. Justice GRIER would have ruled in 1859 as he did in 1849. The case is shorn of its authority, being founded upon views of maritime contracts now confessedly erroneous. The decision in 1880 in *The E. A. Barnard* is placed upon grounds of consistency with the uniform practice in the Eastern district of Pennsylvania, founded, doubtless, upon the ruling in *The S. G. Owens*. Judge BUTLER, rendering the decision, claims to be in accord, although citing none, with all the American cases, with the exception of *The George T. Kemp*, but fails to refer to *The Windermere* and *The Senator*, *infra*, holding to the contrary, possibly not then published. Judge BUTLER intimates that the doctrine is not satisfactory, and bases his decision mainly upon the ground that the service was rendered at the home port of the vessel, and therefore no lien attached under the twelfth rule in admiralty. In this respect the decision may be upheld. That ground is considered further on. *The Ilex* was ruled solely upon the authority of Judge BETTS and Mr. Justice GRIER. Mr. Justice BRADLEY, who delivered the opinion, held the question foreclosed by these decisions. He evidently had not considered the subject upon its merits, for he observes, with respect to the arguments of Mr. Justice GRIER, that they "are so clear and forcible that I am not certain that I should come to a different conclusion if the question were a new one." It may be mentioned as passing strange that Mr. Justice BRADLEY should have so readily yielded to the views of Mr. Justice GRIER, since he delivered the opinion in *Insurance Co. v. Dunham*, to the effect that the maritime nature of contracts depended, not on the place where made, but on their subject-matter,—as to whether they had reference to maritime transactions,—with which view Mr. Justice GRIER was not in accord. He probably overlooked the mistaken views of maritime contracts entertained by Mr. Justice GRIER at the date of the decision of *The S. G. Owens*, and of the decided change of his views as announced by him in *Morewood v. Enequist*, in 1859, 10 years after the decision in *The S. G. Owens*, to which Mr. Justice BRADLEY alludes in *Insurance Co. v. Dunham*.

It may therefore fairly be said that the decisions denying the maritime nature of a stevedore's contract all rely upon the views expressed by Judge BETTS in *The Amstel*, and with one exception follow without indorsing them. "It is but one decision, of which the others are the echoes." Judge BETTS denies that delivery of cargo is in any sense a maritime service because performed partly on board and partly on shore after voyage ended. He asserts that the gist and foundation of the action in the admiralty is the marine service. In 1832, in *The Gold Hunter*, Blatchf. & H. 300, the same learned judge cites approvingly the case of *De Lovio v. Boit*, and asserts that subjects of a maritime nature are things done upon or in relation to the sea; "in other words, all transactions and proceedings relating to commerce and navigation." He declares the maritime nature of contracts of affreightment and bills of lading because they concern transportation by sea, "and the whole service

and consideration contemplated by the parties to it relate to navigation and to maritime employment." He says that the transaction is one of navigation and commerce on navigable waters, and is subject to the cognizance of a court of admiralty, whether entered into on land or on water.

If, then, the contract of affreightment be maritime, I confess my inability to comprehend why services essential to the fulfillment of a maritime contract are not also maritime. Delivery is part of the service contemplated by the parties to the maritime contract of affreightment, and relates to maritime employment, and, as I conceive, comes within the ruling in *The Gold Hunter*. Naturally, therefore, we find that the decision of Judge BETTS in *The Amstel* and kindred cases is no longer controlling within the district in which he presided. *The Windermere*; *The Hattie M. Bain*; and *The Scotia*, *infra*. With the exception of *Hubbard v. Roach* and *The Ole Olesen*, in which Judge DYER repudiates the principles of the decisions considered, all the cases save *The Ilex*, and *The E. A. Barnard*, were decided before the deliverances of the supreme court in *Insurance Co. v. Dunham*. As to those two, *The Ilex* merely followed the prior decisions, without consideration of the principles then lately established by the supreme court, and without expression by Mr. Justice BRADLEY of his own views upon the subject. *The E. A. Barnard* likewise followed the older decisions, somewhat under protest, and without consideration of later and controlling authority. The maritime character of the service has been sustained in *The Williams*, 1 Brown, Adm. 225, decided in 1873; *The George T. Kemp*, 2 Low. 477, decided in 1876; *The Senator*, 21 Fed. Rep. 191, decided in 1876; *The Windermere*, 2 Fed. Rep. 722, decided in 1880; *The Canada*, 7 Fed. Rep. 119, decided in 1881; *The Hattie M. Bain*, 20 Fed. Rep. 389, decided in 1884; *The Scotia*, 35 Fed. Rep. 916, decided in 1888; and *The Wyoming*, 36 Fed. Rep. 495, decided in 1888. All of these cases were subsequent in point of time to *Insurance Co. v. Dunham*, are largely based upon the principles thereby established, and are the logical result of and accord with the broad and comprehensive spirit of that decision. Analogous cases are not wanting. Thus in *The Kate Tremaine*, 5 Ben. 60, decided in 1871; *The J. H. Starin*, 15 Blatchf. 503, decided in 1879; *Ex parte Easton*, 95 U. S. 68, decided in 1877,—a contract for wharfage is held to be a maritime contract. In *The J. H. Starin* a libel *in rem* for cargo discharged and carted over the wharf, and to enforce lien given by state authority, was sustained, because "the use of the wharf pertains to navigation by water to such an extent that the implied contract for wharfage in respect of the goods, may properly be regarded as a maritime contract of benefit to the steamer," and held to be cognizable and enforceable in the admiralty. In *Ex parte Easton* it is asserted that accommodations at the port of destination are equally indispensable for the voyage as at the port of departure. Consignments of goods and passengers must be landed, else the carrier is not entitled to freight or fare. In *The Emily Souder*, 17 Wall. 666, decided in 1873, the court held that custom-house dues, consular fees, and charges for medical attendance upon the crew stood

in the same rank with necessary repairs and supplies to the ship. In *The Onore*, 6 Ben. 564, decided in 1873, the services of a cooper to put in landing order the cargo of the ship, and performed partly on the ship and partly on the wharf, were held to be maritime, "because they are a necessary part of the maritime service which the ship renders to the cargo, and without which the object of the voyage would not be accomplished." Likewise in *The River Queen*, 2 Fed. Rep. 731, decided in 1880, the weighing, inspecting, and measuring of cargo preparatory to its delivery were held to constitute a maritime service. And so, also, are the cases noted above, holding to the maritime nature of a policy of marine insurance, for that is a contract made on land, and to be performed on land. It derives its maritime nature solely from the fact that it deals with the risks of the sea. So the stevedore's contract deals with commerce and navigation, and has relation to the fulfillment of a maritime contract for carriage at sea. In *The Bob Connell*, 1 Fed. Rep. 218, a claim for lockage in a public navigable river was held to be of a maritime nature, and so cognizable by a court of admiralty. It seems clear, therefore, that the decided weight of authority concurs with the proper conception of the principles of the admiralty jurisdiction, in clothing the services of a stevedore in lading the ship or discharging cargo with the essentials of a maritime contract.

It does not necessarily follow, the contract being maritime, that a lien upon the vessel is allowed. The stevedore stands in no such relation to the ship as a mariner. He is neither bound to like control, subject to like liabilities, nor are his rights so peculiarly protected by statute. His services are not connected with the navigation of the ship. They are incidental to the execution of the maritime contract of carriage and delivery. He is not, strictly speaking, a material-man, but he stands on the same footing when he has rendered service necessary to the business of the ship. *The George T. Kemp*, 2 Low. 483. It is established law that material-men furnishing repairs and supplies to a ship in her home port do not acquire any lien by the general maritime law as received in the United States, notwithstanding the maritime nature of the contract. *The Belfast*, 7 Wall. 645; *The Lottawanna*, 21 Wall. 559; *Norton v. Switzer*, 93 U. S. 366. This proceeds upon the ground that the origin of the maritime lien for supplies and services is based upon the necessities of trading vessels visiting distant localities, where neither the master nor the owners have credit. Hen. Adm. § 43; *The St. Jago de Cuba*, 9 Wheat. 409; *The Lottawanna*, *supra*, 579. At the home port they are presumed to have been furnished upon the credit of the owner. In the cases cited to sustain the maritime nature of the services performed by stevedores, all, with the possible exception of *The Senator*, were for services rendered at a port to which the vessel was foreign. In that case the report does not disclose the fact, and no reference is made thereto. In *The E. A. Barnard* the lien was denied mainly because the services were rendered at the home port. *The George T. Kemp* expressly rules that the service, though maritime, gives no lien to a domestic vessel, unless by the state law. The twelfth rule in admiralty, adopted in 1859, limited proceed-

ings *in rem* to a foreign ship or a ship in a foreign port. As changed in 1872, it provided that "in all suits by material-men for supplies or repairs or other necessities, the libellant may proceed against the ship *in rem*, or against the owner or master *in personam*." The notion prevailed that this change authorized material-men to proceed *in rem* against a domestic ship. In *The Lottawanna*, *supra*, the court held otherwise; that the rule was only intended to remove embarrassments as to proceedings *in rem*, where liens exist by law; and that the court had no power to create any new lien. See pages 579, 581. Therefore, although the contract be maritime in its nature, no lien attaches by the maritime law for services rendered at the home port of the ship. *Ex parte Easton*, 95 U. S. 75; *The Bob Connell*, 1 Fed. Rep. 218.

It is believed to be no longer doubtful that executory contracts, maritime in their nature, and within the master's authority, are within the scope of the admiralty jurisdiction. Whether or not for breach of such contract a remedy in the admiralty is given *in rem* as well as *in personam* has been the subject of conflict in the courts. It is unnecessary to consider that question here, since the highest authority determines that, although the state cannot grant jurisdiction to the admiralty, a state may give certain liens on ships for services or supplies in the home port, which the admiralty, the subject-matter being maritime, and within its jurisdiction, will recognize and enforce. *The Lottawanna*, 21 Wall. 558; *Weston v. Morse*, 40 Wis. 455. By Rev. St. Wis. § 3348, subd. 3, a lien is constituted on every vessel used in navigating the waters of Wisconsin "for all demands or damages accruing from the non-performance or mal-performance of any contract of affreightment, or any contract touching the transportation of persons or property entered into by the master, agent, owner, or consignee of the ship, boat, or vessel on which such contract is to be performed." Executory contracts are manifestly within the provision of this statute. *The J. F. Warner*, 22 Fed. Rep. 345. It covers the claim of a stevedore for breach of contract to unload a vessel. This conclusion compels an examination into the merits of the claim of the libellants.

The Gilbert Knapp was owned, one-third by her master, Michael Maloney, and two-thirds by Mr. Hazelton, her managing owner, both residents of Kenosha, the home port of the vessel. She arrived at Kenosha on the 17th day of May, 1888, with a cargo of lumber. At this time it is charged by the libellants that they contracted with the master to unload the cargo then in the vessel, and three other cargoes which the master stated the vessel had contracted to deliver at Kenosha, for a certain agreed price for the unloading of each cargo. They assert that under such contract they unloaded three cargoes, and were, without cause, forbidden and prevented from unloading the fourth, by the refusal of the master and owners to accept or allow performance of the contract. This is all denied by the respondents, who affirm that libellants were only employed upon each arrival of the vessel on the first three trips, to unload the particular cargo, and were not employed to unload the fourth cargo. Without entering into details of the evidence, it is satisfactorily established

that the contention of the respondents is correct. There are certain earmarks of the transaction which in the conflict of evidence seem decisive. Upon the unloading of the second cargo, according to the testimony of the captain, not controverted by the libelants, the latter refused to receive the alleged contract price for the work, as they were compelled, if any such contract had been made, but demanded a somewhat larger sum, which the master paid to avoid trouble. Such conduct is not in harmony with the pretension of previous contract at a fixed rate. Upon the arrival of the third cargo, as the vessel was making fast to the dock, a messenger with a note to the master from Mr. Hazelton boarded the vessel, and presented the message. This messenger belonged to another party of stevedores, and was there assaulted by the libelants and their men, and brutally used. There seem to have been two rival gangs of stevedores, one working at cheaper rates than the libelants. The latter undertook to inaugurate a forcible boycott, neither commendable nor lawful. The captain, upon receipt of the message, refused to permit the libelants to unload, and thereupon the master and representatives of the rival gangs proceeded to Mr. Hazelton's office, where, after much disputation, it was arranged as a peace measure that the libelants should unload the cargo then in port, and that the unloading of the next or fourth cargo should be given to their rivals. All parties united in this arrangement, in pursuance of which the libelants unloaded and were paid for the third cargo. If there had been a contract as claimed, its obligation was waived on the part of libelants by this new arrangement, and a new and substituted agreement made. Upon arrival of the fourth cargo, the libelants' gang of stevedores undertook to anticipate their rivals, and to unload the vessel without authority, and in breach of their arrangement. They were promptly stopped in their unlawful undertaking by the master, and the vessel was unloaded by the stevedores to whom, by the assent of all parties, the work had been committed. The claim of the libelants is unfounded and unjust.

In view of this conclusion upon the evidence it may be said that inquiry into the maritime nature of stevedores' services was unnecessary. Possibly that is so. It seemed essential, however, that the obviously correct views upon that subject entertained by my predecessor, Judge DYER, should hereafter have practical effect given to them in this district, and that they should not be throttled by a supposed weight of authority, which I think a critical examination of the cases does not disclose. At all events, the current of authority now is quite in accord with his expressed views. The rule, therefore, in this district will hereafter obtain as stated, until overborne by superior authority.

The libel will be dismissed, with costs.

PETERSON v. THE NELLIE AND ANNIE.

(District Court, E. D. Wisconsin. January 7, 1889.)

MARITIME LIENS—SEAMAN'S WAGES.

Libelant had been employed by S., the master, for some time as a seaman. S., desiring to stop ashore for a few trips, accompanied libelant to the custom-house, where he caused him to be enrolled as master of the vessel, without the knowledge or consent of the owner. He made one trip as master, when S. again took command in fact of the vessel, though libelant's name continued on the enrollment as master, and he reported and cleared at the custom-house. *Held*, that libelant was entitled to a seaman's lien for services rendered, except during the trip he actually served as master.

In Admiralty. Libel for wages.

O. T. Williams, for libelant.

Mr. Krause and Mr. Wildish, for claimants, etc.

JENKINS, J. This case comes now before the court upon the objections to the payment of libelant's claim out of the proceeds of the sale of the vessel, covered into the registry of the court. The facts upon which opposition to the claim is based are disclosed by the evidence of the libelant. In April, 1888, F. C. Seefluth was master of the vessel, and employed libelant as seaman, at \$50 a month. He continued in the service under that agreement one month, when the master reduced the pay to \$1.50 per day. He served as seaman under the changed agreement until the 8th day of June, when he left the service because of threatened further reduction of wages. He remained idle until the 6th of July, when he was re-engaged by the master at \$1.50 per day. At this time the master informed him of his intention to stop ashore for two or three trips, and suggested that the libelant had better go on the papers as master. He accompanied the master to the custom-house, took the oath of citizenship, and was then rated on the vessel's enrollment as master. He made one trip of six days as master; then Seefluth again took command in fact of the vessel, and remained in command until her seizure. The libelant's name continued on the enrollment as master, and he reported and cleared at the custom-house; but Seefluth was in fact master, purchased cargoes, collected freight, and in all other respects commanded the vessel; the libelant performing seaman's services.

It is objected that the services were rendered as master, and no lien therefor exists upon the vessel or the proceeds in court. Without respect to the registry laws, he would be master to whom the owner actually intrusted the navigation and discipline of the vessel. The inquiry in such case is, what is the fact? As Judge NIXON observes in *The Imogene M. Terry*, 19 Fed. Rep. 463, "Courts of admiralty deal with things, not words." It cannot be questioned upon the evidence that the libelant, with the exception of the one trip, was in fact a seaman, and not the master. Seefluth was in every respect the master, charged by the owner with all the duties and responsibilities of master. What effect did

the transaction, with respect to the change upon the enrollment of the vessel, have upon the rights of the libellant? This change was made at the request of the master because he desired to stop ashore for a time. It does not appear to have been done by or with the knowledge or authority of the owner. It may be, as determined in *The Dubuque*, 2 Abb. (U. S.) 21, that, where there is a master *de jure* by virtue of the registry, there cannot be in contemplation of law another master *de facto*. It is there held that the registry conclusively determines the relations of owner, master, and crew. The case of *Draper v. Insurance Co.*, 21 N. Y. 378, is directly opposed. If the question was properly here for determination, it might be well to consider whether the penalties imposed by law for false enrollment should be extended by implication, so that, as between contending claimants, a seaman *de facto*, although entered upon the enrollment as master, should be deprived of his wages as seaman; whether an offense against the United States which may be satisfied by payment of a fine can be invoked by a stranger to work injustice. In *Badger v. Gutierrez*, 111 U. S. 734, 737, 4 Sup. Ct. Rep. 563, the court holds that when a vessel or its owner becomes subject to a statutory penalty for taking out improper papers, that does not justify a collector of customs in withholding from the vessel the papers to which it is lawfully entitled. The court says that for the offense the law prescribed a penalty, payment of which might be exacted, and that "prosecution for that violation of the law stood on its own ground, and had its own penalty, which did not include a forfeiture or seizure of the papers of the vessel."

So, as to the case at bar, it might well be urged that, if the libellant by reason of his acquiescence in and active consent to the request of the master incurred a penalty for violation of a provision of law, that did not make him an outlaw, nor, as to the claimants, estop him from showing the actual relation he bore to the ship. If wrong there was, was it not a wrong done to the United States, not to the other claimants, or to their injury? It is not necessary, however, to determine that question here, for *The Dubuque* is expressly put upon the ground that one can only be the lawfully registered master by the act of the owner, which is not this case. Here, so far as the evidence discloses, the entry of the libellant's name upon the enrollment as master was at the request of and for the convenience of Seefluth, the master registered as such by the act of the owner. The change was made without the knowledge or consent of the owner, and was for a temporary purpose. In *The Exchange*, Bee, 198, the libellant, at the request of the real captain, lent his name to clear the vessel at the Havanna. It was held he was not captain in fact, and therefore not barred from suing for services. This case is referred to by Judge LONGYEAR in *The Dubuque*, who observes with respect to it that "the real master has no authority thus to divest himself of his office, and confer it upon another. This could be done by the owners only." Whatever object Seefluth had in causing or continuing the change in the registry, so far as the evidence discloses it, was without the knowledge or privity of the owner. Seefluth remained master in fact, with

the exception of the navigation of the vessel for one trip, receiving all moneys, and presumably accounting therefor to the owner. The latter so dealt with him, not with the libellant. The answer of the owner, after such dealing, and after seizure of the vessel, asserting that libellant was master, carries no weight.

It is urged that the libellant should not be permitted to recover, for the reason that by his action in registering as master he has held himself out to the world as such, and others have dealt with the vessel supposing him to be master, and entitled to no lien on the vessel for his services. Whether the laws for the enrollment of vessels can be considered in the light of the recording acts of the state need not be determined, because here nearly, if not all, of the demands against the vessel accrued before the transaction complained of. There is no suggestion that any supplies were furnished or services rendered at the request of the libellant, or upon the faith of his being master of the vessel. The libellant's claim will be allowed as the first lien upon the fund in the registry of the court. There must, however, be deducted from the claim the amount expended by him to the use of the vessel, and the amount of his services upon the trip he actually served as master.

PARK v. THE HULL OF THE EDGAR BAXTER

EVERY v. SAME.

(District Court, S. D. New York. November 30, 1883.)

MARITIME LIENS—SHIPWRIGHTS—COMMON-LAW LIEN—ASSIGNMENT.

A shipwright holding possession of a tug under his lien for repairs assigned his claim to E., still holding possession as the latter's agent. The owner filed a libel *in personam* to recover possession of the tug, without tender of the amount owing for repairs; and E. filed a libel *in rem* to enforce the claim for repairs. Held that, the contract being maritime, the claim and lien were transferable, and could be enforced in this court by the assignee; that the latter was entitled to a decree for the amount owing, and the owner to a decree for possession only on payment of that amount.

In Admiralty.

Wilcox, Adams & Macklin, for libellant Park.

Carpenter & Mosher, for libellant Every.

Wing, Shoudy & Putnam, for claimant in second suit.

BROWN, J. The first-named libel was filed by the owner to recover possession of the tug Edgar Baxter, possession of which was refused on the ground that she was held under a shipwright's lien for the expense of certain repairs made under contract, and for an additional sum for extra work.

The second libel was brought to enforce payment of the amount alleged to be due for the contract work and the extra work; the libellant

having taken an assignment of the repair claim and lien, and the shipwright still retaining possession as agent for Mr. Every, the assignee.

The evidence shows a *bona fide* assignment of the shipwright's claim and lien, to obtain moneys to pay bills that the shipwright had incurred in making the repairs. The repair bill being a maritime contract, it is considered, in this court, competent for a shipwright to transfer his common-law lien along with his claim, and to enforce such a lien at the suit of the assignee in admiralty for the sale of the vessel, or of the owner's interest in it, in order to satisfy the common-law lien. *The B. F. Woolsey*, 7 Fed. Rep. 108, 116; *The Two Marys*, 10 Fed. Rep. 919, 925; *Nash v. Mosher*, 19 Wend. 431; 3 Pars. Cont. (6th Ed.) 244; 2 Kent, Comm. 639. Both libels were, therefore, properly filed.

The libelant Park is entitled to possession of the vessel on payment of \$1,578, without interest; and Every is entitled to a decree in his suit for the same sum; and the costs of the two suits must be divided between the parties.

THE ONTARIO.

(District Court, E. D. Michigan. January 2, 1889.)

1. MARINE INSURANCE—THE POLICY—EXEMPTIONS—NEGLIGENCE OF INSURED.

Under a marine policy exempting the underwriter from liability for "all perils, losses, misfortunes, or expenses consequent upon, or arising from, or caused by, * * * the want of ordinary care and skill in navigating said vessel," the insured cannot recover general average expenses incurred in rescuing the vessel from a peril brought about by negligence in her navigation.

2. SAME.

Where a vessel was negligently run ashore, and, a storm coming on, was voluntarily scuttled to save her from total loss, and other general average expenses were subsequently incurred, *held*, that the stranding, and not the storm, was the proximate cause of the loss.

(Syllabus by the Court.)

In Admiralty.

This was a libel by the Northwestern Transportation Company, owner of the Ontario, against the Boston Marine Insurance Company, to recover a general average loss. The facts connected with this loss were substantially as follows: The propeller Ontario, valued at \$55,000, was insured against total loss and general average only in five companies, of which the respondent was one. The policy in suit contained the following exception to the general liability of the respondent as insurer:

"Excepting all perils, losses, misfortunes, or expenses consequent upon, or arising from, or caused by, the following or other legal excepted causes: * * * Damages that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew, or want of ordinary care and skill in navigating said vessel, and in loading, stowing, and securing the cargo of said vessel; rottenness, inherent defects, overloading, and all other unseaworthiness; theft, barratry, or robbery."

On the 11th day of October, 1883, the propeller, laden with a large cargo of miscellaneous merchandise, left the port of Sarnia, Ontario, bound for Duluth. While endeavoring to enter the harbor of Southampton, on the east shore of Lake Huron, and while running at her ordinary speed of nine or ten miles an hour, in a dense fog, the propeller took the ground upon a shoal near what is known as "Nine Mile Point," a short distance from Southampton. She stranded hard and fast, and in her struggles to relieve herself, broke her wheel and shoe. Efforts were made to get her off by the officers and crew, but, failing so to do, they sent for lighters and tugs, and notified the insurers. Before the arrival of the tugs, the wind and sea increased so much, and the steamer began to pound so heavily, that it was found necessary to open the sea-cocks, and allow her to fill and settle to the bottom. This was done, and thereby the cargo was greatly damaged. Soon after she was scuttled, a wrecking agent representing the underwriters appeared upon the scene, and took charge of the work. She was subsequently gotten off, and, with her cargo still aboard, taken to Sarnia. The owner, claiming that there was a general average loss, caused an adjustment to be made, and filed this libel to recover the propeller's share of the damage done to the goods by water, and the expense of releasing the vessel. The insurance company defended upon the ground that the loss was occasioned by negligence, and was within the exception of the policy.

Moore & Canfield, for libelant.

H. H. Swan, for respondent.

BROWN, J. At the time this case was originally submitted the principal argument of the respondent was addressed to the point that the action had not been brought within the time required by the policy. The question was indeed raised that the libelant was not entitled to recover by reason of the exception in the policy of losses and perils occasioned by negligence, but the point was not dwelt upon or considered with the care its importance demanded, and an interlocutory decree was ordered for the libelant without much reflection. The case comes now before the court upon the report of the commissioner, to whom it was referred to compute the damages, and I am now asked to reconsider the question of liability as if it had never been determined. As no objection has been made by the libelant, I am quite willing the case should take this course.

1. There can be no doubt in my mind that the master was guilty of gross negligence in approaching the land, and in endeavoring to enter the harbor of Southampton at the speed of nine or ten miles an hour, in a fog which he admits himself to have been very wet, dense, and heavy,—"as thick a fog as we ever have on Lake Huron;" and if the loss had been total, libelant would not have been entitled to recover by reason of the exception in the policy exonerating the insurer from liability for all perils, losses, misfortunes, and expenses arising from the incompetency of the master or the insufficiency of the crew, or want of ordinary care and skill in navigating the vessel. This question was fully considered by this

court in the case of *The Spartan*, reported under the name of *The Richelieu, etc., Navigation Co. v. Insurance Co.*, 26 Fed Rep. 596. Other cases to the same effect are *The Portsmouth*, 9 Wall. 682; *The Costa Rica*, 3 Sawy. 538.

In this case, I do not understand it to be seriously claimed by the libellant that it can recover for damages occasioned by the stranding of the Ontario. These are excluded both by reason of the exemption of the underwriters for all losses directly caused by the negligence of the master, and because the policy does not cover cases of particular average or partial loss. But it is insisted that its right to recover general average expenses is not impaired by the negligence attendant upon the original stranding of the propeller, because the proximate cause of these losses and expenses was the voluntary sacrifice occasioned by the scuttling of the steamer, which is all that is necessary to lay a foundation for a claim for general average. The real question then is, can the insured, under a policy exempting the underwriters from perils and losses consequent upon and arising from or caused by negligence, recover general average expenses incurred in rescuing the vessel from a peril produced by negligence in her navigation?

(1) If this were an action by the ship-owner against the owner of the cargo for a general average contribution, we apprehend that it would be a sufficient answer to show that the necessity for the sacrifice was occasioned by the negligence or unseaworthiness of the ship. We understand the law to be as stated in Goul. Gen. Av. 15, that "if the necessity for the general average act arises through the unseaworthiness of the vessel, the *vice propre* of the cargo, or the negligence or barratry of the master or crew, no contribution generally would be due. If the danger and the necessary sacrifice are produced by the fault of the vessel or captain, and the vessel appears as a claimant for contribution, it would seem a proper answer that he by whose neglect the loss had been produced should bear it without relief." See, also, Lowndes Av. 138; *Chamberlain v. Reed*, 13 Me. 357; *The Ann Elizabeth*, 19 How. 162; *Ross v. The Active*, 2 Wash. C. C. 226; *The Jenny Jones*, Deady, 82; *Bentley v. Bustard*, 16 B. Mon. 643; *The Norway*, Brown & L. 377; *Schloss v. Heriot*, 14 C. B. (N. S.) 59. There can be no doubt in my mind, under the facts of this case, that if the owners of the cargo sacrificed had sued the vessel and her owners, they would have recovered not merely a general average contribution, but the entire value of the property. In other words, this principle is but a restatement of the general doctrine that a loss produced by a peril of the sea consequent upon negligence will be deemed a loss by negligence, and not by the act of God. *The Portsmouth*, 9 Wall. 682; *The Hornet*, 17 How. 100; *Davis v. Garrett*, 6 Bing. 716; *Williams v. Grant*, 1 Conn. 487; *Crosby v. Fitch*, 12 Conn. 410.

Is the same rule to be applied as between the ship-owner and the underwriter? There is no doubt that, in the absence of a special provision in the policy, the underwriter is liable for the consequences of all negligence on the part of the master and crew not amounting to barratry or unseaworthiness. 1 Pars. Mar. Ins. 381.

The fairness and justness of exemptions for negligence in policies of insurance may admit of considerable doubt; but so long as ship-owners will consent to accept such policies, they must expect that courts will give them the construction ordinarily put upon similar exemptions. The remedy, if one be needed, must be applied by the legislature, and not by the courts.

The clause in this policy excepts from the general liability of the underwriter all perils, losses, or expenses consequent upon or arising from or caused "by the want of ordinary care and skill in navigating the vessel," and if, in answer to this, it be said that the immediate, proximate cause of the loss in this case was a peril of the sea, the defendant may justly reply that the policy also excepts all "perils" caused by negligence. It would seem to follow that, if the vessel had been brought into peril by the negligence of her master, the general average expenses incurred in rescuing her from that peril, also fall within the exception of the policy. Indeed, if the vessel be liable, and the insured be exonerated for all damages done directly by the stranding, it is difficult to see why the same rule should not be applied with regard to losses and expenses incurred in rescuing the vessel. It is not less an "expense" or "loss" caused by, arising from, and consequent upon the original negligence, by reason of the fact that it was voluntarily incurred. Had the negligent act ceased its operation and effect, or had there been a distinct intervening pause, such as fire or collision, the damages consequent thereon would undoubtedly be attributed to such intervening cause. Such was the case in *Insurance Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. Rep. 68. In this case there was an exemption of liability for all losses "arising from or caused by * * * barratry, * * * or occasioned by the bursting of boilers, the collapsing of flues, explosion of gunpowder, or derangement or breaking the engine or machinery, or any consequence resulting therefrom, unless the same be caused by unavoidable external violence." The evidence showed that on the arrival of the steamer at Louisville the master gave the usual signal, which was transmitted to the engineer, that he had no present need of the engine. The joint of the mud-valve was out of order, threatening damage to the cargo, and making repairs necessary. The steam was thereupon blown off in order to make repairs. The captain, coming on board, saw that repairs were going on, and knew that the mud-valve connected with the boiler needed repairs. He subsequently went on deck, and without making inquiry of the engineer as to the condition of the steam, or receiving any notice from him that the steam was ready, gave the signal to let go the boat. At that time there was not sufficient steam to propel the vessel. It was shown to be the custom of the river for the master, before giving the order to let go, to inquire of the engineer as to the condition of the steam, and await his reply that the steam is ready before giving the order to let go. Upon being started, the steamer was carried by the current down the river, and over the falls, and, striking a pier, was badly damaged, in consequence of which she sank. It was held that the loss was not the consequence of the derangement of the mud-valve, and therefore not within the exception of the

policy, but that the proximate cause of the loss was a peril of the river, occasioned by negligence of the master in not ascertaining, before giving the signal to let the vessel go, that she had steam enough for her proper management. It is true that in delivering the opinion of the court Mr. Justice HARLAN uses language which would seem to indicate that, if the loss was occasioned by a peril of the river, it would make no difference that it was remotely caused by the negligence of the master; but the case did not call for this observation, as there was no exception in the policy of losses occasioned by the negligence of the master, and the law has ever been well settled in this country that for such negligence the underwriter, in the absence of any stipulation to the contrary, is liable. 1 Pars. Mar. Ins. 534, note; *Waters v Insurance Co.*, 11 Pet. 213; *Insurance Co. v. Webster*, 83 Ill. 470; *Insurance Co. v. Powell*, 13 B. Mon. 311; *Insurance Co. v. Transportation Co.*, 117 U. S. 325, 6 Sup. Ct. Rep. 750, 1176.

This case, however, is readily distinguishable from the one under consideration in the following particulars:

First. There was no exception in the policy of liability for losses occasioned by the negligence of the master or crew.

Second. Apparently the derangement or breakage of the machinery, for the consequences of which the company was not responsible, had been repaired.

Third. But it is clear the accident was not due to such derangement or breakage, but to the negligence of the master in giving the signal to start the boat before inquiring of the engineer whether there was sufficient steam. As this negligence was followed by the sinking of the vessel,—a peril of the sea,—for both of which the underwriter was responsible, there would seem to have been no doubt of the owner's right of recovery. Here, it will be noticed, there was a distinct intervening cause between the remote cause—the derangement of the machinery—and the loss, viz., the negligent act of the master in starting the boat.

A case nearer in point, and an instructive one upon the subject of proximate and remote cause, is that of *Dole v. Insurance Co.*, 2 Cliff. 394. In this case the policy was warranted free from capture, seizure, or detention. During the Rebellion, the ship was captured and burned by the commander of a rebel privateer, and it was insisted on behalf of the plaintiff that the fire, and not the capture, was the proximate cause of the loss; that the fire, not having been a means used in taking possession of the ship, but having occurred after the taking was complete, and after her assailants had obtained undisputed possession of her, was the efficient and sole cause of her loss. But the defense contended that the hostile act of the officers and crew of the privateer were the efficient and prevailing cause of the loss and destruction of the vessel, and that the taking and the burning were parts of one and the same act of hostility. Mr. Justice CLIFFORD took this view, and held that the capture was made for the purpose of destroying the vessel, and that the capture and burning were parts of the same act. The capture was held to be the efficient, predominating peril, for which the company was not liable, and judg-

ment was rendered for the defendant. The learned judge cites in support of his decision the case of *Waters v. Insurance Co.*, 11 Pet. 213, in which a vessel had been set on fire by the master and crew with a barratrous intent, and it was held that the loss was properly a loss attributable to the barratry, as its proximate cause, as it concurred as the efficient agent with the fire, when the injury was produced. It was said that if the master or crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the sea, although the flow of the water should co-operate in producing the sinking. It was also held in this case that any explosion of gunpowder caused by the fire should be deemed a loss by fire, and not by explosion.

The rule announced in the case of *The Portsmouth*, 9 Wall. 682, is consonant with these principles. This was an action for the loss of part of a cargo by a jettison resorted to in order to lighten the vessel after she had been run aground by the negligence of the master; and the question was whether the jettison was occasioned by the dangers of lake navigation, for which, under the bills of lading, the vessel was not liable. Mr. Justice STRONG in delivering the opinion, observed that—

"A loss by a jettison occasioned by a peril of the sea is, in ordinary cases, a loss by perils of the sea. But it is well settled that if a jettison of a cargo, or a part of it, is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault or breach of contract, rather than to the sea peril, though that may also be present, and enter into the case. This is a principle alike applicable to the exceptions in bills of lading and in policies of insurance. Though the peril of the sea may be nearer in time to the disaster, the efficient cause, without which the peril would not have been incurred, is regarded as the proximate cause of the loss."

It will be observed here that the court expressly repudiates a distinction formerly taken between bills of lading and policies of insurance with regard to what shall be deemed a loss by a peril of the sea. This distinction has also been fully exploded by the house of lords in England in the recent cases of *Wilson v. Owners, etc.*, 6 Asp. 207, 12 App. Cas. 503, and *Hamilton v. Pandorf*, 6 Asp. 212, 12 App. Cas. 518, 525. Pertinent illustrations of this doctrine of proximate and remote causes are also contained in the opinion of Justice STORY in *Peters v. Insurance Co.*, 14 Pet. 99, 110. In this case the vessel had met with a collision in the River Elbe, and, upon being libeled in the admiralty court at Hamburg, was condemned to bear half the entire loss, although the court decreed that the collision was without fault on the part of either vessel. It was held that the underwriters were liable, under the peculiar law of Hamburg fixing the liability for half the loss, and that the collision was to be deemed the proximate cause of the loss. The doctrine of proximate and remote cause was admirably illustrated by Mr. Justice STORY in this case in his argument upon page 110. See, also, *Insurance Co. v. Sherwood*, 14 How. 351. The result of these cases seems to be that by

the proximate cause of loss is to be understood, not necessarily that cause which instantly precedes or accompanies the loss in point of time, but the dominant cause, the cause but for which the loss would not have occurred, and between which and the loss no other distinct cause intervened.

(2) Conceding, apparently, to some extent, the pertinence and force of these suggestions, the learned advocate for libelant insists that such distinct, intervening cause did exist in this case in the storm or threatened storm which is claimed to have created the necessity for the scuttling. The facts in this connection, putting them in the most favorable light for the libelant, are that the stranding, which occurred about half past 2 in the afternoon, produced no serious damage to the steamer. At this time the weather was pleasant, the sea smooth, and no immediate danger threatened the vessel or her cargo. After making some fruitless efforts to get her off, it appears that, some two or three hours after she stranded, the master sent one of his officers ashore for the purpose of telegraphing for a tug. Up to that time she had not pounded, nor was she considered in danger. About half past 5 o'clock in the afternoon, and some five or six hours after the stranding occurred, the wind changed from the north-west, and the sea began to rise; and about 11 o'clock in the evening it became necessary to scuttle the propeller to prevent her pounding on the boulders, and being driven further ashore. If this had not been done, the steamer would probably have been a total wreck, and the cargo lost; the wind changing from north-west to north, and blowing hard, with a heavy sea running. On Monday night the tugs and steam-pumps arrived, and operations were begun to get the steamer off. These were continued until Tuesday afternoon, when she was gotten off, and left for Sarnia in tow of the tugs.

The question is thus presented whether the storm which arose after the stranding must be deemed the proximate cause of the voluntary sacrifice of scuttling, and the subsequent expense of tugs, steam-pumps, and lighters to relieve the steamer. It certainly was not the occasion of the whole of this expense, since the steamer had made fruitless efforts to release herself, and the master had sent one of his officers ashore for the purpose of telegraphing for a tug, some hours before the storm arose. But, irrespective of this consideration, was the storm such a distinct, independent cause of loss as fire or a collision would have been, had it broken out or occurred while the steamer was aground, as renders the insurer liable? In my opinion it was not. To have this effect there must be not only a new agency productive of loss, but it must have been an agency disconnected with the previous peril, and one which could not reasonably have been anticipated as a consequence of it. Now, to say that a storm may not be expected to follow upon a stranding, by which the damage occasioned by the stranding may be increased, is to contradict the experience of every sailor upon the lakes. Indeed, the danger following upon a stranding, and the amount of salvage allowed in such cases for rescuing the vessel, is determined very largely by the situation of the vessel stranded. If she be in an exposed position, where a storm is

likely to do her additional injury, no court would hesitate to allow the expenses of salving her in general average, though the weather at the time were never so pleasant; while if the stranding takes place in protected waters, where a storm can do her no additional injury, the expense of getting her off is not regarded as a salvage claim, but as an ordinary incident of navigation, and chargeable to the vessel alone. *The Alcona*, 9 Fed. Rep. 172. Now, if it had not been for the original stranding in this case, there is no reason to believe that the storm, which was one of the most ordinary incidents of navigation, would have put the steamer in any peril whatever. It was the stranding, and that alone, which made the storm an element of danger, and this was a cause which never ceased to operate until the loss was complete. The sequence of events, from the original shock of striking the rock until the final relief of the vessel, is unbroken by a single incident that could not reasonably have been anticipated. If the steamer had been released from this peril, and before arriving at her port of destination had encountered and been lost in a storm, that would undoubtedly have been deemed the proximate cause of the loss, though it were proved that, had she not been delayed by the stranding, she would have reached her destination before the storm arose. *Daniels v. Ballantine*, 23 Ohio St. 532; *Railroad Co. v. Reeves*, 10 Wall. 176; *Morrison v. Davis*, 20 Pa. St. 171; *Denny v. Railroad Co.*, 13 Gray, 481. But where the storm occurs while the negligent act is still in full operation, and injury by such storm might reasonably be anticipated as a consequence of the negligence, the storm will not be deemed the dominant, efficient cause of the loss.

While there may be a few authorities, both in England and in this country, which lend some encouragement to the position assumed by the libellant here, the federal cases lean distinctly in the other direction. In *Railroad Co. v. Kellogg*, 94 U. S. 469, which was an action to recover for the destruction by fire of plaintiff's saw-mill, the plaintiff alleged that the fire was negligently communicated from the defendants' steam-boat to an elevator built of pine lumber 120 feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to plaintiff's saw-mill and lumber-pile, while an unusually strong wind was blowing from the elevator towards the mill and lumber. The court submitted it to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence and effect of the sparks from the boat without the aid or concurrence of other causes not reasonably to have been expected. The instruction was held to be correct, and in delivering the opinion Mr. Justice STRONG observed:

"It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * But when there is no intermediate efficient cause, the original wrong must be considered as reaching to

the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury."

In *Insurance Co. v. Boon*, 95 U. S. 117, a policy of fire insurance exempted the company from liability for any loss or damage by fire which might happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power. An armed force of rebels, under military organization, surrounded and attacked the city in which the property was located. Finding the city could not be successfully defended, the federal officer in command, in order to prevent the military stores deposited in the city hall from falling into the possession of the rebel forces, set fire to the hall. Without other interference or agency the fire spread to the building next adjacent to the city hall, and through two intermediate buildings to the store containing the goods insured, and destroyed them. It was held that the fire was excepted from the risk undertaken by the insurers, upon the ground that the burning of the city hall and the spreading of the fire afterwards was not a new and independent cause of the loss. On the contrary, it was an incident—a necessary incident—and consequence of the hostile rebel attack on the town,—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power,—events so linked together as to form one continuous whole. The case of *Brown v. Insurance Co.*, 61 N. Y. 332, is much like the present. A policy of insurance upon the cargo of a canal-boat provided the policy should cease if the boat was "prevented or detained by ice, or the closing of navigation, from terminating the trip;" and it was held that where the canal-boat had been driven ashore and stranded, and ice had subsequently formed around it during the night, so that it could not be reached, and was subsequently broken in two by the ice, and the cargo injured, that the predominating efficient cause of the loss was the storm, and not the ice, and that the company was liable. The court observed:

"The detention caused by her being driven out of her course was due, beyond all question, to the gale. Her detention on the shore until the ice formed around her was due to a consequence of the gale,—stranding. Did that cause cease to operate because ice formed in front of the boat, and between her and the channel? Is it not rather the true view that the presence of the ice prevented the removal of the cause which created detention, and was slowly working the destruction of the cargo?"

That a storm is not to be regarded as an unexpected incident, or one which a prudent man should not anticipate, either upon land or water, was held in the case of *Poeppers v. Railway Co.*, 67 Mo. 715, and in *Derry v. Flitner*, 118 Mass. 134. It was said in these cases that the rise of the wind could not be regarded as the intervention of a new agency, so as to relieve the defendant from the consequences of previous negligence.

Upon the whole, it seems to me that the storm in this case, which was not one of unusual violence, was such a consequence of the stranding as might have been reasonably anticipated, and ought not to be considered as a distinct, independent cause of the voluntary scuttling. Bearing in

mind the very broad exemption of this policy "of all perils, losses, and expenses arising from or consequent upon negligence," and that jettison or voluntary scuttling is not a distinct peril or loss of itself, but is such only when covered by a peril insured against, I find it impossible to avoid the conclusion that the loss in this case was within the exception of this policy, and that the libel should be dismissed.

MCKAY *et al.* v. ENNIS *et al.*¹

(District Court; S. D. New York. December 21, 1888.)

1. SHIPPING—BILLS OF LADING—MISCONDUCT OF MASTER.

A master who is in doubt as to the weight of cargo received, and who consequently inserts in the bill of lading, "Vessel not responsible for difference in weight," is not chargeable with misconduct in signing such bill of lading, though it eventually appear that it calls for more cargo than was actually received on board.

2. SAME—CHARTER-PARTY—WEIGHT OF CARGO—LIABILITY OF VESSEL—SET-OFF.

A chartered vessel received on board less cargo than was called for by the bill of lading, through fraud or error of the consignor, but the master, before signing, inserted in the bill of lading, "Vessel not responsible for difference in weight," and she thereafter duly delivered her cargo, but, owing to the error in the bill of lading, the draft drawn against it being protested, and the transmission of the bill of lading being delayed, no consignee appeared to receive the cargo on arrival, and it was consequently taken by the collector and afterwards sold for customs duties. *Held*, that the ship had made a "right delivery" of her cargo, and that the charterers, who were also the consignees of the cargo, were liable for the agreed hire of the ship, notwithstanding that they had suffered an indirect loss through the error of the bill of lading, by not having funds sufficient to meet the draft drawn against the quantity specified in it; such damage being too remote to be off-set.

In Admiralty. Action for charter money against charterers of the bark Platina.

R. D. Benedict, for libelants.

Whitehead, Parker & Dexter and *Mr. Parker*, for respondents.

BROWN, J. On the 6th of February, 1888, the libelants, owners of the barks Platina and Silicon, entered into two separate contracts, by which they chartered those vessels to the respondents to proceed to load with ore at Santander, Spain, and to deliver the same at Philadelphia. The Platina loaded at Santander as agreed, and, having received her cargo from Casuso y Hijo, a bill of lading therefor to his order was delivered to him by the master.

On arrival at Philadelphia, about May 1st, no person appearing with the necessary bill of lading or other documents authorizing them to receive delivery of the cargo within the time limited by law for unloading, (Rev. St. § 2880,) it was directed by the collector to be discharged and

¹Reported by Edward G. Benedict, Esq., of the New York bar.

stored in the public store; and afterwards, to avoid further expense, it was sold for duties and charges, netting a balance insufficient to pay the freight due under the charter. The libelants had given notice to the collector, pursuant to law, of their lien on the cargo for freight; and on the trial of this action they offered to assign the claim and the lien to the defendants on payment of the amount due under the charter. The defendants had a contract with Casuso whereby the latter agreed to sell them iron ore to be shipped on various vessels as sent to Santander therefor by the defendants; the ore to be "delivered into the ship's hold, free of scale," "the weights to be according to United States custom-house certificates; terms of payment by draft at 60 days' sight on London bank credit for amount of invoices, plus advances to the master, acceptable against delivery of bill of lading and consular invoices."

The Platina and the Silicon were chartered by the defendants and sent out for the receipt of ore under the foregoing contract. The Silicon being loaded first, Casuso presented for signature a bill of lading stating the receipt of 945 tons. The master, believing that the vessel carried only 825 tons, at first refused to sign the bill of lading; but he finally yielded to the importunity of Casuso, and signed the bill of lading, after first adding, "Vessel not to be responsible for difference in weight;" but before sailing he entered a protest with the consul against the bill of lading, made out for an excessive amount, as he believed. Afterwards the master of the Platina was in like manner induced by Casuso to sign a bill of lading for 1,015 tons, the same clause being first inserted in the body of the bill of lading. On the subsequent delivery of the cargoes it was found that by the United States custom-house certificates the weight of the Silicon's cargo was but 788 tons, and that of the Platina but 949 tons.

Upon receipt of the bills of lading severally, Casuso at once drew drafts on London, pursuant to his contract, for the full number of tons stated in the respective bills of lading and invoices; and the draft on account of the Silicon's cargo, being presented first, was paid. The defendants were informed by the libelants at the outset that the two barks could not carry over 1,800 tons; they had consequently provided credit in London for that amount only; and when the second draft was presented, based upon the Platina's bill of lading of 1,015 tons, the gross amount of the two bills of lading and invoices—1,994 tons—being considerably in excess of the credit provided, payment of the second draft was refused. Delay ensued in the transmission of the bill of lading thus thrown back upon Casuso, who sent it to Brown Bros., of Philadelphia, for his account. But it was not received by them until after the collector had taken possession of the cargo, and had begun to store it. An attachment had also in the mean time been issued against the cargo upon a debt of Casuso to one Romaine, and the defendants had also attempted to libel the cargo. But neither Brown Bros. nor the defendants, who had notice of all the proceedings, wished to interfere with the collector's possession, or to enter the goods, and pay the freight and charges.

Upon these facts the defendants contend that the masters of both vessels are chargeable with misconduct in signing the bills of lading pre-

sented by Casuso, and that the loss occasioned thereby is a defense to this action. The defendants, it is true, have paid Casuso nothing for the Platina's cargo, and have never received the bill of lading; but they have received no benefit from the Platina's voyage under the charter, and have also sustained a loss from the short delivery of the Silicon.

Several of the questions which have been raised, growing out of this transaction, are not necessary to be considered, the action being founded upon the charter, for the recovery of the charter moneys, namely "8s. per ton of 2,240 pounds delivered." The only questions are: *First*, whether the vessels made a "right delivery" of their cargo; and, *second*, whether the respondents' losses, under the circumstances stated, constitute any legal or equitable ground for recoupment.

1. There is no doubt that the stipulated hire of the Platina was earned. The Silicon's cargo was received by the respondents in the ordinary course. The Platina's cargo was not received by the respondents; but that was only because the respondents did not obtain from Casuso, the shipper, the necessary invoice and bill of lading to enable them, under the customs laws, to enter and receive the goods within the time allowed by law after the ship's arrival and readiness to deliver them. There is no suggestion that the action of the collector in Philadelphia was not strictly legal, through the failure of any person to appear and enter the goods. The ship's discharge of the cargo under the direction of the collector was therefore "a right delivery" of the cargo, and a fulfillment of the ship's contract under the charter. That completed her right to the stipulated charter money or hire, namely, eight shillings per ton, upon the amount delivered. The respondents became, under the charter, liable personally for the freight earned; and the cargo, lawfully delivered to the collector, was also subject to a lien for the freight, and remained in his hands for the benefit of whoever might prove to be entitled to it. Had there been no customs regulations applicable, the master might lawfully have stored the cargo on notice to the respondents, and the freight or charter money would have been similarly earned. *Fox v. Holt*, 4 Ben. 278, 299-302.

2. I do not think any legal or equitable ground of recoupment is established. It is assumed by the respondents that Casuso's conduct was fraudulent. There is doubtless strong suspicion of fraud on his part. But it is not the necessary inference, even from the testimony of the master, which is the only evidence in the case bearing upon that point. He says: "The ore was loaded from lighters. They had no facilities down there for weighing it, anyhow,"—and that he was not exactly certain about the weight; that Casuso told how much each lighter carried; and he figured it up, making it 1,005 tons. The bill of lading presented being for 1,015 tons, he objected to signing it, but finally did so, after inserting the clause, "Vessel not responsible for difference of weight." I do not think there was any breach of legal or equitable obligation by the master in signing the bill of lading in that form, under such circumstances. The bill of lading, with such a clause, is notice to whoever takes it that the amount and weight specified in the bill of lading are not guaranteed. It is substantially equivalent to the other phrase,

"weight unknown," upon which it is well settled that the indorsee for value takes it subject to all risks as to the actual weight of the cargo. See *The Querini Stampalia*, 19 Fed. Rep. 123, and cases there cited; *Jessel v. Bath*, L. R. 2 Exch. 267. Where there is dispute about the weight between the shipper and the master, I see no other course that is reasonably practicable than to sign the bill of lading with some such qualifying clause, except in a very gross case. It would be absurd to require the ship to incur the expense of unloading the cargo for the mere purpose of reweighing it, even if the means of reweighing were at hand. The master would not be permitted to sail without signing any bill of lading; and the result would be a dead-lock until one or the other yielded.

In the present case, moreover, there was an incongruity likely to lead to difficulty in the very terms of the contract of sale between Casuso and the respondents. That contract says: "Weights to be according to the U. S. custom-house certificates," which of course could only be obtained upon weighing at the end of the voyage; while the payments were to be "by draft on London, for amount of invoice, acceptable against delivery of the bills of lading and consular invoice;" that is, invoices and drafts were to be based on approximate estimates before the final determination of weights at the close of the voyage.

Considering that there were no facilities for weighing at the point of shipment, the necessary inference is that the respondents by their contract with Casuso were willing to trust him to make out a proper estimate of weight for the invoice and bill of lading, with authority to draw accordingly on London, leaving the final adjustment of balances to be made up after the weigher's certificates were obtained on delivery at Philadelphia. The respondents, therefore, took the risk of Casuso's accuracy, as well as of his honesty, in making out his invoices and bills of lading. Had the respondents not limited their credit in London, the second draft would have been paid like the first; and the claim against Casuso for excessive weight on the Platina's cargo would have been but a little over \$100, without any of the large consequential loss which finally arose through the storage and sale by the collector from the want of a timely receipt of the invoice and bill of lading at Philadelphia. It does not appear that the respondents, on arrival, endeavored to enter the goods on a bond for forthcoming documents, as they might have done. Nor does any sufficient reason appear why, as soon as Brown Bros. received the bill of lading, the respondents should not have taken up the draft and bill of lading, and have then entered the goods in order to avoid a much greater loss; looking to Casuso for the difference on final adjustment.

The attachment suit of Romaine against Casuso was no obstacle, since the goods became the property of the respondents under the contract from the time of their delivery on board the vessel.

However this may be, no fault in the vessel is proved, and in no event could the master or the respondents be held for these large consequential damages. There is no evidence that the master had any knowledge of the terms of the contract between Casuso and the respondents, or of the

limited credits provided by the respondents in London to meet Casuso's drafts; and these were the accidental causes of the delay in the receipt of the bill of lading that caused the loss. Had the master signed the bill of lading as presented, even without qualification, no claim to these large consequential damages that accrued in Philadelphia could, I think, have been maintained; because they were not the natural consequences of the master's act. The claim would have been limited to the value of the shortage in weight; and any such liability for shortage is precisely what both vessels stipulated against upon the face of the bills of lading. This was notice to every one, the respondents' agents in London as well as others, of the liability to such shortage; and it was all the notice that the master was called on to give, under the circumstances of this case.

The libelants are entitled to a decree for the stipulated freight as the charter money earned by the ship's right delivery of cargo, with interest and costs; the decree to provide for an assignment by the libelants of their claim and lien for freight upon the proceeds of sale by the collector, on defendant's payment of the amount of the decree.

THE ANN L. LOCKWOOD.¹

PEARCE v. THE ANN L. LOCKWOOD.

(District Court, D. Delaware. December 28, 1888.)

1. SALVAGE—DERELICT.

A vessel at least six miles from shore, submerged from midships to bow, her running rigging overboard and snarled fast, her boat gone, her cabin, fore-castle, and galley full of water, a distress flag set, and deserted by her crew, who had left no signs of an intention to return, and were not visible, is *prima facie* derelict and abandoned, though she was anchored, and her master was intending to return to save her, and had telegraphed for a wrecking vessel to assist him.

2. SAME—TRESPASS.

The respondent, a strong, well-equipped vessel, found a vessel in distress, and abandoned by her crew, about six to ten miles from shore. Respondent's master, discerning no signs of the crew, who were ashore at a life-saving station partially hidden behind a small hillock, and there being no sign when the vessel was abandoned except a live dog, took her in tow. During the following night the tow-lines parted in a gale, and the crew placed on the distressed vessel were forced to abandon her. She was afterwards found adrift, and taken to port. *Held*, that the respondent, having acted in good faith, with reasonable expectation of saving the vessel, was not a trespasser, or liable for the injury caused by the gale that compelled her abandonment.

In Admiralty.

Libel *in rem* by George B. Pearce, master of the schooner Carrie Hall Lister, against the schooner Ann L. Lockwood, for injury done the Lister by a gale, while in the possession of the Lockwood.

Chas. C. Lister, Levi C. Bird, and Henry R. Edmunds, for libellant.

¹Reported by Marks Wilks Collet, of the Philadelphia bar.

Alfred Driver and J. Warren Coulston, for respondent.

WALES, J. The schooner *Carrie Hall Lister*, of 160 tons register, with a crew of four men all told, laden with 182,000 feet of lumber and laths above and below decks, at about 5 o'clock A. M. on the 2d of October, 1883, while on a voyage from Bowdoinham, Me., to New York, and when off Shinnecock light, Long Island, encountered a strong gale from the south-east, with a heavy sea, causing her to pitch and plunge so that her master was compelled to bear away towards shore. At 12 M. on the same day she lost her mainsail, main-boom, and gaff, the main-peak halyards were cut away, and, the wind working round more to the south-erly, the deck load began to shift, breaking off her stanchions, and loos-ening the combings. At this time she began to fill, and at 2 P. M., be-ing water-logged and soaked, her captain ran in to land until sundown. The kedge anchor was first let go, but, this failing to hold, the starboard anchor was got over with 30 fathoms of chain, and the vessel was stopped at 9 P. M. in 15 fathoms of water, and at from 5 to 7 miles from the Bell-port life-saving station. The *Lister* was now submerged from midships to bow, and unmanageable. One-third of the deck load had been washed overboard, and the crew, without water or provisions, passed the night on deck until sunrise the next morning, when they all left in the yawl-boat for shore, leaving a signal of distress hoisted on the foremost back-stay, but without any notice of their intention to return, or of where they had gone. Upon approaching the beach, the surf being high, they anchored the boat on the bar, and signaled the life-saving crew for as-sistance, who came off in their surf-boat, and carried them to the station. The captain of the *Lister* immediately sent a telegram to New York, re-questing the wrecking company to send a tug to tow the schooner to New York, and three hours afterwards received a reply that the steamer *Rescue* would be sent at once. In the mean time, while the crew of the *Lister* were at breakfast in the station, at about 9 o'clock, the schooner *Lockwood* sailed up to the *Lister*, and slipping her anchor, took her in tow, and sailed off in an easterly direction. As soon as the captain of the *Lister* saw, or was informed of this, he countermanded the order for the tug. The *Lockwood* subsequently abandoned the *Lister* at sea; and when the latter was afterwards found at Newport, R. I., into which port she had been taken by the United States revenue cutter, *Dexter*, she was materially damaged and despoiled, as specifically set forth in the libel; and it is for the damage and the consequent detention, together with the loss of the personal effects of the crew, amounting in all to \$5,681.79, which occurred between the time the *Lockwood* wrongfully took the *Lister* away from her anchorage, and the finding of the vessel at Newport, that reparation is now sought. The libel alleges that the *Lister* was securely anchored, was in no immediate danger, that her master and crew had left her only temporarily for the purpose of getting provisions and of procur-ing assistance to tow her to New York, and that she was neither derelict nor abandoned. The *Lockwood* was therefore a trespasser, and not jus-tified in interfering.

The evidence on the part of the respondents is substantially this: The Lockwood, a three-masted schooner, loaded with 500 tons of coal, was bound from Philadelphia to Boston, when she fell in with the Lister, in the condition already described, distant about 11 miles from land, the wind being north-west, with a heavy sea rolling from the south-east. A mate and two seamen were put on board the Lister. They found her port anchor lashed to a ring bolt, and the starboard anchor gone, the chain hanging out of the hawse-pipe, the end of which could be seen as the vessel rose with the sea; her running rigging was overboard, and snarled fast to the vessel, and towing along-side; her boat was gone; the deck load shifted; her cabin, forecastle, and galley full of water, and water in her hold; no lines or hawsers, and no provisions or water on board. With the exception of the main jib, all the sails were gone or useless. She was taken in tow as a water-logged, unmanageable wreck, abandoned and derelict. The master of the Lockwood had previously examined the sea and land, and saw no human being or craft in sight, excepting the fishing steamer Joseph Church, which had made towards the Lister with the intention of taking her in tow, as derelict, to the nearest port, but was anticipated by the Lockwood. Everything movable in the Lister's cabin was afloat, and the secretary in the captain's room broken open, from which the ship's papers were taken by the mate, and subsequently deposited in the custom-house at Boston, and from thence forwarded to Wilmington, in this district, where she was enrolled and licensed. Soon after the Lockwood had started with her tow, a second hawser was attached to the Lister, and the towing proceeded favorably until 7 o'clock P. M., when the wind canted, and came out from the north north-west up to the north, and blew a gale, with a heavy and rough sea. The night was very dark, and at 8 o'clock the towing hawsers, by reason of the vessel working in the sea-way, parted. At the same time the deck load on the Lister began to work, and, the lumber cutting the lanyards, one part of the deck load went overboard. The Lister then righted over on the starboard side, and the mainmast fell forward. The mate and the two sailors, who had remained on the Lister up to this time, fearing that she would turn bottom up, left to save their lives, and drifted about in the storm and darkness until 3 o'clock the next morning, when they were taken aboard the Lockwood, which, after the Lister had broken loose, was sailed by the wind, and tacked for several hours in order to rescue the men. The men refused to go on the Lister again, and the Lockwood, seeing nothing of her, kept off on her course to Boston. When the hawsers parted, the Lister was between Montauk and Block Island. The Lockwood had her foresail and jib blown away during the gale. On the 4th of October, at 1 P. M., the captain of the Rose Brothers, a small schooner of 19 tons, of Block Island, seeing a wrecked vessel adrift, about 20 miles distant, which afterwards proved to be the Lister, went to her relief, and after several unavailing attempts finally succeeded in boarding her, and making a hawser fast to her, just before dark, intending to tow her into Vineyard Harbor, or Newport. Four of the crew of the Rose Brothers remained on

the Lister while she was being towed, until the hawser parted, not long after dark. The Rose Brothers laid by the Lister all night, and the next morning took her in tow again, about 9 A. M., when the United States revenue cutter, Dexter, appeared, and, taking the Lister in tow, carried her into Newport, arriving there at 7 or 8 o'clock in the evening of the same day. The owner of the Lister settled with the owners of the Rose Brothers, paying them \$600 for salvage. The Dexter charged nothing, save for fuel and oil.

Capt. Monsell, of the life-saving station, and the captain of the Church both agree in thinking that the Lister was at anchor when the Lockwood first approached her, because her head was kept to the wind, which it would not have done, if she had been adrift. Capt. Monsell also estimates her distance from land to have been from eight to ten miles. Capt. Gabrielson, of the Dexter, and Wrecking Master Waters, both say that they would have taken the Lister in tow, under the same circumstances, as an abandoned vessel; the former qualifying his opinion by saying that he should have first gone to the life-saving station, had he known one to be near, for information. The captain of the Church was within a few miles of the land when he first sighted the Lister, and saw no one on shore. The life-saving station is about 100 yards from the beach, and somewhat concealed by a small hillock. The men from the Lockwood found nothing on the Lister to show how long she had been deserted by her crew, excepting a live dog.

In the course of the argument, much reliance was placed by the libellant's proctors on the evidence of the Lister being at anchor on the morning of the 3d, and on the proved intention of her master to return and endeavor to save her, to take her out of the category of derelict vessels. The question of her being anchored is not wholly free from doubt, but, conceding the fact that she was, yet, in her then condition, being partly under water and unmanageable, in the open sea, at the distance of eight or ten miles from shore, and deserted by her crew, she was, *prima facie*, derelict and abandoned. The intention of her master to procure assistance to take her into port might have affected the amount of salvage to be awarded to the Lockwood, had the latter succeeded in the attempt to reach Newport with her in tow; but such intention was unknown to the captain of the Lockwood, who could only judge of the necessity for his interference from what he saw before and around him, viz., a helpless wreck, sure to be lost, soon or late, by ocean storms, if allowed to remain where she was, without aid. The tempestuous weather of the day before had nearly destroyed her, and the captain of the Church says it looked on the morning of the 3d as if there would be plenty of wind before night,—a prediction that was fully verified. The life-saving station was not in sight, and there is no evidence that its exact location was known to the Lockwood. The two vessels were so far from land that persons on shore could not be seen with the naked eye, and Capt. Monsell, with the aid of a glass, was unable to discern the movements of the men who boarded the Lister. That there was considerable apprehension among the crew of the Lister that she was in some danger, if not in im-

mediate peril of being lost, is evident from her master's answer to the question:

"Did you intend to come back to the vessel? *Answer.* That is the reason we did not take our clothes. Mr. Kirk said that morning, before we started to go ashore, all he cared about was to get his foot upon dry land. I said to him, 'Look here, if you don't intend to come back to this vessel, we might as well stay while we are here;' so he said he would come back if I wanted to come. He said he didn't know I wanted to come back. I told him of course I wanted to go back. I didn't intend to throw away the vessel if I could save it."

He admits that it was impossible for himself and crew, without additional assistance, to save the *Lister*; and two disinterested witnesses, Capts. Gabrielson and Waters, testify that a vessel in her condition, even at anchor, in the open sea, is never safe,—apart from becoming a dangerous obstacle to navigation.

There is some vagueness about the definition of "derelict," when applied to vessels abandoned at sea, but the general rule is that a vessel which is abandoned by her crew, without any purpose on their part of returning to the ship, or any hope of recovering it by their own exertions, comes strictly within the definition. 2 Pars. Shipp. & Adm. 288. It has also been held that, if a ship be left, though not derelict in a technical sense, one who in good faith takes possession as salvor is not a trespasser, but has his reasonable claim for salvage, according to the good he actually does. *Id.* 291. And the same doctrines have been recognized by the admiralty courts of the United States. *The Senator*, 1 Brown, Adm. 372; *The John Gilpin*, Olcott, 80; *The Island City*, 1 Black, 121; *The Grace Brown*, 2 Hughes, (U. S.) 112; *The Laura*, 14 Wall. 336; *The Boston*, 1 Sum. 336. Perhaps the law on this subject is nowhere more clearly and concisely stated than in the case of *The Bee*, 1 Ware, 340, where the court says:

"But when the owner, or the master and crew, who represent him, leave a vessel temporarily, without any intention of final abandonment, but with the intent to return and resume the possession, she is not considered as a derelict, nor is the right of possession lost by such temporary absence for the purpose of obtaining assistance, although no individual may be remaining on board for the purpose of retaining the possession. Property is not, in the sense of the law, derelict, and the possession left vacant for the finder, until the *spes recuperandi* is gone and the *animus revertendi* is finally given up. *The Aquila*, 1 C. Rob. 41. But when a man finds property thus temporarily left to the mercy of the elements, whether from necessity or any other cause, though not finally abandoned and legally derelict, and he takes possession of it with the *bona fide* intention of saving it for the owner, he will not be treated as a trespasser; on the contrary, if by his exertions he contributes materially to the preservation of the property, he will entitle himself to a remuneration according to the merits of his service as a salvor."

The respondents, finding the *Lister* in distress, and without any one on board, had just grounds for believing her abandoned, and lawfully took possession of her as salvors, and, had they succeeded in taking her into port, would have been entitled to salvage compensation. The honesty of their motive must be judged by the situation and condition of

the *Lister* as they saw her on the morning of the 3d, and by the promptness, diligence, care, and ability with which they undertook the work of salvage. The *Lockwood* was a strong and well-equipped vessel, and in all probability would have succeeded in saving the *Lister*, if the storm of the ensuing night had not intervened, as is evident from the fact that the towing progressed favorably for several hours before the hawsers parted, and the *Lockwood* was compelled by stress of weather to seek her own safety, after the loss of some of her sails, and the exposure of her mate and the two seamen to serious personal danger. To hold the respondents to be trespassers under these circumstances might establish a dangerous precedent, and, should such a rule become generally prevalent, it would prevent sea-faring men in the future from making any effort to rescue distressed vessels, and thus contravene the hitherto settled policy of the law, which has always encouraged salvage services by giving to them the most ample rewards. The penalty of total failure in endeavoring to render a salvage service is to forfeit all compensation for work and labor, for risk of life and property, and for detention; and this has been considered sufficient to deter strangers from interfering to save property at sea, unless they believed their interference warranted, and that they would be able to render substantial aid. To increase this penalty by adding to it the punishment of trespassers, in a case like the present one, where the act complained of has been done in good faith, and was begun with reasonable expectation of success, would not be consistent with law or good policy.

It is unnecessary to consider the defenses of laches on the part of the libelant in bringing his suit, and of want of jurisdiction. A decree will be entered dismissing the libel, with costs.

MILLIKEN v. THE C. H. NORTHAM.

(District Court, S. D. New York. January 9, 1889.)

1. COLLISION—OVERTAKING AND PASSING VESSELS—INSPECTORS' RULES 7 AND 8.

The steamer *N.*, overtaking the tug *L.*, with a tow, passing around Negro Point in the flood-tide, and a N. W. wind, attempted to pass the *L.* to the left, after a signal of two whistles, which she claimed to have been assented to by a reply of two. The steamer *E. C.* was at the same time approaching near from the opposite direction, having the right of way on the *N.*'s port side. The three boats collided. The *N.* struck the *L.*'s port quarter; the *L.* having veered to port, her tow struck the *E. C.*'s port waist. Held, (a) both to blame for violating inspectors' rules 7 and 8.

2. SAME—DANGEROUS CHANNEL—HELL GATE.

(b) That the place was dangerous, and the passage to the left of the *L.* not sufficient for safe navigation, and that the *N.* was to blame for going on faster than the *L.* before it was plain that the space and the *L.*'s actual course made it safe to attempt to pass her.

3. SAME—CROWDING.

(c) That the *L.* was also to blame for starboarding her wheel, probably by mistake; that she was bound in any event not to crowd upon the *N.*'s course,

and that, if she had answered with two whistles, she was bound to go to starboard if she could safely do so, there not being sufficient space for the N. to pass to the left.

4. **SAME—CUSTOM.**

(d) That the custom, as well as the inspectors' rules, required an overtaking vessel there to pass to the right.

In Admiralty. Libel for damages caused by a collision between the steamer C. H. Northam and the tug Levering while rounding Negro Point, near Hell Gate.

A. B. Stewart, for libellant.

William J. Kelly, for claimant

BROWN, J. The Levering, in approaching and going around Negro Point to the eastward, had the right of way as respects the Northam, which was overtaking her. The Northam twice gave a signal of two whistles; and hearing, as her witnesses claim, a reply of two from the Levering, being previously slowed down, she started up to pass the Levering to the left, between her and Ward's island. The witnesses for the Levering say that they did not give any signal of two whistles, but only one signal of three whistles. The weight of evidence shows that the signal of three whistles was given when the Northam was very near, certainly not over a length distant. The Levering was not more than from 200 to 400 feet from Ward's island, and the steamer Elm City was at the same time approaching from the eastward and had the right of way along the Ward's island shore. I think it certain that the Northam under those circumstances would not have started up to pass between the Levering and the Elm City, unless her officers heard, or thought they heard, from the Levering a signal of two whistles, when they were at least considerably further distant than at the time when the signal of three whistles was given; and many witnesses testify that the Levering did give one previous signal of two whistles. Even, however, if this signal of two whistles was given by the Levering, that would not, of itself, excuse the Northam for the subsequent collision in a dangerous passage. *The Greenpoint*, 31 Fed. Rep. 231. Both were to blame for violating the inspectors' rules 7 and 8. *The Dentz*, 29 Fed. Rep. 529.

At the time of the collision the boats were all very close together near the shore. The Levering was hit on her port quarter by the Northam, and was swung round so much that the barge on her starboard side struck the Elm City. The Levering then backed, and the Northam passed on between the other two.

The tide was strong flood; and to the eastward of Negro Point there was a counter-eddy near the north shore. The proof, however, does not satisfy me that that eddy extends so far off from the shore as to have caused the bow of the Levering to swing to port, as all the evidence shows that it did; or that it was the Northam's blow that carried the Levering's bow so far round towards shore that her tow struck the Elm City. Considering, therefore, the distance of the Levering from the Ward's island shore at the time of the Northam's second signal of two whistles, I am

forced to the conclusion that the Levering did not keep her course, as she might and should have done; but by some mistake starboarded her wheel, as several of the witnesses for the Northam testify that they saw she did, instead of keeping it steady, or porting. Although this did not probably affect her actual position in the river but little before the collision, it was a fault, whether she had given a signal of two whistles or not. If such a signal was given by the Levering, then it became her duty to port her wheel, if there was not sufficient room already for the Northam to pass safely to port, provided the Levering could port without any danger to herself. *The Dentz*, 29 Fed. Rep. 525, 529. In this court the Dentz was held liable, because it was considered that the Plymouth Rock had not sufficient room, and because the Dentz, after assenting to her passing, did not aid her as she might have done. In the circuit it was considered that the Plymouth Rock did have sufficient room, and she was therefore held solely liable. See *The Britannia*, 34 Fed. Rep. 558.

The Northam, however, is not, I think, free from blame in attempting to pass inside of the Levering around Negro Point on the strong flood. The place is a dangerous one. Both the tide and the north-west wind tended to set vessels upon the rocks on the opposite side. All naturally wished to keep towards the Ward's island shore, and the tug could not safely have veered much to starboard. With the large steamer Elm City coming west, the passage inside of the Levering was very narrow at best. The Northam, even upon a signal of two whistles, and an answer of two whistles, had no right to demand that the Levering should veer to starboard for the Northam's benefit, to her own danger. There was no difficulty in the Northam keeping slowed down until Negro Point and the Elm City were both passed. She ought to have waited, and not gone forward in a dangerous place at a greater speed than the Levering, until at least the opening and the actual course of the Levering gave clearly sufficient space to pass safely. She did not do so, but went in on too narrow a margin for safe navigation. *The Aurania*, 29 Fed. Rep. 98. The supervising inspectors' rules 7 and 8 virtually forbid passing at all at this point. It had previously been always held dangerous and blamable, (*The Narragansett*, 5 Ben. 255, and cases cited;) and the weight of proof shows that if a steamer is to pass there another steamer that is on the north side of the channel, as the Levering was, she must go to starboard in accordance with rule 8.

Both being, therefore, to blame, the libellant is entitled to a decree for half the damages and costs, with a reference to compute the amount, if they are not agreed on.

LILIENTHAL v. WALLACH *et al.*

(Circuit Court, S. D. New York. January 8, 1889.)

EXECUTION—SUPPLEMENTARY PROCEEDINGS—CONTEMPT—SECURITY.

Upon proceedings supplementary to execution, although a third party, having property of the judgment debtor which the third party claims as his own, may be punished for contempt in disposing of it, where his claim appears from the evidence to be so transparent a sham as not to constitute a "substantial dispute" as to title, under section 2447 of the New York Code of Procedure, yet the court will hesitate to adjudge summarily a considerable demand upon a motion for contempt; and in this case, a denial of the motion was directed, provided the claimant deposited the proceeds or gave security for the payment of whatever might be recovered in an action to be brought by the receiver of the judgment debtor against him.

(Syllabus by the Court.)

In Equity. Motion in supplementary proceedings to punish for contempt.

Frank E. Blackwell, for plaintiff.

Louis O. Van Doren and *Charles Donohue*, for defendants.

BROWN, J. Section 2447 of the New York Code of Procedure permits the judge upon supplementary proceedings to order a third person having property or money of the judgment debtor to pay or deliver the same to the receiver of the judgment debtor, unless the right to the same is "substantially disputed." By a substantial dispute I understand some *bona fide* controversy. It cannot include a mere colorable dispute, designed only to render the law ineffective, and to defeat the direct remedy which the proceedings supplementary to execution are designed to afford.

In this case the evidence leaves no doubt that the day before the supplementary order was served on Drucklieb he had 24 cases of goods belonging to the judgment debtor. On that day a bill of sale was executed and delivered, antedated to the 1st August by the judgment debtor's attorney in fact, whereby this property and other property were conveyed to Drucklieb in consideration of \$100. Drucklieb testifies that an additional consideration was the cancellation of an indebtedness to him for previous commissions amounting to about \$2,000. Even this explanation does not make the consideration one-fifth of the value of the property transferred. Without going into the numerous details, the whole history of the transaction is such that if the court were to pass upon the evidence presented it would not hesitate to consider the alleged sale a transparent sham. It has not the appearance of even a colorable *bona fide* claim on the part of Drucklieb; and in this view the court would be justified in treating the case as not one of "substantial dispute" within the meaning of section 2447. So great, however, is my reluctance to pass summarily upon a question of this kind, involving so considerable an amount, upon a motion to punish for contempt, that I shall decline to grant the motion, provided the defendant, within a time to be determined on settlement of the order herein, shall either deposit in court

the proceeds of these goods, which were sold by him after the supplemental order was served on him, or, in lieu thereof, shall execute a bond with approved security to pay any judgment that may be recovered in an action to be brought by the receiver of the judgment debtor for such proceeds; otherwise, the motion for contempt will be granted.

AMERICAN LOAN & TRUST CO. v. EAST & WEST R. CO. *et al.*

(Circuit Court, N. D. Alabama, S. D. January 11, 1889.)

1. RAILROAD COMPANIES—MORTGAGES—FORECLOSURE—PLEA OF *LIS PENDENS*.

Intervenor filed a bill against a railway company to have his judgment, based on his claim for building parts of the road, declared a first lien on portions of the road, for an accounting of the valid indebtedness of the company, and for foreclosure of deeds of trust given by the company. Complainant, as trustee under the deeds of trust, demurred to intervenor's bill, and afterwards filed a bill to foreclose the deeds of trust. The suits were consolidated by order of court, and the parties called complainant and intervenor, respectively. The intervenor filed a plea of *lis pendens* to complainant's bill. *Held* that, aside from the order of consolidation, the plea was insufficient, because, although intervenor asked for an account and marshaling of assets and foreclosure of some deeds of trust, yet there could be no foreclosure under intervenor's bill unless complainant filed a cross-bill for that purpose.

2. SAME—FOREIGN CORPORATIONS—CONTRACTS.

Under Const. Ala. art. 14, § 4, providing that no "foreign corporation shall do any business in this state without having at least one known place of business, and an authorized agent," though the complainant, a trust company of New York, does business in Alabama without having a known place of business or authorized agent, its contracts made in the state, and relating to Alabama property, are not void, but voidable, and a plea in bar to complainant's foreclosure suit, based on such constitutional provision, is insufficient.

In Equity. On demurrer and pleas.

Crane, Ludlow & Fowler, for complainant.

Webb & Tillman, for intervenor.

PARDEE, J. On the 13th of March, 1888, James W. Schley, a citizen of Georgia, brought his bill against the East & West Railroad Company of Alabama, and the American Loan & Trust Company *et al.*, and therein complained that he had been a contractor for the building of certain portions of the line of the East & West Railroad Company of Alabama, and that for the amount due him on the construction of a certain portion of the line he had recovered a judgment against said railroad company in the circuit court of Cherokee county, Ala., for the sum of \$13,760 and costs of suit; that said judgment was wholly due and unpaid; that said railroad company was insolvent; and that complainant was unable, by process of execution, to collect his judgment. He further averred that in and about the construction of its line, and the maintenance thereof, the said East & West Railroad Company of Alabama had contracted and issued a bonded indebtedness for about \$1,100,000, known as the "First Mortgage Bonds" of said railroad company, which said bonds were se-

cured by a first mortgage or deed of trust on its said road-bed, right of way, franchises, and all other property which belonged to said company, conveying the same to said American Loan & Trust Company, as a trustee for the holders of said bonds, and that the said bonds, so secured, were issued and negotiated in the state of New York; and that afterwards, for purposes and uses not known to the complainant, the said East & West Railroad Company of Alabama had issued and negotiated about \$500,000 of what is known as "Debenture Bonds," secured by a second mortgage or deed of trust to the same trustee, some of which were negotiated; and that the entire bonds of the said railroad company, including both the aforesaid issues, on the 19th day of February, 1887, amounted to \$1,600,000; that on or about the 19th day of February, 1887, the said railroad company issued its consolidated bonds at the rate of \$15,000 a mile, and executed a deed of trust upon all its property to the said American Loan & Trust Company, which said bonds were to be deposited with the said trust company, to be certified and delivered to said railroad company only at the rate of \$15,000 per mile of road, as the same shall be completed and ready for operation. It is further averred in said bill that, after the issue of the said consolidated bonds as aforesaid, the East & West Railroad Company gave in exchange consolidated bonds for the aforesaid debenture bonds, and that the said debenture bonds, for reasons in said bill stated, were without consideration, illegal and void, and constituted no part of the valid indebtedness of said railroad company, and that the consolidated bonds given in exchange were also illegal and void. The relief sought by the bill was that an account be taken by the court of the valid indebtedness of said railroad company on its said bonds and mortgages, and upon complainant's judgment; that complainant might be decreed to have a first lien upon a certain portion of the railroad line; that said deed of trust, without specifying which one, might be foreclosed for the satisfaction and payment of the debts secured thereby, except such bonds as were illegally issued; for a receiver pending the litigation; and for general relief. To this bill the American Loan & Trust Company, specially appearing for the purpose, filed a demurrer to the jurisdiction of the court. Afterwards, on the 7th day of July, complainant filed an amendment to his bill. This amendment set forth that one Amos G. West, who had been made a party to the original bill as a holder of some of the bonds charged to be illegal, was not a necessary party to the suit; and that, inasmuch as he resided in the state of Georgia, in which state the complainant resided, his presence challenged the jurisdiction, and prayed for dismissal as to West. Upon this the American Loan & Trust Company renewed its demurrer. Afterwards the American Loan & Trust Company brought its bill in this court against the East & West Railroad Company of Alabama for the foreclosure of the first consolidated trust deed and mortgage, granted by the East & West Railroad Company of Alabama, and to this bill James W. Schley, Joel Brown, and S. I. Stevens were joined as parties defendant, on the ground that they claimed an interest in, or liens upon, the railroad company's property. Complainant alleged default in the pay-

ment of interest, the necessary request of bondholders to bring suit for foreclosure, the insolvency of the company, and also prayed for a receiver. Upon notice, the application for a receiver came on to be heard before the circuit judge. After hearing, all the proper parties being before the court, the court of its own motion directed and ordered "that the suit of James W. Schley against the said East & West Railroad Company of Alabama *et al.*, pending in this court, be, and the same is hereby, consolidated with the suit of the American Loan & Trust Company, complainant, against the East & West Railroad Company of Alabama *et al.*, without prejudice, however, to the rights of the defendants in suit of Schley against the railroad company to raise any jurisdictional questions now present in the record of such suit; that in such consolidated cause the American Loan & Trust Company shall be the complainant, and the said East & West Railroad Company of Alabama, defendant; and the said Schley shall stand therein as an intervenor, and his pleadings heretofore shall be taken as pleadings sufficient for such purpose in said consolidated case." Thereupon, on leave of the court, defendant Schley filed two pleas,—one of *lis pendens*; the other in bar of the suit. By consent of counsel the said two pleas of Schley and the demurrer of the American Loan & Trust Company to Schley's bill have been submitted to the circuit judge on briefs, and are now for decision.

1. The demurrer of the American Loan & Trust Company to Schley's bill being on the ground that the court was without jurisdiction of the American Loan & Trust Company at the time of the commencement of the suit, however good when filed, seems now to fall by the order of consolidation, and the fact that the American Loan & Trust Company has voluntarily appeared; in fact, counsel for the trust company take this view of the matter, and ask leave to withdraw the demurrer.

2. The same result seems to follow with regard to the plea of *lis pendens* filed by Schley to the foreclosure bill. It is doubtful, however, whether this plea would be sufficient if the order of consolidation had not been made. It is true that Schley, in his bill for an account and marshaling of liens, prays for a foreclosure of some deed of trust after an account shall be taken as to the valid outstanding bonds; but it is difficult to see what right he would have to a foreclosure of a mortgage in which he had no title. Besides this, although the foreclosure was prayed for by Schley, no such foreclosure could be had in his suit, unless the trust company had seen fit to ask it by way of cross-bill. When a cross-bill is necessary to the defense of a party, he must file it to establish his defense. When a cross-bill is necessary to bring the parties before the court in order that equity may be done, the court may order one filed; but where a party is merely entitled to a cross-bill in order to obtain affirmative relief, he may or may not file it, at his discretion, and without prejudice to his rights.

3. The plea in bar filed by Schley is based on section 4, art. 14, of the constitution of Alabama, as follows:

"No foreign corporation shall do any business in this state without having at least one known place of business, and an authorized agent or agents

therein; and such corporation may be sued in any court where it does business, by service of process upon an agent anywhere in this state."

This plea does not aver specifically that the American Loan & Trust Company is doing business in the state of Alabama, but avers that it is a foreign corporation, has accepted the trust from the East & West Railroad Company of Alabama, and has no known place of business nor authorized agent within the state; the inference seeming to be that the said company is doing business in this state, because it has accepted the trust under the trust deeds issued by the East & West Railroad Company. It is to be doubted very much whether the transaction of its legitimate business in the city and state of New York, on the part of the American Loan & Trust Company, is doing business in Alabama, in the sense of the constitutional article, when it accepts a trust thereafter on a contingency to be executed in Alabama. The provisions of the trust deed, which is made the basis of the foreclosure suit, do not indicate that any business is to be transacted in Alabama by the trustee, unless default shall be made in the payment of interest, as provided by the trust deed. In case of default, the trust deed provides several lines of procedure upon the part of the trustee in the execution of his trust. One is that the said trustee may enter into possession of the said railway line and property, and manage and operate the same for the account of the bondholders, and apply the proceeds of such management to the payment of interest on the mortgage debt. Perhaps, if this provision of the trust deed should be acted upon, and the trust company should take possession of the railway line and operate the railway, the trust company would then be doing business in Alabama, and would then be compelled, in compliance with the constitutional article, to provide at least one known place of business and one authorized agent. Another provision of the deed of trust is that, on default in the payment of interest, and on the petition of bondholders, the trustee shall bring a suit to foreclose the trust deed. Such suit is the one brought by the trust company in this cause. Merely bringing a suit in the circuit court of the United States in the state of Alabama for foreclosure of a mortgage cannot be said to be doing business in the state of Alabama in any such sense as to require an agent, other than a solicitor, or any known place of business. However this may be, the question submitted by this plea is decided adversely to the pleader by the jurisprudence of Alabama, as declared in the supreme court of the state. In the case of *Sherwood v. Alvis*, 83 Ala. 115, 3 South. Rep. 307, it is held upon principle and authority that, although a foreign corporation does business in Alabama without having at least one known place of business or authorized agent or agents therein, that its contracts made in the state of Alabama, and relating to Alabama property, are not void, even if voidable, by reason of the constitutional provision aforesaid. If the deed of trust granted by the East & West Railroad Company of Alabama in favor of the American Loan & Trust Company is not void, there can be no good reason why the said trust company may not bring suit to foreclose the deed of trust. An order will be entered in this case permitting the American Loan & Trust Company

to withdraw its demurrer to Schley's bill on payment of costs; if not so withdrawn, then to be overruled with costs; and declaring the said plea in abatement and plea in bar filed by Schley to the bill of the American Loan & Trust Company to be insufficient, and that they be overruled, with costs.

DEYO v. OTOE COUNTY.

(Circuit Court, D. Nebraska. January 2, 1889.)

1. RAILROAD COMPANIES — MUNICIPAL AID — VALIDATING ACTS — LEGISLATIVE POWER.

Municipal bonds issued without authority of law, and therefore void, may be validated by an act of the legislature passed for that purpose, if the legislature of the state could authorize the issuing of similar bonds. The bonds sued on in this case, though void when issued, for want of authority to issue them, were made valid obligations of the county by a curative act of the legislature of the state on the 15th day of February, 1869.

2. SAME—SURRENDER OF BONDS FOR NEW ISSUE.

If the holder of valid municipal bonds, such as the ones which form the basis of this suit, surrenders them to the municipality, and receives in exchange therefor other bonds which the municipality had not the lawful right to issue, he is not thereby divested of his title to the bonds so surrendered; and such owner and holder of the bonds so surrendered may maintain an action thereon after the same matures.

(Syllabus by the Court.)

At Law. Action on county bonds.

Watson & Scofield, for plaintiff.

D. T. Hayden and Montgomery & Jeffrey, for defendant.

DUNDY, J. This suit is based upon several bonds issued by Otoe county, aggregating the sum of \$5,000. The bonds were originally issued to the Midland Pacific Railway Company, a railroad corporation organized under the laws of this state. The bonds bear date the 1st day of April, 1868, and matured the 1st day of April, 1888. These bonds are but a small portion of those issued at the same time, and under the same alleged authority. The bonds were issued by the county commissioners of the county, after a vote of the people of the county seemed to authorize the issue, and by virtue of the said vote and the orders made by the commissioners pursuant thereto. The bonds had been put on the market by the railroad company, and had mostly passed into the hands of innocent holders. But the rightful authority to issue the bonds was soon questioned, and the legislature interposed for the purpose of validating the bonds. On the 15th day of February, 1869, the legislature passed an act to enable counties, cities, and precincts to issue bonds, etc., and to legalize bonds already issued. The eighth section of that act is as follows:

"All bonds heretofore voted and issued by any county or city in this state to aid in the construction of any railroad, or other work of internal improvement, are hereby declared to be legal and valid, and a lien upon all the taxable

property in such county or city, notwithstanding any defect or irregularity in the submission of the question to a vote of the people, or in taking the vote, or in the execution of the bonds, and notwithstanding the same may not have been voted upon, executed, or issued in conformity with law; and such bonds shall have the same legal validity and binding force as if they had been legally authorized, voted upon, and executed: provided," etc.

This section seems to apply to all bonds voted and issued in the several counties and cities in the state except Nemaha county, which is specially named in the proviso. The county paid the interest on the bonds until a short time before the suit was instituted, and it is claimed is still willing to pay both interest and principal, except for a supposed legal impediment which seems to be in the way of doing so. The holders of these bonds were willing to receive in exchange from the county refunding bonds, drawing a lower rate of interest, and having a long time to run. This willingness led to an arrangement between the holders and the county, that was mutually satisfactory. Consequently, on the 2d November, 1880, an election was had in the county for the purpose of voting on the proposition to refund the bonded indebtedness. The vote was favorable to refunding, and on the 1st January following refunding bonds were issued in lieu of the ones in suit. But in order to give life and validity to such bonds, so as to make them valid and negotiable, it was necessary to have them registered and certified by the state auditor. This indispensable requisite was never complied with. The auditor declined to certify that the bonds were legally and properly issued; whereupon Otoe county commenced proceedings in the supreme court of the state to compel the auditor to certify and register the bonds as required by law. The supreme court, after full hearing on the merits of the controversy, declined to issue the *mandamus* prayed for, and held the refunding bonds void for the want of authority in the county commissioners to call an election, or to issue such bonds. *Otoe Co. v. Babcock*, 23 Neb. 802, 37 N. W. Rep. 645. After all this, the plaintiff offers to surrender to the county the refunding bonds so declared to be void, and demands the return of the valid ones, which he had delivered to the county in exchange for the worthless refunding bonds. This demand was not complied with for reasons unnecessary to state, nor would the county pay the money alleged to be due on the valid bonds, though often requested, etc.; hence this suit. The admitted facts were reduced to writing, a jury was duly waived, and the cause submitted to the court. The facts were about as the same are detailed herein.

It may be conceded, for all purposes connected with this controversy, that the bonds originally issued, and on which this suit is based, were void from their very inception, for want of authority to issue them. It must be conceded, also, that the eighth section of the act of the state legislature before quoted, was an attempt made to cure the want of authority to issue the bonds, and was really and in fact intended to give life and vitality to a dead or void bond. If the legislature of a state has the constitutional right to do this, then the original infirmity which tainted these bonds has been completely overcome. Counsel for the county

strenuously contend that the legislature has no such right, and when it attempted to arrogate to itself any such right or authority, it transcended its legitimate constitutional authority. This is a pleasing view to take of legislative functions, especially by a strict constructionist, as I am supposed to be; but unfortunately for those who rely on that in this case, the supreme court of the United States has had under consideration this very eighth section, and has held that the legislature had the constitutional right to pass it, and that bonds voted and issued without authority before its passage were validated and binding after the same became a law. See *Otoe Co. v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. Rep. 265. After such an authoritative exposition of the law, there is no room left for argument thereon in this court. We will therefore now and hereafter treat this question as no longer open to dispute.

Again, it is claimed that because the plaintiff exchanged his valid original bonds for the refunding bonds that no action can be maintained until the latter bonds mature. Defendant's counsel insist that the refunding bonds are valid, subsisting obligations, and, as the plaintiff received them in exchange for the others, he cannot now maintain this action. That claim would be difficult to meet and answer if the refunding bonds were valid. But are they valid? The highest court in this state has pronounced against their validity, and that, too, in a case before it in which Otoe county was a party. *Otoe Co. v. Babcock*, *supra*. Notwithstanding this decision it is claimed that the case was not well considered, and that the law of the state then under consideration is the other way, and I am asked to disregard the decision. It may be that the decision is open to criticism, as counsel claim. However that may be, it is a sufficient reply to say that the federal courts usually follow the interpretation put on state laws by the highest courts of the states, and there is no necessity or inclination to depart from the general rule in considering this case. It must, then, be here held that the refunding bonds received by plaintiff in exchange for his valid ones were void and worthless obligations, and that the plaintiff, by his act of surrender or exchange, did not alienate his title to the original bonds, notwithstanding they are not under his absolute control.

The remaining question relates to the right of the plaintiff to bring and maintain his suit when not in the actual possession of the bonds on which he sues. This question, it seems to me, does not present any serious difficulty. The bonds were certainly issued, and came to the plaintiff in due course of business. He was the owner of the same at the time of the exchange. He received interest on the same for many years. There is no question about their identity or ownership. When he surrendered them to the county he received some worthless paper, and nothing else. The consideration for the exchange was a total failure. The county ought to have placed the plaintiff where he was before the exchange; and in legal contemplation, the title of the plaintiff to the bonds in suit was never divested. He is still in a position to sue and maintain suit on the bonds. The supreme court of the state had this same question before it, and the right to maintain the suit was upheld. *Platts-*

mouth v. Fitzgerald, 10 Neb. 401, 6 N. W. Rep. 470. The views here expressed entitle the plaintiff to a judgment for the amount claimed, and judgment will accordingly be entered, on plaintiff filing with the clerk of the court the refunding bonds in his possession, hereby held to be invalid.

HAGOOD v. BLYTHE *et al.*

(*Circuit Court, D. South Carolina. January 11, 1889.*)

1. PRINCIPAL AND SURETY—DISCHARGE OF SURETY.

In order to discharge a surety short of payment of the debt there must be some dealing between the creditor and the principal changing the cause of action, or suspending the right of action.

2. UNITED STATES MARSHAL—BOND—JUDGMENT.

When a private person brings suit against a marshal and his sureties on his official bond for official default, the judgment should be, not for the penalty, but for his damages legally assessed. Such suit, and the judgment thereon, are for his sole use. Rev. St. U. S. §§ 784, 785.

(*Syllabus by the Court.*)

At Law. Action on marshal's bond.

Mitchell & Smith, for plaintiff.

Barker, Gilliland & Fitz Simons and Brawley & Barnwell, for defendants.

SIMONTON, J. Action at law on a marshal's bond, against him and his sureties. A trial by jury waived. Complaint alleges the collection by the United States marshal of certain costs due plaintiff as clerk of the court in *Farr v. Chick*,—\$187.75; the failure to pay the same to plaintiff; and demands judgment on the penalty of the bond. The collection of the money in July, 1883, by Blythe, marshal, and the failure on his part to pay it over, have been proved, except as to the sum of \$12.32, which should be credited on the claim. The answer on behalf of the sureties sets up certain dealings between the plaintiff and Blythe, which they claim discharge them. It appears from the evidence that in July, 1883, Blythe was removed from office as marshal; that he called on the plaintiff and told him that he had collected these costs, but that he was put to such heavy expenses attending the removal from his office, such as paying house-rent and other charges, that he was compelled to use the money. He promised, however, to pay it as soon as he returned to his home in the interior of the state. It does not appear what reply plaintiff made to this. This suit began 25th February, 1887.

In order to discharge a surety short of the payment of the debt there must be some dealing on the part of the creditor and the principal changing the cause of action, or suspending the right of action. Perhaps, in a court of equity, unreasonable and inexcusable delay on the part of the creditor, working injury to the surety, may operate so as to discharge him. In this court there must be a contract to give time; that is, an agree-

ment based upon consideration binding on the creditor. Mere delay, without such a contract, will not discharge the sureties. *Hunt v. U. S.*, 1 Gall. 32; *Locke v. U. S.*, 3 Mason, 446; *King v. Baldwin*, 2 Johns. Ch. 559; 2 Amer. Lead. Cas. 105. If delay be relied on it must be shown to have operated as an injury to the surety. *Hampton v. Levy*, 1 McCord, Eq. 107; *Smith v. Tunno*, Id. 443. In this case there was delay on the part of the plaintiff, but nothing in the shape of an agreement to give time appears. No evidence whatever is offered showing that the sureties have been injured by the delay. They are not discharged, and plaintiff is entitled to a verdict against them, as well as against their principal. There is no evidence of any demand, however, on the part of the plaintiff. He will be allowed interest on his claim, but as against the sureties he can get interest only from the date of the filing of the summons in this case,—25th February, 1887. *U. S. v. Curtis*, 100 U. S. 119.

The more difficult question is as to the form of the judgment. Shall it be for the penalty of the bond? Or shall it be for the sum allowed above with interest? In South Carolina, before the adoption of Code of Procedure, it was the practice to sue the official bond of the public officer either in the name of the state or of any person injured by act of the officer. If the verdict was against the defendant, judgment was entered on the penalty. Inasmuch as suit could be brought by any party aggrieved, (6 St. at Large, 384,) all existing suits were consolidated, and the judgment for the penalty inured for the benefit of such consolidated suits without priority between them, (*Treasurers v. Bates*, 2 Bailey, 379, 1 Hill, S. C. 409; *Mitchell v. Laurens*, 7 Rich. Law, 111.) The judgment for the penalty is entered as security for the several sums assessed for breaches of the condition. This judgment takes priority over any judgment subsequently obtained against the defendants, even though the assessment of damages be made on a suggestion subsequent to the second judgment. *Norton v. Mulligan*, 4 Strob. 357.

In *State v. Moses*, 18 S. C. 366, decided after the adoption of the Code, the action was in the name of the state, verdict for the penalty, judgment accordingly. On appeal it was held that it was proper in cases of this kind—that is, in suits by the obligee of the bond (the state)—to take a verdict for the penalty, and to enter judgment on the penalty for the obligee for the benefit of all parties injured by breach of the condition of the bond. That thereupon, to avoid a multiplicity of suits, and secure equality among claimants, an order should be published requiring them to come in by a day certain, prove damages, and obtain a share in the proceeds of the execution. The counsel for the plaintiff in this case presses upon the court that this is the practice we must observe under section 914, Rev. St. U. S. This case of *State v. Moses* goes beyond the cases cited above of *Treasurers v. Bates*, *Mitchell v. Laurens*, and others. These consolidated existing suits, and brought them into one judgment on the bond. *State v. Moses* invites the presentation of claims not yet in court. There is but one case pending on this marshal's bond besides this. That is *U. S. v. Blythe*. In it the prayer is not for the penalty, but for the breach

of the bond. It was said at the hearing that there are other claims not yet sued. *State v. Moses* was decided by a court which can administer at the same time and in the same pleadings legal and equitable relief. In order to avoid a multiplicity of suits, and equitably administer assets, it can give judgment, call in creditors, and distribute a fund *pro rata*, if need be. I have serious doubts if this court, as a court of law only, can administer this relief, and if the practice so laid down can be followed. Congress has legislated on this subject. Rev. St. §§ 784, 785. Let us compare them with the statute law of this state.

The cases in South Carolina proceed under act 6, St. at Large, 384, reproduced in the General Statutes, § 450. It is in these words: "The bond of any public officer in this state may at all times be sued on by the public, any corporation or private person aggrieved by any misconduct of any such public officer." All that the person aggrieved has to do is to apply for a certified copy of the bond, to which he is entitled by right. Upon this act the case of *Treasurers v. Bates* built up the practice, almost by way of legislating upon it. *Norton v. Mulligan*, 4 Strob. 357. The language used by congress in giving the relief is more full and precise. Sections 784, 785, Rev. St. It is to be regretted that in the construction of these sections we can obtain but little aid from judicial decisions.

Of the cases cited in argument, *Wetmore v. Rice*, 1 Biss. 237, in which judgment was entered for the penalty of the bond, really decides that suit can be brought in the United States courts by a party in his own name, and without regard to citizenship. Everything else is *obiter dictum*. *U. S. v. Davidson*, Id. 433, decides that suit may be brought in the name of the United States or of the private person. *Adler v. Newcomb*, 2 Dill. 45, simply lays down the doctrine that judgment must be for the amount recovered, and not for the penalty. In *Cox v. U. S.*, 6 Pet. 172, the claim was for \$15,000, but judgment was for the penalty \$20,000. It was held erroneous. In *Farrar v. U. S.*, 5 Pet. 373, the judgment was for the breach, which exceeded the penalty. It was set aside. We must therefore construe the sections for ourselves. Section 784 says, in case of a breach of a condition of the marshal's bond "any person thereby injured may institute in his own name, and for his sole use, a suit on said bond, and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution shall issue in due form." The suit may be "in his own name," that is to say, it need not be in the name of the United States, and it must be for his sole use. If so brought, no one else can come in. The results of the suit are his own. Therefore the section provides that he shall recover, not the penalty of the bond, but such damages as shall be legally assessed. The execution issues "for these damages so assessed." As the execution is the mode provided for enforcing and satisfying the judgment, (2 Tidd. Pr. 993,) when this execution—which is for the damages so assessed, and costs—is paid, the judgment itself is satisfied.

Section 785 provides "that the said bond shall remain after any judgment rendered thereon as security for the benefit of any person injured

by the breach of the condition of the same until the whole penalty has been recovered; and the proceedings shall always be as directed in the preceding section,"—that is to say, such injured person may bring suit on the bond notwithstanding the judgment already had on it, in his own name, for his sole use, and may recover such damages as shall be legally assessed, "such suits to continue until the whole penalty is recovered,"—that is, until the sum total of the recoveries equals the penalty. If the suits "shall continue until the whole penalty is recovered" it is clear that the whole penalty is not recovered in the first suit. In the case of *U. S. v. Curtis*, 100 U. S. 119, action was brought on the bond of a paymaster, and breach assigned, was the default in \$3,320.83, and interest. Verdict and judgment were for the breach, and not for the penalty. In New York it is said that on an official bond judgment shall be for the damages, and not for the penalty. *O'Connor v. Such*, 9 Bosw. 318; *Howard v. Farley*, 18 Abb. Pr. 260. In South Carolina, in courts whose civil jurisdiction is limited to \$100 and under, a judgment can be had on the condition of a bond if the judgment be under \$100, although the penalty greatly exceed that amount. Code, § 74.

Construing these sections, therefore, I am of the opinion that a person aggrieved by the action of the marshal may sue on his bond in his own name, or the suit may be in the name of the United States. If the suit be in the name of the United States, the judgment is for the penalty; and, as the United States holds the bond for the protection of all concerned, it may be that the judgment may remain as security for any person aggrieved, who may come in under it, and suggest his interest. This would be the procedure under the practice in this state. *Treasurers v. Bates*, 2 Bailey, 362; *Norton v. Mulligan*, 4 Strob. 356. If, however, the suit be brought in the name of a private person, it is for his sole use. His recovery is the damages legally assessed, and for this he issues his execution. Let plaintiff have judgment against each surety in the sum of \$175.43, with interest from the 25th day of February, 1887, and costs.

STANTON v. UNITED STATES.

(Circuit Court, D. Connecticut. January 14, 1889.

1. DISTRICT ATTORNEYS—CLAIMS—JURISDICTION OF COURT.

Under act Cong. March 3, 1887, authorizing suits to be brought against the United States to recover items in the account of a district attorney suspended or disallowed by the accounting officer, and providing that the courts "herein mentioned" shall not have jurisdiction "to hear and determine other claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same," a district attorney is not concluded by the rejection of items in his bill by the department having charge of the auditing of the accounts of district attorneys.

2. SAME—COMPENSATION—ATTENDANCE ON COMMISSIONER BEFORE ARREST.

Under Rev. St. U. S. § 824, providing for the compensation of district attorneys for the examination before a judge or commissioner of persons charged

with crime, the district attorney is entitled to his "per diem" for time necessarily spent in the investigation of an offense in co-operation with the commissioner before the arrest is actually made, and witnesses are sworn.

3. SAME—ATTENDANCE ON ARRAIGNMENT.

The district attorney is entitled to compensation for time actually and necessarily spent upon the arraignment before the commissioner, though no witnesses are examined, the magistrate having adjourned the hearing on motion of the accused.

4. SAME—APPLICATION OF ACCUSED TO TAKE INSOLVENT'S OATH.

Compensation is recoverable for the actual examination of the accused upon an application to take the poor convict's oath.

5. SAME—EXTRA WORK.

Under section 824, a district attorney who does two days' work in one is not entitled to a double fee.

6. SAME—DISCONTINUANCES.

An order remitting a criminal case from the circuit court to the district court, on motion of the district attorney, is not a judgment within the meaning of section 824, prescribing the fee of the district attorney in such cases.

7. SAME.

For services resulting in a discontinuance before a commissioner the district attorney is to be paid under the "per diem" clause of section 824, and not under the clause prescribing the fee for discontinuances.

8. SAME.

Where the accused is bound over by the commissioner to the district court, and the commissioner's record is sent to that court and docketed, a fee is recoverable for a discontinuance, although no information has been filed.

9. SAME.

Where the commissioner's record and bail-bond are returned to court, and an indictment is drawn, but the grand jury find not a true bill, a fee is recoverable for a discontinuance.

10. SAME—COMPROMISE OF CIVIL ACTION.

For services rendered by a district attorney in securing a compromise of a civil suit brought in favor of the United States, whereby the suit is dismissed without trial, he is only entitled to the fee of five dollars, allowed for a discontinuance.

11. SAME—EXTRAORDINARY EXPENSES.

Under section 846, providing that where the ministerial officers of the United States shall incur extraordinary expense in executing the laws thereof, the payment of which is not specifically provided for, the president is authorized to allow the payment thereof, etc., an action will not lie for money paid out by a district attorney to prevent the escape of an alleged criminal, the allowance not having been made by the president.

12. SAME—INTERNAL REVENUE CAUSES.

Under section 838, providing that it shall be the duty of every district attorney to institute the proper proceedings for any fines, penalties, and forfeitures which may have been incurred by reason of the violation of the internal revenue law, unless he shall decide that the ends of justice do not require such proceedings, in which case he shall make report, etc., and that for the expenses incurred and services rendered in all such cases he shall receive, etc., the district attorney is not entitled to recover for services unless prosecutions have been commenced.

13. SAME—CLERK HIRE—OFFICE EXPENSES.

He is entitled to recover for clerk hire and for necessary expenses of the office, such as telegrams and printing and stationery.

14. SAME—COSTS OF AUDITING ACCOUNT.

The court clerk's fees for recording the orders in connection with the auditing of the accounts of a district attorney should be paid directly to the clerk by the government.

At Law.

Lewis E. Stanton, in pro. per.

Geo. G. Gill, U. S. Dist. Atty.

SHIPMAN, J. This is a petition of Lewis E. Stanton, Esq., late district attorney of the United States for this district, which was brought to this court by virtue of the provisions of the act of March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States," to recover those items in his accounts as district attorney which had been suspended or disallowed by the accounting officers, or which, although allowed, have not been paid. Said petition was duly served in accordance with the provisions of the sixth section of said act. The present district attorney of the United States for this district appeared, filed an answer, which denied an indebtedness by the United States to the petitioner, and upon the trial defended the interests of the government in said suit.

The first question in the cause is one of law, in regard to the jurisdiction of the court, and arises upon the language of the proviso in the first section of said act: "Provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction * * * to hear and determine other claims which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same." The position of the United States is that some of the items contained in the plaintiff's bill of particulars were, prior to March 3, 1887, rejected by the department which had charge of the auditing of the accounts of district attorneys; and that, as to those items, no other court is empowered by the statute to adjudicate. The position is sustained by the opinion of Judge BREWER in *Bliss v. U. S.*, 34 Fed. Rep. 781, which is hesitatingly followed by Judge WEBB in *Rand v. U. S.*, 36 Fed. Rep. 671. Notwithstanding the authority in its favor, I am not satisfied that this statute was merely prospective in respect to disallowed claims, but, on the contrary, think that this part of the proviso intended only to exclude from either of the courts claims which had been adjudicated by a court, department, or commission authorized to determine between the parties. A large part of the jurisdiction of the court of claims, before the enactment of this statute, consisted in the consideration of the validity of claims which had been rejected by the accounting officers of the government; and, among others, the decisions of the comptroller of the treasury were the subjects of revision. Section 191, Rev. St. If the construction which is now contended for is correct, this important branch of the business and duty of the court of claims would be abridged. It was not the intention of congress to diminish, but, on the contrary, to enlarge, the jurisdiction of that court. By statute a department is sometimes authorized to hear and finally determine in regard to specified classes of claims; as, for example, the department of the interior, and the commissioner of Indian affairs, are made final judges of certain claims; and it is an adjudication under this statutory authority by which complete power to pass upon the amount or validity of a claim had been given to a department or commissioner that reference is had in the pro-

viso under consideration. The words "hear and determine" are used three times in the first section. They are used twice to define the power of the courts to which new jurisdiction is given. Once they are used to express the power of the court, department, or commission which had previously passed upon the claim. The words are used each time in the same sense; that is, they refer to judicial determination after a hearing and weighing of testimony on both sides, and not to an *ex parte* accounting. I am well aware that the word "heretofore" seems, under this construction, to be of little value, but I think that the proviso was inserted out of abundant caution, lest subjects which had theretofore been adjudicated by an authorized tribunal could be reconsidered under this statute. If reliance is to be placed upon the opinion of the conference committee, upon whose report this proviso was inserted, it referred to claims which were *res adjudicata* upon being heard and determined before any department, court, or commission, and not to claims which had theretofore been rejected in the ordinary process of presentation and audit.

A number of the items in the plaintiff's bill, which were presented prior to March 3, 1887, were not rejected; no definite action was taken; they were suspended for further inquiry or statement. Some of them were disallowed, which seems to be equivalent to rejected. The items which were disallowed or rejected by the department prior to March 3, 1887, and which I allow, amount to \$125. The suspended items which I allow amount to \$349.50; and the admitted, but unpaid, items amount to \$15.40.

The facts which are found to exist in regard to the several items in the bill of particulars are as follows:

The plaintiff was district attorney for this district from January 2, 1885, to April 2, 1888.

No. 1. The items in the half-yearly account of June 30, 1885, which were disallowed, are:

"Attendance before Commissioner in U. S. v. Meech,				on January 17
"	"	"	"	Prescott, " " 19
"	"	"	"	Meech, " Feb. 18
"	"	"	"	Roath, " Jan. 29
"	"	"	"	Prescott, " " 14
"	"	"	"	Richmond, " March 30
"	"	"	"	Mayer, " April 28

—each at \$5.00, and judgment in U. S. v. Thompson, circuit court, April term, \$10.00. Total \$45.00."

The first Prescott claim is not pressed. The Meech and Roath items, amounting to \$15, arise upon the following facts. Meech and Roath were defaulting cashiers in two Norwich banks, and the cases were important. The days that are charged for were days necessarily spent in Norwich, at the request of the parties in interest, in the actual examination and investigation of the cases, partly in the office of the commissioner, but before the arrest was made; and no sworn testimony of witnesses was taken before the commissioner on the days which were disallowed. The action of the accounting officer is based upon a construction of section

824, which refuses "per diems" before commissioners, unless after arrest, and unless sworn testimony is actually taken before the commissioner. This construction of that portion of the section which relates to the subject of preliminary examination of criminal cases, is, in my opinion, incorrect. The language is: "For examination by a district attorney, before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed." It frequently happens, especially in important cases, that much time is necessarily and exclusively spent by the attorney in the investigation, preparation, and examination of the cases before the arrest is actually made, and before witnesses are sworn. The result of this investigation is submitted to the commissioner, before whom complaint is made, before arrest. The Roath and Meech items are of that class. This general question was considered by Attorney General Black in 9 Op. Atty. Gen. 170, who came to the conclusion that there was no distinction between an investigation or examination before the warrant is issued, and that which comes before the committal, and that examination of the person charged includes an investigation of the case. Confining myself to the facts in this case, I think that the district attorney is entitled to a fee of five dollars per day for the time necessarily employed in consultation or co-operation with the commissioner, in the preliminary proceedings of a criminal prosecution before the actual arrest. The second Meech item was for a day necessarily spent in Norwich with the commissioner, upon the arrest of the accused upon a new information. These items are allowed. The item of five dollars for services in Prescott's case, on January 14th, is unobjectionable. The services were rendered and the day was spent before the commissioner in New Haven, after arrest, when the accused was arraigned. The Richmond and Mayer items involve the question whether, for actual services before commissioners, and for actual services not provided for by docket fee, before the circuit or district court, on the same day, a double fee of five dollars can be allowed. I think that the intention of congress in section 824 was to give only five dollars for the work of one day, which may not be provided for by docket fees; and if the attorney performs two days' work in one he is entitled to five dollars only. The item of \$10 for judgment fee *v. C. B. Thompson* rests upon the following facts: Thompson was arrested in Vermont and was bound over to the circuit court. In this district, all criminal cases over which the district court has jurisdiction are tried in that court. Upon motion, the case was remitted to the district court. Although the affirmative ruling upon the motion was a final disposition of the case, so far as the circuit court was concerned, I do not think it could be called a judgment in the sense in which the word is used in the fee-bill, and which is a sentence or order pronounced on hearing of the points in issue, and determining the rights of the parties. This motion was a part of the ordinary routine business, for the performance of which the "per diem" of five dollars is given. Upon the items in No. 1, \$20 are allowed.

No. 2. The claimed and unpaid items in the half-yearly account ending December 31, 1885, are as follows:

Travel and attendance before court, in case of Robert Jeffrey,	- \$ 15 40
Attendance before Com'r, also charged before circuit court,	- 20 00
Services in case v. E. Williams, administrator, - - -	100 00
Expenses in case of D. C. Rodman, - - - - -	2 50
	<hr/>
	\$137 90

The Jeffrey charge was suspended, but was afterwards allowed by the accounting officer, and is due for services actually rendered, and mileage, which was traveled, but has never been paid. The \$20 rest upon the question which is stated and decided in the Richmond and Mayer items, and are disallowed. The claim for \$100 in the Williams case depends upon the following facts: A civil suit in favor of the United States was brought against Ephraim Williams, Jr., as administrator of his father's estate. The questions in the case made a settlement desirable, in the opinion of the attorney. It remained in court some time, and by his vigorous effort an equitable compromise was made without trial, and the money upon the compromise was paid to the government. For his special services the item is charged. That the fee of five dollars which is allowed for a discontinuance is very inadequate compensation for the services rendered, and for the time which was spent, is manifest; but compensation is controlled and governed by the statutes, and there is no clause in the fee-bill, and no section of the statutes, which authorizes the payment of a larger or special fee for services in a civil suit in which the United States is plaintiff. The rule of law is correctly announced by Attorney General Black in 9 Op. Atty. Gen. 146:

"When a duty is enjoined upon him (the district attorney) by the law of his office, and not merely by the request of a department, he is bound to perform it, and take as compensation what the law gives him. * * * All civil suits in which the United States are a party of record fall within this principle. In them no charge for extra services can legally be allowed, though it be true that some of them require an amount of labor and skill for which the compensation allowed by the fee-bill is altogether inadequate."

The law is also thus correctly summarized in the opinion of Attorney General Bates, 10 Op. Atty. Gen. 489:

"A district attorney is entitled to receive for the prosecution of any civil action in which the United States is concerned, before a federal court of his district, only the fee provided by the act,"—now embodied in section 824.

To the charge of \$2.50, which was paid to the judge of probate for copies of record which were ordered by the solicitor of the treasury, and which related to the estate of Daniel C. Rodman, a surety upon a collector's bond, no objection is made, but it is unpaid. Upon the items in No. 2, \$17.90 are allowed.

No. 3. Upon the account for the first half year of 1886, the attorney claims eight per diems before commissioners, of five dollars each, which were suspended, and are still unpaid, viz.: January 23d, B. C. Thompson; February 6th, Charles Bunnell; February 25th, D. H. Holcomb; February 28th, Manna Alderman; February 29th, George J. Hinman;

March 10th, Coleman & Bement; May 17th, Nathan Rose. All these days were actually and necessarily spent upon the arraignment before the commissioner, after arrest. Upon the suspended days no witnesses were examined, for the reason that the magistrate adjourned the hearing, for reasons satisfactory to himself, upon motion of the accused. The attorney was present upon each of the days, for the purpose of the examinations. The item of \$40 is allowed, and of \$2 for unpaid and due mileage. The attorney also claims \$105, the same being admitted items of this account, which the accounting officer suspended, because an examiner of the department of justice had reported, in 1886, that upon 21 court days in 1885, which had been paid for in the account for that year, no business was done. The examiner made a subsequent report that the days were business days. The suspension was continued that the attorney might show that upon these days he was necessarily employed in court upon the business of the government. The suspension was upon the ground that if the attorney could not explain satisfactorily the required facts in regard to the days in 1885, the sum of \$105 should be set off against a like sum, which was admitted to be due upon the account for the first half of 1886. No notice of set-off or counter-claim is made or pleaded. If it is not necessary to give notice of such a defense, the facts in the case are substantially identical with those hereafter stated in regard to item *d* of No. 4. In the last half of 1885, the attorney necessarily attended 21 days in a court of the United States, in the business of the United States, less those hereinafter deducted by his agreement. Upon No. 3, \$147 are allowed, less the amount hereinafter agreed by the attorney to be deducted for absences in August, 1885.

No. 4. Upon the account for the half year ending December 31, 1886, the attorney claims:

(a) For 14 discontinuances before commissioners, at \$5,	-	-	\$ 70
(b) For 4 per diems before commissioners—U. S. v. Bartram, September 27th; U. S. v. Willis, October 18th; U. S. v. Plumb, July 14th; U. S. v. Penard, October 6th,	-	-	20
(c) 4 charges for discontinuances in district court,	-	-	20
(d) 39 court per diems in circuit and district courts,	-	-	195

The facts in regard to item *a* are as follows: These were criminal cases for violation of the internal revenue acts, upon which propositions for compromise were made and forwarded to the commissioner of internal revenue. To save expense to the accused, who must pay the costs, and for simplicity of procedure, the accused were not bound over, but the cases were adjourned by the commissioner; the accused being upon bail, until an acceptance or rejection of the offers of compromise. They were all accepted, and by direction of the commissioner of internal revenue the cases were discontinued, and for the services a discontinuance fee is charged. The judgment and discontinuance fees in section 824 refer, in my opinion, to fees for services in the circuit or district courts. All services before commissioners are payable under the *per diem* clause. For the services which resulted in a discontinuance before the commissioner upon his docket, or the withdrawal of the case, I see no reason why the

per diem fee of five dollars is not justly chargeable, for the reasons which have been heretofore given. The service is a necessary one, requires time, is useful, and is in the interest of economy and efficiency. Upon an amendment of the bill of particulars, the sum of \$70 will be allowed.

The charge in item *b* is properly made. The days which are charged were necessarily spent in actual attendance before commissioners, upon the arraignment after arrest, in the examination of the accused. The Willis case, was the actual examination of the accused upon an application to take the poor convict's oath under section 1042 of the Revised Statutes. He was supposed to be possessed of property. The fee is payable under section 824.

The charge in item *c* is properly made. In four cases before commissioners the accused were bound over to the district court, the commissioner's record, with the bail-bonds, were sent to the court, and were docketed. The cases were then discontinued, and the discontinuance fees were not regarded by the accounting officer as payable, because no information had been filed. When the commissioner's record has been returned to and docketed in the district court, the case is in that court, and remains there until it is disposed of by affirmative action. The accused then appears, and can ask for a reduction of the bond; or the bail-bond can be called or forfeited. This is in accordance with the uniform usage of the district court in this district, and is in harmony with the usage of the state courts of this state.

The charge in item *d* is one upon which the action of the accounting officers has not been uniform. Sometimes a like charge is allowed. The suspension was for information as to whether the attorney was actually present on those days upon business of the United States; Hartford, the place where the court was held, being the place of the attorney's residence. The facts are as follows. In this district the terms of the courts, as a rule, continue until the succeeding term commences. The circuit court, as a court of equity, is always open, and the district court is open for the performance of the business appropriate to that court; but no days are entered upon the minutes of the clerk as "court days" unless business is actually done, or, having been regularly assigned, is postponed. Fifty-seven court days are entered upon the minutes during this half year, and the attorney was in necessary attendance in court upon the business of the United States for 53 separate days, perhaps more; but the custom of the present attorney, who lives in Hartford, has been to take the record of the clerk as the days for which the charge is to be made, and not to keep a separate account of each day, and of the business which he transacted,—a custom which is in the interest of economy, and of convenience to the court. The business of the office and the requirements of the government are of that character that frequent attendance in court, at the clerk's office, or at the judge's chambers, is necessary, for which the *per diem* compensation is allowed, and without which the office is of little pecuniary value. Upon No. 4, \$305 are allowed, less the amount hereinafter agreed by the attorney to be deducted for absence in August, 1886.

No. 5. For account for quarter ending June 30, 1887, \$325. Of this amount \$320 has been allowed, but has not been paid. One "court day" of five dollars was suspended, but should be paid for reasons heretofore stated. Upon No. 5, \$325 are allowed.

No. 6. Upon quarterly account for quarter ending September 30, 1887, the attorney claims:

For twenty-three court "per diems" during the quarter, -	-	\$115 00
For attendance before a commissioner in U. S. v. Sparks, August 12th, and U. S. v. Roemer, August 15th, -	-	10 00

The "per diems" are due for 23 days of necessary attendance in court on the business of the United States, and are allowed for the reasons heretofore stated. There is no assistant attorney in this district, and in the absence of the plaintiff from the state, upon his summer vacation, he employed counsel to represent him in the two named cases, who attended before the commissioner. The attorney paid them \$10. The two items are allowed, amounting to \$125.

No. 7. Upon quarterly account for quarter ending March 31, 1888, the attorney claims:

Two per diems in U. S. v. W. C. Griswold, -	-	-	-	\$ 10 00
Discontinuance of U. S. v. Parker, -	-	-	-	5 00
Thirty-one court days, -	-	-	-	155 00

The days in the matter of Griswold were necessarily spent before the commissioner after arrest, and upon arraignment, and the fees should be allowed. In U. S. v. Parker the commissioner's record was returned to court, with the bail-bond, and an indictment was drawn, but the grand jury found not a true bill. This action did not discharge the accused, for a new indictment could have been presented to another grand jury. In order to discharge the accused and his bondsmen, the case must be discontinued. The fee was properly charged. The 31 court days rest upon the same grounds which have been previously stated, the attorney having necessarily attended 31 days in a court of the United States on the business of the United States. Upon No. 7, \$170 are allowed.

No. 8. To cash paid O. D. Seymour for services in the arrest of R. S. Hicks, \$32.83. Had the accounting officers understood the nature of this bill it would undoubtedly have been approved, and authority have been obtained for its payment; for the bill is an eminently just one. The special expenses were incurred, and were specially taken, under a widely entertained apprehension that the accused would escape, and in consequence of a determination that the laws should be executed. They were entered into upon careful consideration and consultation with those who were in a situation to give advice. If the accused had escaped, the attorney would have been reproached. But, under section 846—the only section which relates to the subject—it is not a debt for which an action will lie. The clause of the section which relates to extra expenses of this sort provides "that where the ministerial officers of the United States have or shall incur extraordinary expense in executing the laws thereof, the payment of which is not specifically provided for, the president of

the United States is authorized to allow the payment thereof under the special taxation of the district or circuit court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary." The president alone is vested with power to allow the payment of this class of expenses, after they have been specially taxed. If he does not think that the allowance is proper, or does not authorize the payment, they cannot be paid, and with his decision the courts cannot, in my opinion, interfere.

No. 9. To cash paid for telegrams for the United States from September 25, 1885, to March 31, 1888, \$38.37. Copies of these telegrams were kept, and were produced and examined. They are the ordinary and necessary communications in regard to criminal business, were a part of the necessary expenses of the office, and were necessarily sent in the course of official business. The amount of the bill is allowed.

No. 10. Clerk hire from January 2, 1885, to April 2, 1888, approved by attorney general, but rejected by comptroller, \$699. In view of the large amount of clerical work in the way of reports which is required by the departments, and of the amount of business which the attorney was called upon to perform in the collection of internal revenue, at the instance of the collector of revenue, the assistance of clerks was important and necessary, and was obtained. The amount claimed, and which was paid by the attorney, being about \$216 per annum, is a moderate one, and should be allowed. This item, with the next one, is payable under section 835.

No. 11. Cash paid from January 2, 1885, to April 2, 1888, on account of printing and stationery of the United States, \$64.55. The bill was a part of the necessary expenses of the office. The articles therein mentioned were furnished and were paid for, and the bill is allowed.

No. 12. Fees for examination, and report to the secretary of the treasury, under section 838, of 37 "No Pros." customs cases, and for like services to commissioner of internal revenue, in 192 "No Pros." internal revenue cases, at \$5 each, \$1,145. These were cases which were reported to the attorney by the proper officers in this district, were examined, and, for adequate reasons, were settled without suit, or were not prosecuted. The attorney claims, under section 838, that a proper and adequate fee for his services should be paid. The secretary of the treasury rejected the claim, after its presentation in the year 1888, upon the ground that payment thereof is unauthorized by the section, which is as follows:

"It shall be the duty of every district attorney to whom any collector of customs or of internal revenue shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay for the fines, penalties, and forfeitures in such case provided, unless upon inquiry and examination he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted, in which case he shall report the facts in customs cases to the secretary of the treasury, and in internal revenue

cases to the commissioner of internal revenue, for their direction. And for the expenses incurred and services rendered in all such cases the district attorney shall receive and be paid from the treasury such sum as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of."

This question has been frequently under consideration by the treasury department, and the secretary followed the practice since 1873. If section 838 was the only one which now relates, or has related, to this class of cases, the construction of the attorney, and for which he has the authority of *U. S. v. Bliss*, 23 Fed. Rep. 26, would seem to be the correct one; but, as pointed out by Attorney General Brewster, in his opinion in 31 Int. Rev. Rec. 70, section 838 was an amendment, in 1873, of the seventh section of the act of July 18, 1866, now re-enacted as section 3085 of the Revised Statutes, which is as follows:

"District attorneys, upon receiving the report of a collector, shall cause suit and prosecution to be commenced and prosecuted without delay for the fines and personal penalties by law in such case provided, unless upon inquiry and examination they shall decide that a conviction cannot probably be obtained, or that the ends of public justice do not require that a suit or prosecution should be instituted, in which case they shall report the facts to the secretary of the treasury for his direction. For expenses incurred and services rendered in prosecutions for such fines and personal penalties, they shall receive such allowance as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such prosecution was had."

It is obvious that the payment provided by section 3085 is only where prosecutions have been actually commenced, and that section 838 was an enlargement of the pre-existing statute, so as to make its provisions applicable to internal revenue cases also. Viewed in this historical light, the provisions in the two sections in regard to payment for services are of the same character; and, notwithstanding the phraseology of section 838 is somewhat different from the pre-existing statute, I am of opinion that it was not the intention of congress to authorize payment for these services, unless prosecutions had been commenced. The opinions of Attorney Generals Brewster and Garland are to the same effect.

No. 13. The attorney also presents a bill of the clerk of the district court for original and duplicate orders passed in approval of the attorney's accounts in accordance with the statute of February 22, 1875, (18 St. 333,) since July, 1886,—\$26.90. The clerk's fees on similar orders were paid prior to July, 1886, by the government, but since that date have been disallowed, as chargeable only to the attorney. The statute requires that the officer shall prove, in open court, his services, and that the court shall thereupon cause to be entered of record an order approving or disapproving the account. The clerk's fees for these orders are in accordance with the fee-bill. By the statute the judge of the court is made an auditing officer, and the clerk is compelled to enter the auditing orders in the records. For these auditing services, so far as they are provided for in the fee-bill, the government, which requires the services to be rendered, is indebted to the clerk. The officers whose accounts are audited are not required by the statute to pay the expenses of the

audit. The bill should be paid directly by the government to the clerk. It is not properly chargeable to the attorney, and therefore should be here disallowed. Upon the foregoing bill, as allowed, \$255 have been paid since suit was brought, and the attorney agrees that \$45 should be deducted for absences in August, 1885, and August, 1886. Let judgment be entered in favor of the petitioner for the sum of \$1,611.82, and the taxable costs under the statute of March 3, 1887.

UNITED STATES v. GUION.

(District Court, E. D. Missouri, E. D. January 14, 1889.)

ELECTIONS AND VOTERS—INTIMIDATION OF VOTER.

Where the evidence tends to show that defendant was at the polls for the purpose of scrutinizing the vote cast, and it does not appear that he acted with evil motive or intent in challenging a vote, a conviction cannot be had, under Rev. St. U. S. § 5511, for "inducing a voter by threat or intimidation to refuse to vote."

Indictment for Intimidation of Voter. On demurrer to evidence.

The indictment in this case was framed under section 5511, Rev. St. U. S., and charged that defendant unlawfully, by threats and intimidation, induced one Samuel Butler, a duly-qualified voter, to refuse to vote at an election, held for a representative in congress of the United States, in the city of St. Louis, on November 6, 1888. At the conclusion of the government's case a demurrer was interposed to the testimony.

Thomas P. Bashaw, U. S. Atty.

Thomas B. Harvey, for defendant.

THAYER, J., (*orally*.) To make out the offense defined by section 5511, Rev. St. U. S., "of inducing a voter by threat or intimidation to refuse to vote," it must appear, either directly or by fair inference from the proof, that the accused acted with evil motive or intent. That is to say, it should appear that he threatened or intimidated a person whom he knew or had reason to suppose was a duly-qualified voter. If a citizen at the polls challenges the right of another citizen to vote, and does so in good faith, believing that the party challenged is not a qualified voter, no offense is committed under the statute, although the challenge is accompanied with a threat to have the party arrested and prosecuted if he persists in voting. In the present instance, all the evidence on behalf of the government, in my opinion, tends to show that the accused acted in good faith, without evil intent. It tends to show that the accused was at the polls for the purpose of scrutinizing the vote cast, and that he believed that Butler was not a qualified voter, and that he challenged his vote solely in consequence of such belief. If any fact has been proven tending to show that the accused acted *mala fide*, that is to

say, with intent to deprive a citizen of his vote, whom he supposed or had reason to believe was a legal voter, I have failed to note it. The jury must be instructed to acquit. A construction must not be placed on the statute that will deprive a citizen of his right of challenge, as that right in many cases is quite as important as the right to vote. Furthermore, the law was not intended to restrict the right of challenge, when exercised in good faith. The jury will return a verdict of not guilty.

ROSENTHAL *et al.* v. THE LOUISIANA.

(*Orbit Court, E. D. Louisiana, January 11, 1889.*)

1. SHIPPING—CARRIAGE OF GOODS—PLEADING—AMENDMENT.

To a libel for the value of goods shipped on claimants' vessel under a contract of affreightment, claimants answered, admitting the contract and delivery of the goods to the master of the wharf at the place of shipment, but alleged that the goods were accidentally destroyed by fire while on the pier, and before they were actually laden on board, and that the bill of lading exempted them from loss by fire at sea or in port. Libelant filed an amended libel, alleging that claimants agreed to insure the goods for the amount claimed, from the time they came into their possession until laden on board; and, having failed to make the insurance, they were liable. *Held*, that the amendment was not inconsistent with the original libel.

2. ADMIRALTY—JURISDICTION—CONTRACTS.

The contract of affreightment, the basis of the ship's liability, being a maritime contract, the additional stipulation for insurance while the goods were on the wharf cannot oust the jurisdiction of the admiralty.

In Admiralty. On appeal from district court.

Libel by Rosenthal Bros. against the steam-ship Louisiana for breach of contract of affreightment. Decree for libelants, and claimants appeal.

Bagne & Denegre, for appellants.

Hornor & Lee, for appellees.

PARDEE, J. The commercial firm of Rosenthal Bros., of the city of New Orleans, brought a libel in the district court for non-delivery of certain 12 cases of shirts, valued in New York at \$1,106.42, shipped on board the Louisiana, to be delivered to libelants at New Orleans, they paying freight. The claimants answer, admitting the affreightment contract, the delivery of the goods to the master on the wharf at the port of New York, the issuance of the bill of lading; but then allege that, after the goods were delivered to the master, and while on the pier, a fire accidentally broke out on the said pier, and that therefrom said goods were destroyed by fire before they were ever actually shipped or laden on board; and they further allege that the bill of lading granted and issued in the case, and made the basis of the libelants' suit, con-

tained, among other provisions, an express provision that the said steam-ship Louisiana and owners "should not be liable for any loss, damage, or injury to said goods, which should be caused by the acts of God, fire at sea or in port," etc.; and they claim, by virtue of such exemption, that although the goods were destroyed by fire after delivery to the ship, yet neither the ship nor owners are liable. Thereupon libelants filed an amendment to their original libel, averring "that if their said goods were destroyed by fire while on the pier of the claimants in the city of New York, as alleged in the answer, that still the said claimants are liable for the value of said goods; because said merchandise was sent to said port for shipment to New Orleans, under assurance and statements made by the agents of said steam-ship Louisiana and of said respondents, both at the port of New Orleans, where the said libelants reside, and at the port of New York, where the respondents reside, that the same was covered and protected by said steam-ship owners by insurance effected by them against loss or damage by fire by lying on said pier awaiting shipment." Thereupon the claimants filed an exception to the said amended libel on the ground that it was at variance and inconsistent with the original libel filed, and on the further ground that the contract alleged in said amendment was not a maritime contract, and that, with regard to said contract, the court was without jurisdiction. The district judge, in giving judgment for the libelants, gave the following reasons in such judgment, that "there was a contract by which respondents agreed to insure the goods for the value of which this suit was brought, from the time they came into their possession up to the time they were laden on board; and that, having failed to make such insurance, they are liable for the value of the goods at the port of New York."

The case made by the pleadings and evidence is a contract of affreightment with an ancillary provision that while the ship was not to be liable for fire on board, either at sea or in port, yet she was to protect the goods from fire while on the wharf awaiting lading. It is difficult to see any inconsistency in the provisions of this contract. The ship was certainly liable as carrier from the acceptance by it of the goods on the wharf. See *Macl. Shipp.* 413; *Abb. Shipp.* 345. By the terms of the bill of lading in this case (and it is a common one in such bills) the ship was not to be liable for damages from fire at sea or in port; yet while the goods were in the custody of the carrier, although not yet loaded, the carrier was responsible for loss or damage arising from negligence, if not responsible for loss arising from accident. The exemption from liability from fire at sea or in port, contained in the bill of lading, might well be considered to apply only when the goods were loaded on board; and the parties could well agree, as they appear to have done, that the goods should be protected while on the wharf, and in danger from outside negligence; and particularly when, as appears in this case, such provisions seem to be necessary to obtain freight for the ship. See *Walker v. Transportation Co.*, 3 Wall. 150.

As to jurisdiction, there seems to be no doubt. As the main contract (and the basis of the ship's liability) is a maritime contract, the addi-

tional stipulation as to insurance while the goods lay on the wharf cannot oust the jurisdiction. I agree with the district judge, that on the case made judgment should go for libelants.

GRAY v. MOORE *et al.* SAME v. BOHNE *et al.* SAME v. MASON *et al.*

(Circuit Court, E. D. Louisiana, January 11, 1889.)

1. SHIPPING—CARRIAGE OF GOODS—CONTRACT—TIME OF THE ESSENCE.

When the time of the arrival of the vessel at port of shipment is specified in the contract to furnish freight, and both parties contract with regard to it, it is in the nature of a condition precedent to the enforcement of the contract by the owner.

2. SAME—CANCELLATION CLAUSE.

Where contracts for furnishing freight are entered into in reliance upon untrue representations as to the arrival of the vessel at port of shipment, which representations amount to a warranty on the part of the ship and her agents, they cannot be enforced against the shippers, though the contracts contained no canceling clause.

In Admiralty. Appeals from district court.

Libels for breach of contracts to furnish freight. From a decree dismissing the libels, libellant appeals.

E. D. Craig and *E. W. Huntington*, for appellant.

Farrar, Jonas & Kruttschnitt, for appellees.

PARDEE, J. These cases involve substantially the same facts, and have been argued and submitted together. They are suits brought by the owner of the steam-ship City of Manchester against the several defendants for damages growing out of alleged default in the performance of contracts to furnish freight to the said steam-ship City of Manchester. The following are samples of the contracts entered into:

"GEO. GERDES, FREIGHT BROKER, 37 CARONDELET STREET.

"NEW ORLEANS, Nov. 2d, 1886.

"Messrs. Ross, Keen & Co.: Please enter my engagement to-day: 2,000 bales of cotton per SS. City of Manchester, here about 20th Nov., Capt. ———, for Havre, at $\frac{3}{4}$ cents per lb., with 5% primage.

"Yours, respectfully,

GEO. GERDES.

"1,000 b/c Wm. Blake. 1,000, L. E. Moore & Co."

"ED. COUTURIE, FREIGHT BROKER, 26 UNION STREET. REMOVED TO 44 CARONDELET ST.

"NEW ORLEANS, Nov. 4th, 1886.

"Messrs. Ross, Keen & Co.: This day engaged 500 bales of cotton for SS. City of Manchester, to arrive ———, Capt. ———, for Havre, at 25-32 at 5% primage, account of L. E. Moore & Co."

"Yours, respectfully,

ED. COUTURIE."

On the 23d of October, 1886, the agents of the steam-ship City of Manchester sent the following cablegram:

"Oct. 23d, 1886.
"Mr. James Gray, Whitby: Is Manchester coming?"

—And afterwards received the following answer:

"CARDIFF, Oct. 25th, 1886.

"Ross, Keen & Co., New Orleans: Manchester leaving Genoa in few days for New Orleans."

Mr. William P. Ross, of the firm of Ross, Keen & Co., who made the negotiations on the part of the steam-ship City of Manchester, testifies as follows:

"Question. Now, it is alleged on the part of the defendants that the ship did not arrive in time in order to carry out this contract, and that they were therefore released from it. Answer. I say at the time I made the engagements, I showed the freight brokers the copy we had received as to the position of the ship, which in the figuring had been estimated to be due about the 20th of November, and it is on that alone that we made the contracts. We did not make them for the November shipments, or with the canceling clause."

The ship did not sail from Genoa in a few days, in fact did not sail from Genoa for New Orleans until the 18th day of November,—a period of nearly four weeks; and did not arrive in New Orleans until the 6th day of December. On this showing, it seems clear that the contention of the defendants that they entered into the contracts on the faith of the representations of the agents of the ship that she would arrive about November 20th, is well founded; and that the agents so understood the matter seems clear from other telegrams sent by them to the owners, to-wit:

"NEW ORLEANS, 4th Nov., 1886.

"Keen & Co. to James Gray, Hogan, New York: Have engaged 1,100 at 25, but I must know her position. Have informed shippers she would be here soon after 20th, as cable of 25th stated she would leave Genoa in a few days. Can you meet Ross at Pensacola for shipping convention there 10th November? May possibly develop some business."

"Nov. 5th, 1886.

"Mr. James Gray, Atlantic Hotel, Norfolk, Va.: Steamer's position disappointing, but do not look for any trouble with engagements, as market firm. Think Pensacola convention worth attending."

"When time, therefore, is specified, and both parties contract with regard to it, whether it be the time at which the vessel is to be ready to receive cargo, or the day of sailing, or of arrival outwards, or the day of any other event in the voyage, the courts hold that it is in the nature of a condition precedent to the rights of the owner under the rest of the charter-party." *Macl. Shipp.* 372. Time and situation of a vessel are materially essential parts of the contract of charter-party or af-freightment. See *Lowber v. Bangs*, 2 Wall. 732; *Davison v. Von Lingen*, 113 U. S. 50, 5 Sup. Ct. Rep. 346; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. Rep. 12; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. Rep.

19; *Rolling-Mill Co. v. Rhodes*, 121 U. S. 260, 7 Sup. Ct. Rep. 882. The proctors for libelant contend that, as there was no canceling clause in the said contracts, (and on this point there is some evidence to show that the ship's agents refused to put in a canceling clause,) the contract was enforceable against the defendants at whatever date the ship might arrive. On this point it is only necessary to say that the presence or absence of a canceling clause in the contracts sued on can cut no figure; because the contracts were based upon untrue representations as to the sailing and arrival of the ship, which representations amounted to warranties on the part of the ship and her agents. It seems clear that libelant cannot recover, and judgment to that effect will be entered; costs of this and the district court to be paid by libelant.

SEAMAN *et al.* v. ADLER *et al.*

(Circuit Court, E. D. Louisiana. January 9, 1889.)

SHIPPING—FREIGHT—LIABILITY OF CONSIGNEE.

The consignee of merchandise, who is also owner, is liable for the freight thereon, though without fault of the ship's crew it has, by exposure to severe weather before shipment, become worthless at the time of delivery.

In Admiralty. Libel for freight. On appeal from district court.

Libel by S. H. Seaman and others, owners of the ship Louisiana, against A. Adler and others for freight money. Judgment for libelants, and respondents appeal.

Fergus Kernan, for appellants.

E. W. Huntington, for appellees.

PARDEE, J. In January, 1887, Adler & Co. ordered through merchandise brokers in New York 200 barrels of Irish potatoes, to be shipped to them at New Orleans. The potatoes were bought from Oscar Frommel & Bro., who delivered the same to the steam-ship Louisiana, consigned to A. Adler & Co., at New Orleans. At the time of delivery to the ship the weather was very cold, and it is a fair inference, from the evidence of the case, that during the loading and hauling necessary, the potatoes were frost-bitten. On her voyage to this port the steam-ship Louisiana was delayed by an accident to her machinery some 10 days. The potatoes arrived here in a rotten and worthless condition. Adler & Co. sent down for a dray-load, and had carted to their store about 50 barrels, which they examined, and discovered the rotten condition of the potatoes; whereupon they refused to accept any more. The agent of the Louisiana demanded the freight of Adler & Co., which was refused, and thereupon, between Adler & Co. and the steam-ship's agent, a telegram was drawn up to the shippers, Frommel & Bro., inquiring what disposition should be made of the potatoes, and asking for authority to

pay the freight for their account. To this telegram no answer was received, and thereupon Adler & Co. gave orders to Morphy, auctioneer, to sell the potatoes at public auction for account of whom it might concern. At the auction sale they did not bring the price of the barrels in which they were packed, and not enough to pay freight. Adler & Co. still refusing to pay freight, the owners of the steam-ship bring a libel *in personam* for the freight money.

The questions presented for decision are—*First*. Whether the vessel earned her freight money. *Second*. If she has earned her freight money, are Adler & Co. liable therefor? There doesn't seem to be any trouble under the evidence in finding that the vessel earned freight money. The potatoes, it is true, were received in apparent good order; but they were properly stowed, and received no injury while on board, except it may be from delay. The delay was caused by an accident to the machinery, which is one of the excepted perils mentioned in the bill of lading. It is pretty clear from the evidence that the damage to the potatoes was caused by cold weather at the time of delivery in New York. On the second point, a great deal of argument has been had, tending to show that a consignee is not liable for freight money unless he receives the goods, and the law on this point may be taken to be that way. See Abb. Shipp. marg. p. 421; and Mael. Shipp. 500. The case shows, however, that Adler & Co., although nominally, in the bill of lading, consignees, really were the owners of the goods. It is clear that when they ordered potatoes in New York, to be shipped to them at New Orleans, that the contract of sale was complete upon the delivery of the goods to the carrier. See Abb. Shipp. 326. Authorities might be multiplied to any extent upon this point. The real case is that Adler & Co. shipped the potatoes by the Louisiana, which vessel complied, in all respects, with its contract as a carrier. "It may happen, however, that goods existing in species, when brought to the place of destination, are so deteriorated in condition as not to be worth the freight; and then arises the question whether the merchant is bound to pay the freight, or is at liberty to abandon the goods to the ship-owner for his claim. In considering it, the causes from which the deterioration in the merchandise may proceed, must be distinguished. If it proceeds from the fault of the master or mariners, the merchant is entitled to a compensation, and may recover it against the owners or master." Mael. Shipp. 469. "On the other hand, if the deterioration proceeds from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the hold of the ship, the merchant must bear the loss, and pay the freight. The master and owners are in no fault; nor does their contract, though taken as the contract of common carriers, contain any insurance or guaranty against such an event." Id. 470. Judgment must go for the libelants.

O'NEIL v. THE I. M. NORTH.

(District Court, S. D. New York. December 21, 1888.)

COLLISION—TUG LANDING TOW—NEGLIGENCE—DAMAGES.

The tug N., in landing a tow of nine canal-boats at the dock at Port Ewen, North river, through miscalculation and the kinking of the tow upon a slack hawser, ran the libelant's canal-boat upon the corner of a gap in the dock, bringing the boat to a dead stand, causing her damage. Though the boat was old, and not very strong about the bows, the blow being much more violent than the ordinary contacts of navigation, *held*, that she was not unseaworthy, nor so weak as to require notice of weakness to the tug; that notice, if given, could not have affected her handling; and that she was therefore entitled to full damages.

In Admiralty. Libel for damages.

Libel by Kate O'Neil against the tug North for negligence in running a canal-boat against the corner of the dock at Port Ewen, on the North river, when landing a tow of canal-boats.

Hyland & Zabriskie, for libelant.

Robert D. Benedict, for claimants.

BROWN, J. I am satisfied that the libelant's witnesses are mistaken in their estimate of the speed of the tow when near the dock at Port Ewen. Considering all the circumstances, the most probable cause of the collision of the libelant's boat with the corner of the gap in the dock is miscalculation on the part of the captain of the tug in approaching too near the line of the dock, having reference to the fact that there were four boats in the second tier of the tow, while there were only three boats in the front tier, and that the second tier, with the libelant's boat on the port side, projected more than the captain of the tug had taken account of. The libelant's testimony seems to confirm that of the respondents, that the hawser was slack, and that therefore some kinking of the tow, more or less, was unavoidable. Nothing is shown, however, in the circumstances, of an unusual or unexpected character. The liability of the tow to sheer and kink either way was fully known. The tug was bound, therefore, to make all necessary allowance for this liability in approaching the dock on a slack hawser; and, as the canal-boat was not in fault, the responsibility for the blow rests on the tug.

The canal-boat was 14 years old. The evidence shows clearly that the wood-work about her bow was not very strong. The claimants contend, and some of their witnesses testify, that she was not fit for the ordinary contacts of navigation; others of their witnesses hesitate on that point. I am not entirely satisfied in that respect; and, looking at the other circumstances, I give the libelant the benefit of the doubt; for the blow must have been a very trying one, from its place near the stem of the square-headed boat. Striking the corner of the gap in that way, she could not turn to the right or left, but was necessarily brought to a dead stop. The lines of the other boats were broken; and with nearly 200 tons of coal on board, and other boats pushing up from behind, even

though her rate may not have been more than one mile an hour; the blow was not one of those ordinary contacts that boats are expected to encounter without injury. The fact that she did not sink at once, and that the bow was only so little broken that it could be wedged up so as to enable her to complete the voyage, make strongly against the contention that her beams were as weak as some of the claimants' witnesses suppose. Considering that she was so heavily loaded when brought to a dead stand against such a corner, and that the lines attached to her were parted, there seems to me little doubt that boats in the ordinary condition of those usually towed in this business would have been injured substantially the same as this one, and so as to require substantially the same repairs; and that this boat was not so nearly in an unseaworthy condition, or so specially liable to injury by the ordinary contacts of navigation, as to make it incumbent on the captain to give notice of her weakness, so as to demand special care by the tug in handling; and, if such notice had been given, the evidence does not indicate that that would have made any difference in the handling of the tow. The cases of *The Syracuse*, 18 Fed. Rep. 828; *The Reba*, 22 Fed. Rep. 546; and *The N. B. Starbuck*, 29 Fed. Rep. 797, are not, therefore, applicable here; but rather those of *The Granite State*, 3 Wall. 310; *The Baltimore*, 8 Wall. 386; and *The Howard*, 30 Fed. Rep. 280. As in the case last cited, however, damages can only be allowed for repair in a manner corresponding with the previous condition of the boat; not the cost of building a new stem and new bow, since the evidence shows that that was not necessary.

The libelant at the time offered to take \$125. The claimants expected to repair her for a much less sum; but it appeared that this did not include the repair of the stem, which I think the boat was entitled to. Nor does it appear that the claimants had taken into account any allowance for the few days' detention, for which the libelant would have been entitled to compensation, if there was employment for the boat at that time. I think \$125 is probably all that the libelant is entitled to; but, as the testimony on that subject was not fully gone into at the trial, either side can take a reference with respect to damages, if desired, paying the costs of the reference if it obtains a less favorable result than that sum.

LEVY *et al.* v. THE THOMAS MELVILLE.

(Circuit Court, S. D. New York. December 31, 1888.)

ADMIRALTY—APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Although on appeal in admiralty to the circuit court a new trial is to be had, yet in reviewing testimony brought up from below every possible test is to be used in determining its weight; the effect which the manner and appearance of a witness produced upon the judge below is proper to be considered; and, where there is no decided preponderance of the evidence either way, the district judge will be followed.

In Admiralty. Appeal from district court. 31 Fed. Rep. 486.

Treadwell Cleveland, for libellant.

E. B. Convers, for The Thomas Melville.

LACOMBE, J. The appellants' counsel in this case, referring to the opinion in *Windmuller v. The Thomas Melville*, 36 Fed. Rep. 708, where damage to other parcels of the same cargo was under consideration, asks this question: "Is not the trial in the circuit court one in which the parties have the right to ask for the independent, untrammelled views of the judge there presiding?" and thus answers it: "In this court we submit that the trial is as if there had never been a trial before." In support of this answer he cites *The Lucille*, 19 Wall. 74; *The Charles Morgan*, 115 U. S. 75, 5 Sup. Ct. Rep. 1172; *The Hesper*, 122 U. S. 266, 7 Sup. Ct. Rep. 1177,—in which it is held that an appeal in admiralty to the circuit court vacates altogether the decree of the district court, and that there is to be in the circuit court a new trial, "in which the judgment of the court below is regarded as though it had never been rendered." His inquiry is to be answered in the affirmative, and the statements above cited as to the practice in the federal courts accepted as correct. It by no means follows, however, that all the proceedings on the trial below are obliterated. If they were, and no testimony were to be considered save such as is taken in this court, the situation would be different; but so long as testimony taken below is brought up for review, the reviewing court must use every possible test to determine what weight it should be accorded. Thus the statement of any particular witness is to be compared with the rest of his testimony, with all the other evidence, and with the inherent probabilities of the case, with proper allowance for bias, for point of view, and for such physical or mental defects as may operate to affect his account. After all this is done, it often happens, however, that the mind is left in doubt as to whether such statement is truthful or not. It is matter of common knowledge that a proper appreciation of the appearance of the witness on the stand, and of the manner in which he gave his evidence, will in such cases lead the mind to an assured conclusion. From the application of this test, the reviewing judge is debarred. The effect, however, which such appearance and manner produced upon an associate judge, is a fact in the case, spread before him on the record, and eminently proper to be considered by him in reaching his conclusion. It was the application of this principle that in view of the conflict of testimony in the district court induced this court, which could not find in the printed narrative a decided preponderance either way, to follow the district judge in the *Windmuller Case*. The additional evidence of the two experts, neither of whom saw the vessel, has not changed the weight of evidence in the printed narrative, and I shall therefore again follow the district judge.

RICH et al. v. BRAY et al.

(Circuit Court, W. D. Missouri, C. D. January 14, 1889.)

1. COURTS—FEDERAL JURISDICTION—EQUITY—EXECUTORS AND ADMINISTRATORS.

The federal courts will take equity jurisdiction of a bill by non-resident heirs at law against resident heirs to compel an accounting of the property of their intestate in the hands of the defendants, and for a distribution of the estate, notwithstanding the remedy of complainants under the probate law of the state, when the bill alleges facts evoking the exercise of the powers of a court of chancery, such as that there has been no administration after the lapse of five years; that defendants have wrongfully appropriated the whole estate to their use, traded and speculated upon it, changing the original form of some of the property, made profits thereon, and been guilty of concealment, rendering a discovery and accounting necessary.

2. SAME—JURISDICTIONAL AMOUNT—SEVERAL COMPLAINANTS.

The theory of the bill being that a portion of the heirs entitled to distribution may maintain the action for their respective proportions without joining others, in order to give jurisdiction to the circuit court the interest of each independent of others must amount to the sum of \$2,000; and an allegation in the bill that "the amount of [the property in controversy] is unknown to said complainants, but much more than \$2,000, over and above all just debts and funeral expenses," is not sufficient to confer jurisdiction.

3. PARTITION—IN EQUITY—DISPUTED TITLE.

In a partition suit, either at law or in equity, the title to the land cannot be litigated; and when the bill avers that defendant, one of the heirs at law of the complainants' intestate, possessed himself of the intestate's land on the latter's death, without authority of law, and has since held the same, except such part as he may have disposed of or given to his co-defendants, to the entire exclusion of complainants, denying that there was any such property belonging to intestate, and refusing to give complainants their share; living on and cultivating such real estate as defendants own; using said property as his own; making great profits thereon, no part of which has he ever shared with complainants,—the bill shows such an adverse holding under claim of right amounting to an ouster among tenants in common as destroys the unity of possession, and takes away the right to partition.

4. SAME—PARTIES—DEFENDANTS—FEDERAL COURTS.

When an action for partition is instituted in the United States court, all the plaintiffs on one side must be non-residents of the state in which the suit is brought, and jurisdiction cannot be conferred by making a necessary party plaintiff a defendant, who is a resident of the state, whose interests are all in common with those of the complainants, and against whom no antagonistic act is alleged.

5. LIMITATION OF ACTIONS—PLEADING THE STATUTE.

When it affirmatively appears on the face of a bill that the statutory period has run, the objection may be raised by demurrer; but, as this objection is personal to defendant, if he does not raise it by demurrer or plea, it is deemed to be waived.

In Equity. On demurrer to bill.

Bill by Ernest A. Rich and others, as heirs at law of William Bray, against Thomas Bray and Minnie G. Kinsey, also heirs at law of said William Bray, to compel an accounting of all properties in the hands of Thomas Bray coming from said William Bray, and for distribution of the estate among the heirs.

D. B. Henderson and J. C. Meredith, for complainants.

Smith, Silver & Brown, for defendants.

PHILIPS, J. This is a bill in equity. The petitioners are non-residents of the state, and the respondents are citizens of this district. The bill alleges, in substance, that William Bray, the maternal grandfather of complainants, died intestate at Macies county, Mo., on or about the 15th day of February, 1883; that he died seised and possessed of a large amount of real estate and personal property, undisposed of by will or otherwise; that he left no widow, and that no letters of administration have ever been granted on his estate; that complainants and respondents, and other unknown heirs, citizens of the dominion of Canada, not made parties hereto, are his sole heirs at law; that on his death the respondent Thomas Bray took possession of the entire estate of decedent, consisting of large tracts of land and personal property, mill machinery, stores, and appliances, household furniture, horses, wagons, and implements of husbandry, farm products, live-stock, and other chattels, as also the rents, products, and profits of said mill and farm, moneys, notes, mortgages, and bonds, and has ever since continued to hold, use, and enjoy the same as his own property, to the exclusion of the other rightful heirs of the decedent; that he has made large profits out of said property, concealing from the complainants the fact of the existence of such property, whereby they have sustained great loss by the acts and misrepresentations of said Thomas Bray. The prayer of the bill is that said Thomas Bray be declared a trustee of said estate for the said heirs, and that he be required to render a full and true account of all properties, real and personal, that so came into his hands, and account for the increase and profits thereof; that distribution be decreed to be made of the entire estate among the lawful heirs; and for all proper relief. To this bill the respondent Thomas Bray demurs for various grounds of objection, which, so far as deemed essential, will be considered in their order.

1. It is objected that complainants have no standing in a court of equity, for the reason that they have an adequate and complete remedy at law. It may be conceded that if this action had been instituted in the state court, it would fail, so far as the personal property is concerned, for the reason that the probate system under the state statute has in this respect largely superseded the ancient equity jurisdiction of the chancery courts for discovering, marshaling and distributing the estates of decedents at the suit of the heir or creditor. The administration law of the state affords adequate remedies and facilities to accomplish the object sought by this bill, to have an executor *de son tort* disclose the assets in his hands, and for their summary recovery, administration, and distribution by either a private or public administrator, rendering a resort to a court of equity unnecessary. *Titterington v. Hooker*, 58 Mo. 596; *Pearce v. Calhoun*, 59 Mo. 274; *Johnson v. Beazley*, 65 Mo. 251; *Davis v. Smith*, 75 Mo. 228; *French v. Stratton*, 79 Mo. 562, 563. See, also, discussion in *Rozelle v. Harmon*, 29 Mo. App. 569. It cannot be questioned, however, that such a bill would have come within the cognizance of the court of chancery in England, as that jurisdiction was exercised at the time of the adoption of our federal constitution. In *Pratt v. Northam*, 5 Mason, 105, Judge STORY observed:

"It has been for a great length of time settled that in cases of the administration of assets courts of equity have a concurrent jurisdiction with courts of law. The original ground seems to have been that a creditor or other party in interest had a right to come into chancery for a discovery of assets; and, being once rightfully there, he should not be turned over to a suit at law for final redress. And for the purposes of complete justice, it became necessary to conduct the whole administration and distribution of the assets under the superintendence of the court of chancery, when it once interfered to grant relief in such cases."

See *Thompson v. Brown*, 4 Johns. Ch. 619. The United States courts derive their equity as well as common-law jurisdiction from the federal constitution and laws. Even in states where there are no chancery courts the equity jurisdiction of the federal courts none the less obtains. The state legislature cannot by the adoption of any system of administering justice restrict the constitutional jurisdiction of the federal court. *Lor-man v. Clark*, 2 McLean, 568; *Robinson v. Campbell*, 3 Wheat. 212. As said by Mr. Justice WAYNE in *Barber v. Barber*, 21 How. 592:

"It is no objection to equity jurisdiction in the courts of the United States that there is a remedy under the local law, for the equity jurisdiction of the federal courts is the same in all of the states, and is not affected by the existence or non-existence of an equity jurisdiction in the state tribunals. It is the same in nature and extent as the jurisdiction of England, whence it is derived."

So it has been repeatedly held that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the state which prescribes the modes of redress in their courts, or which regulate the distribution of their judicial power. *Hyde v. Stone*, 20 How. 175; *Suydan v. Broadnax*, 14 Pet. 67. In *Payne v. Hook*, 7 Wall. 430, Mr. Justice DAVIS uses this language:

"If legal remedies are sometimes modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses; is subject to neither limitation nor restraint by state legislation; and is uniform throughout the different states of the Union."

I do not wish to be understood as holding, by anything here said or maintained, that where an estate is in process of administration under the state statute, in the absence of any matters of fraud, and the like, which would call into action the special powers of courts of equity for the attainment of entire justice, that a party entitled to sue in this court on the grounds of citizenship could call upon it to arrest the jurisdiction of the state court, already acquired, and take upon itself the administration and distribution of the estate. And where relief is sought on the equity side of the court, the bill, of course, should present some of the exceptional facts which evoke and call into exercise the extraordinary powers of a court of chancery. The bill in this case shows that there has been no administration after the lapse of five years; that Bray has wrongfully appropriated the whole estate to his use, traded and speculated upon it, changed

the original form of some of the property, made profits thereon, and been guilty of concealment, rendering a discovery and accounting necessary. These are matters coming within the customary jurisdiction of courts of equity.

2. It is also objected that it does not sufficiently appear that the matter in dispute exceeds the sum or value of \$2,000. As the amount in dispute is a jurisdictional fact, it should be made to appear affirmatively on the face of the bill. The only allegation from which any idea of the value of the property in controversy can be derived is contained in the following statement: "The amount of which is unknown to said complainants, but much more than two thousand dollars, over and above all just debts and funeral expenses." How much more than \$2,000? This averment could be true if the amount were only \$2,100, or less. Is this sufficient to give this court jurisdiction? There are a large number of heirs or distributees to share in this property; and it is manifest on the face of the bill that the interest of no one of them, nor the interest of all the complainants combined, amounts to the sum in suit. Some of the heirs who are admitted to be distributees, and whose respective shares would have to be reserved for them, are not made parties to this suit. Therefore the position necessarily assumed by complainants is, that their respective interests and rights are so far separable that any number of them may proceed with the litigation without the others. I understand the rule in such case to be that, where two or more parties may thus join, as a matter of convenience to prevent multiplicity of suits, in one action, for the ascertainment and distribution of their respective interests in a common fund, the interest of each independent of the others, must amount to the sum of \$2,000, to give jurisdiction to this court. *King v. Wilson*, 1 Dill. 556-568; *Massa v. Cutting*, 30 Fed. Rep. 1; *Woodman v. Latimer*, 2 Fed. Rep. 842; *Seaver v. Bigelows*, 5 Wall. 208-210; *Terry v. Hatch*, 93 U. S. 44; *Chatfield v. Boyle*, 105 U. S. 231-234. The case presented by this bill is, in my opinion, quite distinguishable in principle from that involved in *Davies v. Corbin*, 112 U. S. 36, 5 Sup. Ct. Rep. 4. That was a proceeding by *mandamus* at the relation of several judgment creditors to compel the levy of taxes by the proper county officer to raise the fund necessary to satisfy such judgments. In such case the officer is to collect a tax, not for the benefit of any one creditor alone, but for all. As said by the court:

"A payment of the judgment of one creditor would not relieve him from his obligation to collect the whole tax. The object of the proceeding is, not to raise the sums due the relators, but to raise the whole tax of ten mills on the dollar. As the matter stands, each relator has the right to have the whole tax collected for the purpose of distribution among all the creditors. It is apparent, therefore, that the dispute is between the tax collector on one side and all the creditors on the other, as to his duty to collect the tax as a whole, for division among them, after the collection is made, according to their several shares."

But it cannot be maintained here that the payment by the respondent Bray of the shares of complainants would not abate this action, al-

though there are other heirs. This bill, as already stated, is framed upon the theory that a portion of the heirs entitled to distribution may maintain the action for the recovery of their respective proportions, bringing the case directly within the rule established by the authorities cited. In the tax-levy case the judgment creditors have no common fund existent until after levy and collection; whereas in the case at bar the fund already existed before suit, of which each complainant is entitled to a definite portion. The demurrer to the bill on this ground is well taken. *Maxwell v. Kennedy*, 8 How. 210.

3. In respect of the real estate mentioned in the bill there is serious difficulty. There is no question of the jurisdiction of a court of equity to make partition of lands, in which action all the equities between the coparceners may be considered and adjusted. But I understand the rule to be likewise inflexible that, in a partition suit, either at law or in equity, the title to the land cannot be litigated. Where there is an adverse holding under claim of exclusive right, amounting to an ouster among tenants in common, it destroys the unity of possession, and takes away the right of partition. Resort must first be had to the action of ejectment at law. "If one coparcener disseise another, during this disseisin a writ of partition doth not lie between them for *non tenant in simul et pro indiviso*." Co. Litt. 167a; 5 Com. Dig. 225; 16 Vin. Abr. 225. So it is said in *Adam v. Iron Co.*, 24 Conn. 230:

"The rule at common law is well established that where the writ of partition would lie only between coparceners, the plaintiff must be in possession, or seised of the land when the writ was brought; and since the remedy by partition has been extended to joint tenants and tenants in common, the same rule obtains, whether the remedy is sought by writ or bill in equity."

And this rule has been applied to an adverse holding by one tenant in common adversely to his co-tenant. *Law v. Patterson*, 1 Watts & S. 185; *Clapp v. Bromagham*, 9 Cow. 560; *Lambert v. Blumenthal*, 26 Mo. 471; *Ellis v. Davis*, 109 U. S. 493, 3 Sup. Ct. Rep. 327. What will amount to such ouster by one tenant in common of his co-tenants has been a much-debated question by the courts. It requires stronger evidence, or rather, more affirmative acts, to constitute an ouster by one such tenant of his co-tenants than against a stranger. As the possession and seisin of one tenant in common is the possession and seisin of the others, his possession is *prima facie* not adverse to his co-tenants. Judge STORY, in *Clymer's Lessee v. Dawkins*, 3 How. 689, says:

"This presumption will prevail in favor of all, until some notorious act of ouster or adverse possession by the party so entering into possession is brought home to the knowledge or notice of the others. Such a notorious ouster or adverse possession may be by any overt act *in pais*, of which the other tenants have due notice, or by the assertion, in any proceeding at law, of a several and distinct claim or title to an entirety of the whole land, which, in contemplation of law, is known to the other tenants."

This question was fully considered, and with characteristic ability, by Judge NAPTON, in *Warfield v. Lindell*, 30 Mo. 272, from which we make

the following quotation, as expressive of what we conceive to be a conservative and correct view:

"To constitute an adverse possession of one tenant in common against his co-tenants, there must be some notorious act asserting an entire ownership. It is further said in some cases that this act must be brought home to the knowledge of the co-tenant. This, we suppose, depends upon the nature of the act. If it consists altogether of a mere verbal assertion of entire ownership, such an assertion could not with any propriety be regarded as an act of adverse possession of which the co-tenant was bound to take notice, unless made to him, or communicated to him. A declaration to a mere stranger amounts to nothing, unless that declaration is brought to the knowledge of the co-tenant. But when the act is of such a nature as the law will presume to be noticed by persons of ordinary diligence in attending to their own interests, and of such an unequivocal character as not to be easily misunderstood, it is not believed to be necessary that any positive notice should be given to the co-tenant, or that it devolves upon the possessor to prove a probable actual knowledge on the part of the co-tenant. It is sufficient that the act itself is overt, notorious; and if the co-tenant is ignorant of his rights, or neglects them, he must bear the consequences."

The bill in the case at bar in substance avers that the respondent Thomas Bray possessed himself of this land on the death of William Bray without authority of law, and has ever since held the same, except such part as he may have disposed of, or given to the co-respondent Minnie G. Kinsey, to their entire exclusion; denying that there was any such property belonging to William Bray, and refusing to give complainants their share; living on and cultivating such real estate as his own; using said property for his own private gain in every way possible; making great profits thereon, no part of which has he ever shared with complainants. Construing the pleading most strongly against the pleader, the legitimate inference to be drawn from the concessions of the bill is that the ouster was complete. There was not only an adverse holding, but an open occupation of the property, to the exclusive use and benefit of respondent, with the denial of complainants' right to any share therein; acts so overt and notorious as to imply notice to the co-tenants. In fact, his adversary character in the occupancy and exclusive claim of right is unduly made the basis of the relief sought by the respondents, and therefore this action cannot be maintained in respect of the real estate.

4. It is next insisted by the respondents that complainants' right of action as to the personal property is barred by the statute limiting such causes of action to five years after the right of action accrued. It may be conceded that where it affirmatively appears on the face of the bill that the statutory period has run, the objection may be raised by demurrer; but on examination of the demurrer no such ground is assigned therein, and as this is an objection personal to the respondent, if he does not raise it by demurrer or plea, it is deemed to be waived by him. Under the Missouri statute advantage cannot be taken of the statute of limitations otherwise than by plea, except in those instances where the statute creates an absolute bar by lapse of time without any exception. *Bank v. Winslow*, 30 Fed. Rep. 488.

5. There is another fatal objection to the jurisdiction of this court. The defendant Minnie G. Kinsey is joined as a co-respondent with Thomas Bray. She is a citizen of this state and district. She is an heir equally with complainants. No wrong is alleged against her. Her interests, as appear from the bill, are in harmony with those of the complainants. She is a necessary party to any partition proceeding. *Dameron v. Jameson*, 71 Mo. 97; *Barney v. Baltimore City*, 6 Wall. 280. Why is she joined as a co-respondent? No reason whatever is assigned therefor; and I apprehend that none other can be assigned than the fact that she could not be joined as a co-complainant without ousting the jurisdiction of this court, for the reason that she is a citizen of the state of Missouri, and of this federal district. The question, therefore, presents itself on the face of this bill: Can the complainants by this maneuver bring this controversy into this jurisdiction? The law is that all the plaintiffs on one side, where the action is instituted in the United States court, must be non-residents of the state in which the suit is brought. It would, in my opinion, be a palpable fraud on our jurisdiction if such a subterfuge could be resorted to successfully by making one of the necessary parties a defendant whose interests are all in common with those of the complainants, and against whom no antagonistic act is alleged. This question has undergone thorough examination in the case of *Bland v. Fleeman*, 29 Fed. Rep. 669, in a case quite parallel in principle; and, approving the principle therein announced, as applied to the facts of this case, I hold that jurisdiction cannot thus be thrust upon this court.

6. There are other objections made to this bill, but they are not of sufficient importance to justify the prolongation of this already too long opinion. Demurrer sustained.

NORRIS v. ATLAS STEAM-SHIP Co., Limited.

(Circuit Court, S. D. New York. January 29, 1889.)

COURTS—FEDERAL JURISDICTION—APPEARANCE—EFFECT.

Where the action is one of which the circuit courts have jurisdiction, under act Cong. March 3, 1887, § 1, the controversy being one between a citizen of the state and a foreign subject, and the amount in dispute exceeding \$2,000, the provision of that section in relation to the district where the action shall be brought does not affect the question of jurisdiction, and the privilege it accords to defendant is waived by filing a general appearance and answering to the merits.

At Law. Motion to set aside service of summons.

Action for damages for personal injuries, brought by Abraham Norris against the Atlas Steam-Ship Company, Limited. The present motion is based on the ground that defendant, being a British corporation, is not an inhabitant of the district, and therefore cannot be sued therein. Before making the motion, defendant had appeared generally, answered to the merits, and gone to trial without raising the point.

Everett P. Wheeler, for the motion.

Herman H. Shook, *contra*.

LACOMBE, J. The main point raised upon this motion need not be now decided. Inasmuch as the controversy is one between a citizen of a state and a foreign citizen or subject, and the matter in dispute exceeds the sum of \$2,000, it is within the class of cases in which, by the express language of the first clause of section 1 of the act of 1887, the circuit courts are given jurisdiction. *Wilson v. Telegraph Co.*, (FIELD and SAWYER, JJ.) 34 Fed. Rep. 563, 564; *Denton v. International*, 36 Fed. Rep. 1. Whatever may be the true construction of the second clause of that section, (beginning "But no person shall be," etc.,) it affects, not the question of federal cognizance, but solely the question of the place of bringing suit by original process in cases of federal cognizance. *Fales v. Railroad Co.*, 32 Fed. Rep. 673. The privilege which it accords to a defendant, viz., that he shall be sued only in the district of which he is an inhabitant, is one which may be waived. *Hulstead v. Manning*, 34 Fed. Rep. 565. It was waived in this case by filing a general appearance, and answering to the merits. In this conclusion Judge WHEELER, with whom I have consulted, concurs.

WAKELEE v. DAVIS.

(Circuit Court, S. D. New York. January 21, 1889.)

EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

On an application for a discharge in bankruptcy, the specifications of the opposing creditor were dismissed upon the contention of the bankrupt's attorney that the creditor's debt had been reduced to judgment after the petition was filed, and that it could not be affected by the discharge, and the discharge was granted. *Held*, that a complaint in an action on the judgment, which sought only a money judgment, and such other relief as to the court might seem fit, did not state a cause of action cognizable in equity, though it alleged that defendant was estopped to plead the discharge; there being no averment that defendant had taken or threatened to take any proceeding prejudicial to complainant's rights, or that the bill was filed in aid of another action.

In Equity. On demurrer to bill.

This action, commenced upon the equity side of the court, is based upon a judgment recovered in 1873, in a state court of California. The only specific relief demanded is for a money judgment. Briefly, these are the facts: In August and September, 1869, the defendant, Erwin Davis, made six promissory notes, aggregating \$15,720, and delivered them, for value, to Henry P. Wakelee. On the 30th of September, 1869, Davis was adjudicated a bankrupt, on his own petition, and Wakelee proved the notes against the estate. On the 28th of June, 1873,

Wakelee petitioned for leave to sue Davis upon the notes. The petition was granted, and on the 18th of November, 1873, upon service by publication, judgment was entered against Davis for \$22,760. This judgment is now owned by the complainant, and is the judgment sued on. In December, 1875, Davis applied for his discharge, and Wakelee filed specifications in opposition, charging Davis with various frauds under the bankrupt act. In March, 1876, Davis moved the court for an order dismissing these specifications, on the ground that Wakelee, since proving his debt, had obtained a judgment thereon by leave of the court, which judgment merged the debt, and was still valid and in force, and, having been obtained since the adjudication, would not be affected by the discharge. The motion was granted, and Wakelee's proof of debt was canceled and his specifications were dismissed. Wakelee's opposition being removed, Davis obtained his discharge. Wakelee accepted the order dismissing the specifications, and did not appeal therefrom because of the statements made on behalf of Davis that the judgment was a valid one, and would not be affected by a discharge in bankruptcy. The bill alleges that by reason of these proceedings "the validity and binding force of said judgment of November 18, 1873, was affirmed, and said Davis was thereby forever estopped from denying the same; notwithstanding his discharge in bankruptcy, then petitioned for, and subsequently obtained." Prior to the commencement of this suit, the judgment was duly assigned to the complainant, no part thereof having been paid. There is no averment that the defendant has taken or threatens to take any proceeding prejudicial to the complainant's rights, or that the bill is filed in the aid of another action. The relief demanded is—*First*, that the defendant pay the amount of the judgment, namely, \$22,809, with interest, and the costs of this action; *second*, for such other and further relief as to the court shall seem meet. The defendant demurs on the ground that the bill does not state a cause of action in equity. In her brief the complainant requests, in case the demurrer is sustained, that she may be allowed to amend.

Anson Maltby, for complainant.

Henry A. Root and Thaddeus D. Kenneson, (Joseph H. Choate, of counsel,) for defendant.

COXE, J., (after stating the facts as above.) To the opinion expressed at the argument but little need be added, as I am unable to see, after reading the elaborate briefs presented, that the *status* of the cause is materially altered. It will be seen that the action is upon a judgment, pure and simple,—a judgment obtained upon promissory notes in a common-law court of California. No injunction or accounting or discovery is asked. The complainant does not seek a specific performance, or to set aside the discharge, or any of the proceedings in bankruptcy, upon the ground of fraud, accident or mistake. None of the elements of equitable cognizance are here present. The demand is precisely what it would be were the action at law, namely, for \$22,809, with interest and costs. Assuming that no defense is interposed, and that a *decree* could be entered in

such an action, it would be for this sum only, and execution would issue immediately to collect it.

It appears from the bill that the defendant has obtained a discharge in bankruptcy; and at one time, and while the petition for the discharge was pending, his counsel in open court, took the position that the judgment "still stood of record and was of full force," and therefore that Wakelee was not in a position to oppose the discharge. Although the counsel for Wakelee, apparently, contended for the contrary of this proposition, its soundness so impressed itself upon the court that Wakelee's proof of debt was canceled, and his specifications in opposition to the discharge were dismissed. It would seem, although she does not say so in the bill, that the complainant is apprehensive lest the mind of the defendant may have undergone a change upon this subject. It is quite evident that she believes that he intends to attack the judgment because the summons was not personally served, and that he expects to rely on his discharge as a defense. She seeks, therefore, to anticipate these objections by alleging that the defendant is estopped from raising them because of the proceedings in the bankruptcy court. An action upon an outlawed promissory note is not an equitable action, because the defendant has promised not to plead the statute of limitations. An action upon a common-law judgment is not a chancery action, because the defendant is not in a position to attack it or plead a discharge in bankruptcy as a defense. It is generally the cause of action, and not the defense, which determines the character of the suit; and it is not easy to see why the situation is altered by allegations ancillary to and in aid of the principal cause of action. It is unnecessary now to decide whether the occurrences in the bankruptcy court do or do not amount to an estoppel, for the reason that, even if they do, the bill does not state a cause of action in equity. For aught that appears, the defendant may now entertain the same view of the law that his counsel successfully maintained in 1876. He may still think that the judgment is of binding force. Since then he has made no sign. No suit at law has been commenced against him. He has instituted no attack on the complainant's judgment. He has interposed no defense; he has not even threatened so to do. He may not attack the judgment or rely upon his discharge. He may plead payment, want of title, or other defenses. He may not answer at all. I am unable to discover any theory upon which the complainant can invoke the aid of a court of equity upon the bill in its present form. The action is an action at law. It is no more a chancery suit than it was in California. Its character is not changed by anything alleged in the bill. The demurrer is allowed. The complainant, if she is so advised, may amend within 20 days.

CORNWALL v. DAVIS.

(Circuit Court, S. D. New York. January 21, 1889.)

PER CURIAM. Upon the authority of *Wakelee v. Davis*, ante, 280, the demurrer is allowed. The complainant may amend within 20 days.

HAYS et al. v. HUMPHREYS et al.

(Circuit Court, W. D. Missouri, C. D. January 14, 1889.)

EQUITY—PARTIES.

Complainants, who claimed title to certain lands by virtue of a mortgage and foreclosure thereunder, sought to have defendant declared trustee of the land to their use, alleging that one S. had been furnished with money to pay off a judgment lien on the land, and that in violation of such trust he had bought the land for himself at the execution sale, and pending the foreclosure proceedings had conveyed to defendant. In the deed from S. the name of the grantee was omitted, and it appeared that S. was not bound by the foreclosure proceedings. Held, that S., being a resident of the state, should be made a party.

In Equity.

Smith, Silver & Brown, for appellants.

Amos S. Smith and Geo. T. White, for respondents.

PHILIPS, J. This is a bill in equity to have respondents declared trustees to the use of complainants of certain lands situated in Hickory county, this state. The controversy grows out of about the following state of facts: The land formerly belonged to one F. V. Thomas, who sold the same to one Emily Hays of Indiana. Mrs. Hays conveyed to one Susannah Stewart, taking her note for the purchase money, and a deed of mortgage on the land to secure the same. Mrs. Stewart assigned and transferred this note and mortgage to one Samuel M. Hays of Indiana. In 1875 said Samuel Hays died testate, as is alleged, in the state of Indiana, making the complainants executors of his will. The bill further discloses the fact, that at the time of the sale of this land by Thomas to Emily Hays the land had been attached for the debt of Thomas, which fact was then unknown to Mrs. Hays, as also to Mrs. Stewart when she bought. On discovery of this fact, the bill alleges that money was furnished by Mrs. Hays or Thomas to one Adam Stewart, who was going from Indiana to Hickory county, Mo., to pay off this attachment lien; and that he agreed and undertook to attend to the same. But in disregard of his promise and duty in the premises, he not only neglected to so pay off said lien, but at the sale of the land under the judgment in the attachment proceeding he became the purchaser thereof, and received to himself the sheriff's deed therefor, in violation of his trust, and in fraud of the rights of the mortgagee. Said executors, in

1879, instituted suit in this court against Susannah Stewart and husband, to foreclose said mortgage. Decree accordingly, under which the complainants became the purchasers, and received a deed therefor from the marshal. During the pendency of this foreclosure suit Adam Stewart executed and delivered a deed, so called, to the respondent Nancy C. Humphreys, who is married to her co-respondent, Henry Humphreys. The bill charges that Mrs. Humphreys took with notice of the trust relation of Adam Stewart to the mortgagee, and in collusion with him, to further his fraudulent design against the said mortgagee. The answer puts in issue the allegations of fraud and notice, as also the averment of the payment to Adam Stewart of the money with which to satisfy said attachment lien, and his promise to attend thereto. The answer also alleges that in the imputed deed from Adam Stewart to Mrs. Humphreys there was no grantee named. An examination of the so-called deed from Adam Stewart shows that no grantee is named therein. In this respect it is a blank. At law such an instrument is void, and conveys no title. 3 Washb. Real Prop. 242, etc.; *Garnett v. Garnett*, 7 T. B. Mon. 547; *Chase v. Palmer*, 29 Ill. 307. Nor does the covenant of warranty create any estoppel against Adam Stewart in such case. *Kercheval v. Triplett*, 1 A. K. Marsh. 369, (496.) The utmost that can be claimed for the instrument is that in equity the right to the land passed to Nancy Humphreys. The legal title remaining in Adam Stewart, no decree made herein could affect that legal title, as he is not made a party defendant in this action. Nor was this legal title concluded or affected by the decree of foreclosure between complainants and the Stewarts. While Adam Stewart was named as a party defendant, the record presented to this court fails to show any service of summons upon him, or any appearance by him. The decree does not contain any recital of service of summons, or appearance by him. It merely foreclosed the equity of redemption of Susannah and Henry Stewart.

The question, therefore, presents itself for answer at the very threshold of this investigation: Should the court proceed to judgment without the legal presence of Adam Stewart? Concede that the court could by its decree conclude whatever interest Nancy and Henry Humphreys acquired in the land, in what attitude would it leave the complainants? In the foreclosure proceeding they might have made Adam Stewart a party defendant, and possibly concluded the controversy as to this land, although he may have conveyed *pendente lite*. Again suing to reach the end of their trouble respecting the title, by leaving him out, they would at the end of this litigation still be without the legal title. One of the principal offices of a court of equity would be unfulfilled,—the prevention of a multiplicity of suits, and the putting an end to litigation. The equity rules as to proper and necessary parties are succinctly stated by Mr. Justice BRADLEY, in *Williams v. Bankhead*, 19 Wall. 571, as follows:

"The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of pub-

lic policy, and the necessities of particular cases. The true distinction appears to be as follows: *First*. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. *Secondly*. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party, if possible; and the court will not proceed to a decree without him if he can be reached. *Thirdly*. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

The relation of Adam Stewart to this litigation brings him, in my opinion, within the second of these rules. Although a decree herein, in his absence, would not bind him, he is certainly an interested party. He holds the legal title to the land in controversy. In *Gaylords v. Kelshaw*, 1 Wall. 81, it is held that in a bill to vacate a conveyance made without consideration, and in fraud of creditors, the fraudulent grantor is a necessary defendant in the bill. This not only because it is his debt and insolvency that is to be inquired into, but for the further reason that "it is his fraudulent conduct that requires investigation." The whole groundwork of complainants' bill is the imputed wrong-doing of Adam Stewart in buying in the land under the attachment suit in bad faith, and in fraud of the rights of the mortgagee. That is the matter to be investigated throughout; and any decree in favor of complainants must find as its basal fact the existence of the fraudulent conduct of Adam Stewart. And, he being the holder of the legal title, which must be divested to end this litigation, why proceed without him, provided it be possible to bring him in? It appears from his deposition taken herein that he is a citizen of this state. "He can be reached," and therefore he ought to be made a party defendant. Other technical objections are made to this bill by respondents. They will be reserved, however, to the final hearing, when all the necessary parties are before the court. On payment by complainants of the costs made in this court after the appearance of respondents, except such as have been heretofore adjudged against respondents, they may, if they so desire, file an amended bill making said Adam Stewart a party defendant.

THAMES & MERSEY MARINE INS. Co. v. CONTINENTAL INS. Co.

(Circuit Court, S. D. New York. January 30, 1889.)

PLEADING—SUPPLEMENTAL ANSWER—LEAVE TO FILE.

Leave to file a supplemental answer should be granted where the defenses proposed to be set up are an agreement by which it is alleged defendant would be discharged from liability, the agreement not being shown by the opposing affidavits, and a prior judgment in an action in which the pleadings show a cause of action similar to the one now in issue.

In Equity. Motion for leave to file supplemental answer.

Evarts, Choate & Beaman, for complainant.

Butler, Stillman & Hubbard, for defendant.

LACOMBE, J. The supplemental answer which defendant asks leave to file sets up two supposed defenses. The first of these is an agreement made by plaintiff with the estate of Dimick, which defendants claim is of such a character as to discharge them from liability. The opposing affidavits do not set out this agreement; defendant should therefore have the opportunity of submitting it to the court for construction. The second supposed defense arises upon a judgment recovered in an action brought by the plaintiff against the estate of Dimick. The pleadings in that action indicate that a claim similar to the one in suit was advanced. Ordinarily a judgment is assumed to dispose of all issues raised by the pleadings. Whether the judgment in the *Dimick Case* did or did not dispose of this claim is a question which the defendant should be allowed to settle upon the trial. The motion for leave to file supplemental answer is granted.

UNION MUT. LIFE INS. Co. v. UNION MILLS PLASTER Co. et al.

(Circuit Court, W. D. Michigan, S. D. January 29, 1889.)

1. MORTGAGES—FORECLOSURE—ON DEFAULT OF INSTALLMENT.

When a mortgage securing several installments stipulates that if one of these remains 60 days overdue the whole amount shall become due and payable at the mortgagee's election, the mortgagee must, if it knows that the mortgagor has the installment ready at its usual place of payment, and requires payment at the place stipulated in the mortgage, so notify the mortgagor, and, if it does not do so, and its agent at the usual place of payment refuses to receive payment except on certain conditions, it waives the right to payment elsewhere, and cannot, in default thereof, treat the whole debt as due.

2. SAME.

Though the mortgagee's agent unjustifiably refused to accept an installment due unless the mortgagor would agree to make repairs on the premises, yet, since there is no bad faith shown, and the mortgagee may have thought that it had a right to require the agreement, the lien of the mortgage will not be deemed divested as to that installment.

3. SAME—RECEIVERS—WASTE.

Mere disuse of a manufacturing plant under an agreement with other manufacturers to restrict production, though attended with the decay and dilapidation inseparable from disuse, is not such destruction or waste as to entitle the mortgagee to ask for a receiver.

4. SAME—FEDERAL COURTS—FOLLOWING STATE PRACTICE.

How. St. Mich. § 7847, taking from the mortgagee the right to possession until foreclosure sale is confirmed, and the holding in *Wagar v. Stone*, 86 Mich. 364, that this statute secures to the mortgagor the rents and profits pending foreclosure, constitute a rule governing substantial rights, and not mere matters of practice, and deprive the federal courts sitting in that state of the power to appoint a receiver of the rents and profits on the ground that the security is inadequate.

5. SAME—APPOINTMENT ON PLEADINGS.

A receiver will not be appointed on the coming in of the answer, when such appointment is the principal question in the case, and is required, if at all, as a means for enforcing the decree, and not for a merely ancillary purpose connected with the temporary incidents of the suit, but action will be deferred till the hearing.

In Equity. On motion for appointment of receiver.

Butterfield & Keeney, for complainant.

Smiley & Earle, for defendant company.

SEVERENS, J. The bill in this cause was filed for the purpose of foreclosing a mortgage given to Daniel Sharpe, the complainant's assignor, on the 11th day of August, 1880, by Brosnan and McKee, to secure the payment of the sum of \$45,000, made payable in 12 installments of \$3,750 each, on the 1st day of June in each year thereafter, with annual interest at 4½ per cent. on the whole sum from time to time, unpaid, according to the tenor of a certain bond, of even date with the mortgage, from Brosnan and McKee to Sharpe. The mortgage was given to secure the purchase price for the plaster-mills property at Grand Rapids, and covered the whole plant. The Union Mills Plaster Company, having become incorporated, purchased the mortgaged property of Brosnan and McKee, and by the terms of its purchase assumed and agreed to pay the mortgage debt to the complainant. The first two installments of principal, and the annual interest on the whole sum for the first and second years, were paid. On the maturing of the third installment, a further agreement was entered into between the complainant and Brosnan and the plaster company, whereby the payment of it was deferred, and it was put at the foot of the other installments, to follow them as an annual installment; and the rate of interest was raised to 6 per cent., but it was to be, and was, until 1888, in fact paid annually as before. Upon the same arrangement, the installments of principal due in 1884, 1885, 1886, and 1887 were turned behind the first deferred payment. By the terms of the obligations they were payable at the complainant's office in Boston, but in fact the payments were never made there, and generally, if not always, they were made at or through a bank at Grand Rapids. Complainant's incorporation was under the laws of Maine, and its home office was at Portland, but it is alleged that it had also an office at Boston. It was stipulated in the mortgage that if any portion of the mortgage debt should remain unpaid for the period of 60 days

after it should become due, the whole debt should, at the election of the mortgagee, become immediately due and payable. And it was expressly provided in the agreement for deferring payments that it should not prejudice any right of the mortgagee further than should be needful to give that agreement effect. Brosnan was a friend, and seems to have had the confidence, of De Witt, the president, and was, so far as the present business is concerned, managing officer of the complainant. The agreements for deferring payments, above recited, were probably induced by this favor towards Brosnan, who, when the plaster company was formed, became a prominent factor in it, but died before the present controversy arose. The installment and the annual interest due on June 1, 1888, not being paid at maturity, correspondence ensued between the representatives of the plaster company and Mr. De Witt, having in contemplation a further agreement about the payment of what was due, and the management and preservation of the mortgaged property; but, no agreement having been arrived at, on the last of the 60 days after the payment was due, the plaster company telegraphed the complainant, asking it to designate some bank at Grand Rapids to receive payment of the amount due. The answer to this referred the matter to their attorney at the latter place, who, on being applied to, refused to receive the money at Grand Rapids, except it should be accompanied by an agreement to put the buildings and the machinery on the mortgaged lands in a better state of repair and preservation. The plaster company was willing to stipulate to a qualified limit in that direction, but would not agree to the terms in that regard required by the complainant. The day wore off without a coming to terms, and no tender was made to the attorney for complainant, except that the agent of the plaster company, to whose credit the money had for this purpose been deposited in a national bank at Grand Rapids, offered to give his check for the amount due. This was refused upon the general ground above stated, and because the attorneys professed to be bound to follow strictly their instructions, which were to insist upon the condition. On the following day the whole amount was tendered to and refused by the attorneys, and the plaster company thereupon sent a draft for the same amount by mail to the complainant, at the same time telegraphing advice of its transmission. This draft was returned by the complainant, the grounds of its refusal to receive it not being stated.

It also appears that the complainant paid the taxes on the mortgaged property for the year 1887, after they had been returned delinquent, and prior to the filing of the present bill. This it was authorized to do by the express provision of the statutes of Michigan, which gives the mortgagee the right to tack a payment so made to his debt, and extends the mortgage security to it. How. Ann. St. § 1137. And I am of opinion that the mortgagee may do this at any time after the mortgagor has made default, and suffered the property to be returned for the unpaid taxes. On the 12th day of November, 1888, the present bill was filed to foreclose the mortgage, the complainant declaring therein its election to treat the whole debt as due, and praying relief accordingly. It is

alleged in the bill that the mortgaged property is, from disuse and wanton neglect of repair, going to dilapidation and ruin; that the buildings and machinery are suffering depreciation in value from want of proper care, and from the same cause the more movable property is being stolen or lost. It is also alleged that the affairs of the corporation have been and are corruptly mismanaged; that its debts are suffered to accumulate, while its assets are appropriated by its officers and agents in charge to their own private use; and a detail of great fullness is exhibited, which, if truly alleged, would illustrate in a striking way the facilities which the fabric and machinery of incorporation afford to those disposed to fraudulent practices. It is alleged, in substance, that the corporation is kept continually on the verge of insolvency by the fraudulent appropriation of its assets by those having charge of them. To this it is added that, in consequence of the depreciation of the value of the mortgaged property, and the crippled condition of the corporation from the mismanagement of its officers, the complainant's security is greatly impaired, and is altogether inadequate to protect the debt. Therefore it is prayed that a receiver may be appointed to take charge of the assets and business of the corporation, under the direction of the court, to take the rents and profits, and that they may be applied to the mortgage debt, etc. The present motion is for the appointment of such receiver, and affidavits are filed in support of the bill. In response to the order to show cause, the defendants, the plaster company, and the officers and stockholders complained of, have answered, and filed affidavits. They deny the allegations of the bill, on the basis of which a receiver is prayed. In the answer the defendants offer to pay the installment of principal and the annual interest, which were tendered before the filing of the bill. The evidence adduced on this hearing was quite voluminous, and all the material parts of it have been attentively considered. The conclusions of fact drawn by the court therefrom will be stated so far as such conclusions form the ground of decision.

That it is competent for parties to stipulate that on default in the payment of an installment the whole may become due at the election of the payee, is well established, and courts of equity will give such stipulations effect when they have been fairly made, and the right of election fairly exercised. *Noonan v. Lee*, 2 Black, 499; *Olcott v. Bynum*, 17 Wall. 62. It will not, however, aid in the enforcement of such right where the conduct of the payee indicates artfulness, trickery, or stratagem in bringing on the technical conditions upon which he exercises the right. His purpose must have been open and honest, and advantage cannot be taken of any misleading produced by his own action, or (what is the same thing) the reasonable implication contained in it. *Noyes v. Clark*, 7 Paige, 179; *Broderick v. Smith*, 26 Barb. 539. In the present case, while I do not find that there was a deliberate purpose to hold off the payment which was due in June, 1888, by stratagem, until the 60 days should have elapsed, still I am of the opinion that when the complainant was notified that the defendants were ready to pay the money at the place where it had usually been paid, and knew that the money

was in readiness, it should have signified its purpose to demand the exact fulfillment of the contract as to the place of payment, if it intended to insist upon it, and that its conduct in refusing to receive payment except upon certain conditions was an implied waiver of its right to have the payment made in Boston, which it signified no purpose to require. It is very probable that if the defendants had understood that that condition was to be exacted, they would have taken steps to have payment tendered at Boston on the last day, and with the facilities of the present day for transmitting funds there would probably have been no serious difficulty in accomplishing it. The almost fatal consequences to the defendant company of bringing this whole debt upon its hands for payment would doubtless have stimulated to great effort to avoid it. It is therefore held that upon the facts disclosed it would be inequitable to permit the right to elect the whole debt due to be exercised.

Another branch of the subject remains for consideration. A tender of the whole sum which was in fact due having been made, is the mortgage security as to the sum so tendered lost by the refusal to accept? It is the rule undoubtedly that a tender discharges the security. *Moynahan v. Moore*, 9 Mich. 9; *Caruthers v. Humphrey*, 12 Mich. 270; *Potts v. Plaisted*, 30 Mich. 149. But to produce such serious and heavy consequence the refusal must have been unqualified, and unaccompanied by any *bona fide* claim of right, which was supposed by the party to justify his refusal. The claim of right may have been one that could not be supported as matter of law; still, if it was believed in, and was not wantonly put forward as a cover to a wrong purpose, it is sufficient to prevent the forfeiture of the security. So here, while it is clear enough that the complainant had no right to make it a condition of receiving payment, that the defendant should enter into stipulations about making repairs on the mortgaged property, still it may have been that it thought it had such right, and I do not find such evidence of its bad faith in this regard as to justify a declaration of forfeiture. *Waldron v. Murphy*, 40 Mich. 668; *Post v. Springsted*, 49 Mich. 91, 13 N. W. Rep. 370. It results from these considerations that the complainant's bill is well filed for the foreclosing of the mortgage in respect of the installment of principal and the annual interest and the taxes for 1887. A question about costs may arise at the hearing.

It is shown that the plaster-works covered by the mortgage have not been operated for two or three years past, the defendant company having entered into a combination with other plaster companies at Grand Rapids to restrict production, and keep the price of the product up to the rate agreed upon, and arranged with another member of the combination for the production of the Union Mills Plaster Company's proportion, as allotted by the combination. The reason for this arrangement with the other company is said to be that the latter has such facilities that it can produce the plaster at a cheaper cost, and it is claimed that it is better for the defendant to pay what it does for thus furnishing its proportion, than to furnish the plaster from its own mills. The defendant's mills and works have therefore remained idle, and have suffered from the decay

and dilapidation incident to all such works when disused. The *prima facie* showing of gross neglect and despoiling of the property, made in support of the motion, is fairly refuted by the answer of the defendants and the affidavits of others supporting the answer, and the result of all the evidence is that no such destruction or waste of the property as would on that account warrant the appointment of a receiver is shown. To justify such an appointment the waste must be serious, and the danger of destruction or impairment of the security imminent. *Pullan v. Railroad Co.*, 4 Biss. 47; *Morrison v. Buckner*, Hemp. 442; *Beverley v. Brooke*, 4 Grat. 187. In this case I am not convinced that the waste is other or more serious than would ordinarily occur to such property from mere disuse.

But it is claimed by the complainant—and, if the conduct which has thus far characterized the management of the affairs of the defendant company is to be continued, I think with strong reason—that the security is inadequate. While I am satisfied that some of the complainant's witnesses have greatly underrated the value of the mortgaged property, still the impression left upon my mind is that it is quite doubtful whether in the present condition of affairs the property is adequate as security for the debt. Upon this aspect of the situation, the complainant prays for the appointment of a receiver to take the rents and profits, to the end that they may be appropriated to the satisfaction of the mortgage debt; and there is thus presented a somewhat difficult, but very important, question, touching the practice of the federal courts in Michigan in mortgage foreclosure cases, which, so far as I am aware, has never been expressly decided in these courts, and that is whether, in view of the law in this state in regard to the rights and relations of the parties to a mortgage of real estate to the mortgaged property, as declared by statute and expounded by the supreme court of the state, the mortgagee may, upon showing that his security is inadequate, have an appropriation of the rents and profits to help out the deficiency. The statute (How. Ann. St. § 7847) takes away from the mortgagee the right to the possession until foreclosure is completed by sale, and the sale has become absolute by confirmation. And it was held in *Wagar v. Stone*, 36 Mich. 364, that this statute, by implication, secured to the mortgagor the rents and profits pending foreclosure, and that therefore an appropriation of them by the hand of a receiver for the benefit of the mortgagee deprived the mortgagor of a substantial right. Notwithstanding this decision, the federal court in this district continued the practice of appointing receivers in such cases and for such purpose in the same way as had been customary in the early equity practice, and a number of precedents have been found in which my predecessor made such appointments after the practice in the state courts had been settled the other way. The matter does not appear to have been debated before him on any actual dispute shown by the record, but it cannot be doubted that so well informed a judge was cognizant of the ruling of the state court on the subject, and I am convinced that he followed the original practice upon the theory that it was a matter of practice merely, and that it was the duty

of this court sitting in equity to follow its own course, instead of conforming to local practice regulations of the state; and such doubtless is the general rule. But it seems quite clear that the duty of following the original course of the court in equity does not extend to the extremity of overthrowing substantial rights. When it meets such it bends so far as is necessary to protect them, but otherwise holds on in its customary way, simply adapting itself to the emergency. This is the doctrine which was so forcibly enunciated in the now familiar case of *Brine v. Insurance Co.*, 96 U. S. 627. The analogy of that case, and the applicability of the reasoning of the supreme court in deciding it, to the present question are obvious, as I think, and lead to the conclusion that it is not a matter of practice simply; that the right of the mortgagor to the rents and profits *pendente lite* is a substantial one under the laws of Michigan, which must be recognized by the courts of the United States in administering the rights of parties to a mortgage. There is no practical difficulty in doing this, and matters of form must yield in the presence of legal right. I am aware that there are some decisions in the courts of the United States in which the principles of decision are inconsistent with those of *Wagar v. Stone*, *supra*, and which hold that the substantial right of the mortgagor to the rents and profits is not impaired in any legal sense by the appointment of a receiver to take them; the theory being that the hand of the court is to be regarded not as hostile, but as holding for the mortgagor as well, and turning over his property through judicial process to the payment of his just debt, when needed to meet a deficiency. It is not needful for me to express any opinion on this divergence of views in the present case, for the doctrine of adherence to the local law in real property matters looks to the rule adopted, rather than to the reasoning which has led to it, and I think that the law of the state as declared in *Wagar v. Stone* requires that it should be held here that a receiver of the rents and profits cannot be appointed, in mortgage foreclosure cases, upon the sole ground that the security is inadequate. Whether the court will appoint a receiver in foreclosure cases, where the property is being destroyed or wasted by the mortgagor, is an entirely different question. There is nothing in *Wagar v. Stone* which controverts the power and duty of the court to interfere in such cases for the protection of the security. What the court should do with any fund that might be left in the hand of the receiver, and incident to the dealing of the court with the property, might be a question subject to the control of the rule in *Wagar v. Stone*, but that question is not now presented. I should have, I think, no doubt that a receiver might be appointed in the circumstances last mentioned, if the waste or destruction was so serious as to justify so grave a step, but, as I have said, the facts are not so bad as to warrant it in the present case.

An offer is made in the answer to pay the amount of the installment, and the annual interest which remains unpaid, and the taxes of 1887, and this offer was repeated at the hearing of this motion. If this is done, the further prosecution of the bill for the purpose of foreclosure would, upon the views already stated, be quite fruitless; and the ques-

tion remains whether the case can be proceeded in as upon a bill filed by a mortgagee and creditor of the defendant corporation upon the ground that the management thereof is so grossly corrupt and bad as to entitle the complainant to ask the court to interfere for the protection of his debt. That relief of this kind may be given in a proper case appears to be settled by the weight of authority. 2 Mor. Priv. Corp. §§ 797, 860. I have had some doubt whether the suit could thus be converted from its original purpose into one which was a mere incident to the primary object of the bill. The allegations in the bill are broad enough to cover litigation on this branch, and the prayer for relief is general, and it may be that the versatility of equity practice will admit of the further suit. If counsel are advised to proceed, notwithstanding the doubt now expressed, the question may be reserved until the hearing; but if the case is proceeded with on that theory, and for that purpose only, it becomes evident that it would be improper to anticipate the very object of the litigation by a prejudgment involving the whole merits of the case. It would be the duty of the court to hold matters in *statu quo* until the hearing, as it could only then be rightly determined whether the facts would require the proposed action or not. It is the very common practice in appointing receivers to take such action on the coming in of the answer. High, Rec. §§ 100, 106. And that is quite proper where the appointment is for a merely ancillary purpose, which is concerned with the temporary incidents of the suit. But it is otherwise where the propriety of the appointment is a principal question in the case, and it is required, if at all, by the view which the court shall ultimately take of the case, as part of the means which should be taken to afford the relief contemplated by the decree. *Barry v. Briggs*, 22 Mich. 201; *Hawkins v. Luscombe*, 2 Swanst. 375; High, Rec. § 109. The result of these views is that the court will order that, upon payment by the defendants into the registry of the court for the benefit of the complainant of the amount of the installment with the annual interest and the taxes of 1887, with interest thereon, within 10 days from the entry of such order, the motion for the appointment of a receiver *pendente lite*, will be denied. If the payment be not made within that time, the matter of such appointment will be further considered by the court. In the event of such payment, and the election to proceed with the suit, an injunction will be awarded to restrain the defendants from disposing of the assets of the corporation by way of dividends or otherwise, except as may, by further order of the court, be allowed, and subject to such conditions as the progress of the business may require, and the court may from time to time think fit, upon the representations of the parties, to prescribe.

HELLEBUSH v. COUGHLIN.

(Circuit Court, S. D. Ohio, W. D. January 26, 1889.)

PARTNERSHIP—CONSTRUCTION OF AGREEMENT.

The articles of copartnership between complainant and defendant provided that complainant should contribute as his share of the capital the exclusive use of his three-fourths interest in certain patented improvements, to be used in the manufacturing business of the firm, together with his three-fourths interest in the property and assets of a certain marble company; that he should contribute such money as might be needed for the purchase of necessary machinery and materials, on which he was to have interest. He was to attend to the financial management of the business, and place the manufactured goods of the firm upon the market. Defendant was to contribute as his share of the capital his one-fourth interest in said patented improvements and his one-fourth interest in the property and assets of said marble company, and was to apply his skill and experience, and devote all his time and personal services to the business of manufacturing. The profits and losses were to be shared equally. At the termination of the partnership, each partner, after payment of the firm debts, was entitled first to withdraw his contribution to the capital, and the residue of the assets, if any, to be divided equally. The business proved unprofitable, the bulk of the capital stock being lost. *Held*, that the articles were not open to the construction that defendant's skill was put in against complainant's capital so as to relieve him from liability to complainant for one-half the loss.

Suit by Clemens Hellebush against Reese P. Coughlin to recover a balance on partnership account.

Long, Avery, Kramer & Kramer, for complainant.

Black & Rockhold and Parkinson & Parkinson, for defendant.

SAGE, J. The articles of copartnership between the parties provided that the complainant should contribute as his share of the capital the exclusive use of his three-fourths interest in certain patented improvements, to be used in the manufactures of the copartnership, together with his three-fourths interest and ownership in the property and assets of the Eagle Marble Company; that he should contribute such money as might be needed for the purchase of necessary machinery and materials, not to exceed \$5,000, on which he was to have interest, payable annually. He was to attend to the financial management of the business, and place the manufactured goods of the firm upon the market. He alone was authorized to sign checks for the firm. The defendant was to contribute, as his share of the capital, his one-fourth interest in said patented improvement, and his one-fourth interest in the property and assets of said Eagle Marble Company, and was to apply his skill and experience, and devote all his time and personal services, to the manufactures of the firm, which were to be under his charge and management. The profits and losses were to be shared equally. At the termination of the partnership, each partner, after payment of the firm debts, was entitled first to withdraw his contribution to the capital; defendant's contribution to be estimated at \$1,000, and complainant's at \$8,000, the residue of the assets, if any, to be divided equally. The business was unprofitable. All the capital stock was lost excepting about \$800, now in the

hands of the receiver. The defendant claims that this loss, excepting what was paid by the sale of his interest in the property and assets of the firm, must fall upon complainant, for the reason that, inasmuch as he lost his time and labor, or, in other words, his skill was put in against complainant's capital, it would be unjust and inequitable to allow complainant to recover one-half of the said loss from him. This position is not tenable, for the following reasons:

1. Each partner contributed to the capital. The valuation of the contribution of each is fixed by the articles. The province of each in the management of the business is defined, and the plain construction of the articles leaves no room for the claim that the defendant's skill was put in against the complainant's capital. The complainant was to attend to the finances and to the sales, and the defendant to the manufacturing department. Doubtless the defendant's undertaking to devote his time, labor, and skill to that department secured to him the concession of an equal share of the profits, but that concession is coupled with the express and explicit stipulation that he should also share equally in the losses, which is altogether inconsistent with the claim now made.

2. The articles, in terms, provide that all that the complainant put into the firm should be credited to him as his contribution to the capital. That in words made him a creditor of the firm for the full amount of his contribution. This plainly refers to the tangible property, and money contributed, and not to the contribution of the exclusive right to use his interest in the invention. The defendant was to have, in like manner, credit for his contribution. The complainant's contribution amounted—so it was agreed in the articles—to \$8,000, and the defendant's to \$1,000. When the firm became insolvent, the first thing to be done was to pay the creditors who were not members of the firm. The next thing to be done was to settle the accounts of the partners *inter sese*, and in that settlement each must be treated as a creditor for the amount of his contributions to the capital. If the surplus remaining after paying outside creditors was more than sufficient to balance the accounts of the parties one with the other, the residue would have to be divided equally between them, for so it is stipulated in the articles. But the entire surplus is insufficient to balance those accounts. It is very much less than the excess of the complainant's credits over the defendant's. This plain statement of the matter, which is in accord with the rule stated in *Lindl. Partn.* § 587; *Bates, Partn.* 810, 812; and *Gunnell v. Bird*, 10 Wall. 304, renders it unnecessary to comment upon the authorities cited in the briefs of counsel; and brings the court to the conclusion that the complainant is entitled to the entire surplus, and it will be ordered accordingly.

McMANNESSE *et al.* v. PAXSON *et ux.**(Circuit Court, W. D. Missouri, C. D. January 14, 1889.)***1. VENDOR AND VENDEE—PAROL CONTRACT—EVIDENCE—SUFFICIENCY.**

A father purchased land in Missouri with the avowed purpose of giving it to his two sons, and, after living on it for two years, returned to his home in Ohio. He left the defendant, one of his sons, in possession of part of it, orally promising defendant, as the latter alleged, to give him the land if he would move on it. After returning to Ohio, the father became embarrassed, and needed the proceeds of the land, whereupon he gave his son notice to leave the land, which he did without objection, and returned to Ohio, where he remained nine years. In the mean time the father conveyed the land to plaintiffs' assignor, subject to certain trusts, with power to sell. Afterwards said assignor sold the land to defendant, taking a mortgage for the purchase money. The deed to defendant referred to the trust under which the mortgagee held the land, and defendant never set up any claim to the land under the oral contract with his father until five years later, when plaintiffs sued to foreclose the mortgage. *Held*, that the alleged oral contract was not established by the evidence.

2. MORTGAGES—FORECLOSURE—ESTOPPEL—TO DENY TITLE.

A defendant mortgagee in foreclosure of a mortgage containing covenants of seisin and special warranty cannot set up a prior and paramount equitable title in himself.

In Equity. On bill of foreclosure.

Bill by Lemuel McManness and Maris Paxson, assignees of M. C. Whitely, to foreclose a mortgage executed by defendants Henry Paxson and Maria Paxson, his wife, on lands in Morgan county, Mo.

Draffen & Williams, for complainants.

Dan E. Wray, for defendants.

PHILIPS, J. This is a bill in equity, to foreclose a mortgage executed by the defendants Henry Paxson, and Maria, his wife. The mortgage grew out of about the following state of facts: One Eli Paxson, the father of defendant Henry, resided in the state of Ohio. In the year 1868 he came to Morgan county, Mo., with the view of making the purchase of some lands. He purchased between five and six hundred acres, for which he paid \$7,000, and received a deed therefor in the fore part of 1869. He came to this land with the defendant Henry and his other son, Maris, the plaintiff herein, and lived upon it for about two years, when he returned to the state of Ohio. He was then some 70 odd years old. At that time he had other money in bank at his Ohio home. This bank failing in 1878 left him in very straightened circumstances, rendering it necessary for him to make some disposition of this Missouri land to obtain the means of support. There was litigation in the courts of Missouri affecting the title to this land. In his extremity he applied to one M. C. Whitely, who was an attorney at law, and an old friend, for assistance. After many suggestions and negotiations it was agreed and arranged between them that Mr. Paxson should convey to Mr. Whitely the said land in Missouri, and thereupon, on the 15th day of March, 1879, Mr. Whitely and Mr. Paxson executed a trust instrument, by which it

was declared that Mr. Whitely should take this land for the purpose of looking after the same, paying the taxes, and furnishing the necessary money for defending and perfecting the title thereto; renting and making sale thereof, if necessary, to raise means for the support of said Paxson and wife. By this declaration of trust, Mr. Whitely was authorized to make sale of the land at his discretion, on the best terms attainable; and out of the proceeds to pay the taxes and expenses of said litigation, and to reimburse Whitely for his services, etc., in the premises; and, after the death of said Paxson and wife, he was furthermore authorized and empowered to make division of the proceeds of said land, or the land in kind, among the children of said Paxson. The old man Paxson died April 1, 1879; his wife surviving him till 1884. In the mean time the litigation in Missouri affecting the land had terminated in favor of Paxson. In March, 1871, Henry, on notice from his father, had surrendered possession of the land to him or his agent, and shortly thereafter returned to the state of Ohio. Whitely, not being able to obtain a purchaser for said land, concluded a sale of the portion covered by the mortgage,—the subject of this litigation,—to the defendant Henry Paxson, for the sum of \$3,000, \$600 of which was then paid, and for the residue of the purchase money the defendant executed five several promissory notes, payable in two, three, four, five, and six years after date, for the sum of \$480 each, to secure the payment of which the defendant executed to said Whitely the deed of mortgage herein sued on. In the settlement of the trusteeship of Whitely, part of the land undisposed of by Whitely was conveyed to the plaintiff Maris Paxson, as also three of the notes, as his distributive share of the estate, and as a compensation for his services in taking care of his mother after the death of his father; and the last of said notes was cancelled and delivered up to the defendant Henry as his distributive share of the estate. The second of said notes was transferred to Bennett Paxson, another of said heirs, in satisfaction of his distributive share, who, on the 18th day of March, 1884, assigned the same for value received to the plaintiff McManness.

Immediately after the purchase of said land by the defendant from Whitely, he returned to Missouri, and Whitely put him in possession of the land, which he has ever since held. The defense set up to this bill of foreclosure in substance is that the defendant did not know at the time he took the deed from and executed the notes and mortgage to Whitely that Whitely held the title to the land under the trust arrangement between him and Eli Paxson; and that, if he had known the facts, he would not have made such purchase, and executed said notes and mortgage; that he supposed Whitely had bought from his father as an ordinary purchaser for value received. The answer does not charge, in terms, that Whitely, in making the sale, was guilty of any positive fraud or misrepresentation to mislead or deceive him as to the existence of such trust. The answer further sets up that Henry's father induced him to come with him from the state of Ohio on the promise to give him this land; that accordingly he did so come and take possession of the same on the faith of such promise, and that he so occupied and held the

land up to the time his father gave him notice to quit; that by reason thereof he became, and was at the time he took the deed from Whitely, the equitable owner of the land.

Without stopping here to consider the evidence in detail adduced at the trial, it occurs to me that there are certain fixed principles of law lying at the very threshold of this controversy, which greatly embarrass the defense interposed to this action. The deed of mortgage, after the *habendum* clause, contains this covenant provision:

"And the said Henry Paxson and Maria Paxson do for themselves and their heirs, executors, and administrators covenant with the said Machias C. Whitely, his heirs and assigns, that at the time of signing these presents they were jointly and well seised of the above-described premises as a good and indefeasible estate in fee-simple, and have good right to bargain, sell, or incumber the same; and that they will warrant and defend the said premises, with the appurtenances unto the same belonging, to the said Machias C. Whitely, his heirs and assigns, forever, against all acts done or suffered by them or either of them."

The authorities are agreed that this affirmative covenant operates as an effectual estoppel against the mortgagor to assert against the mortgagee or assignee that he did not have the title or the right to make the mortgage on the land at the time of its execution. 2 Jones Mortg. § 1483, says:

"A mortgagor is estopped to deny his title. He cannot set up as a defense for himself against the mortgagee that the property so mortgaged is trust property, which he had no right to mortgage. He cannot claim adversely to his deed, but is estopped by it. * * * At the present time, and especially where a mortgage is merely a lien and not a title, this estoppel must be regarded as arising only from a covenant for title, express or implied."

While it may be conceded that perhaps the modern doctrine is that the relation between mortgagor and mortgagee is not so similar to that of landlord and tenant as to prevent the mortgagor from setting up an outstanding title or a newly-acquired title, it does not apply where the mortgage deed contains an express covenant, as does this. *Bush v. White*, 85 Mo. 357, 358. It is also an established principle that in the action of foreclosure in equity the mortgagee's title acquired under the mortgage cannot be questioned by the mortgagor in defense to the bill, except perhaps on the score of usury and the like, in those jurisdictions where such usury avoids the contract. The title can only be investigated at law, and not in a chancery foreclosure. 2 Jones Mortg. § 1482. "It is a general rule that a mortgagor, and those claiming under him, are estopped from saying that no title was conveyed to the mortgagee. In executing the instrument they hold forth that they have title or authority to convey, and that title, whether good or bad, the mortgagee is entitled to." *Bailey v. Trustees*, 12 Mo. 177. So 1 Jones Mortg. § 682, says:

"A mortgagor, by a mortgage containing the usual covenants of seisin and warranty, is estopped to deny the title of the mortgagee. * * * The mortgagor in such case will not be heard to say in contradiction of his covenant of warranty that he had not title at the date of the conveyance, or that it did not pass to the mortgagee by virtue of his deed."

It would be a contradiction in terms of the covenant of seisin and warranty for the mortgagor to either say that he had not title, or that whatever title he did have did not pass to the mortgagee under his mortgage deed. *Cross v. Robinson*, 21 Conn. 379. An executor, who takes a deed as such, and gives back a mortgage as such, is bound thereby, and estopped to deny his appointment and authority. *Van Dyck v. McQuade*, 18 Hun, 376. It was the English law that the title is not brought in issue in a petition for foreclosure. *Bull v. Meloney*, 27 Conn. 563; 564. This rule is very fully and aptly expressed in *Anderson v. Baxter*, 4 Or. 110; as follows:

"Formerly a mortgage of real property was regarded as a conveyance of the legal title, subject, of course, to be defeated by the performance of a condition, and this doctrine still prevails to some extent. Courts of equity, however, have always regarded a mortgage as a mere security for a debt, and the foreclosure thereof as a proceeding to satisfy the debt secured thereby; and courts of law as well as courts of equity, in many of the states, have taken the same view; that is, that a mortgage was a mere lien or pledge, and that the general title to the mortgaged property was in the mortgagor. In the language of one of the authorities, 'the mortgagee has neither a *jus in re* nor *ad rem*, but a specific lien, similar in character to a general lien created by a judgment upon the land of the judgment debtor.' *Gardner v. Heartt*, 3 Denio, 232. However this may be, as a matter of strict law, I am satisfied that a suit to foreclose a mortgage is not for the determination of any right or claim to or interest in real property, but a proceeding to have the mortgaged property adjudged to be sold to satisfy the debt secured thereby. In such a suit the title to the mortgaged premises is in no wise drawn in question. The adjudication is merely as to the fact of the execution of the mortgage, the amount due thereon, and the sale of the property to satisfy the debt secured. It is the mere collection of a debt charged upon specific property by resorting to the property as a means of satisfying it. If it were a suit to divest a party of title, or to establish some right regarding the title to real property, it would stand upon a different footing; but, the mortgage being in equity only a chose in action, a suit to foreclose it is more analogous to an action upon a sealed instrument."

Applying these principles to this case, what difference can it make whether or not the defendant acquired an equitable title under his alleged contract with his father? No matter whence comes his title, he covenanted with the mortgagee that he had title, and the right to mortgage; and he is estopped to deny that whatever title he has passed to the mortgagee as a security for the notes, subject to the conditions expressed in the mortgage. The mere fact, without more, that defendant did not know, when he gave the notes and mortgage, that Whitely held the legal title to the land subject to the declaration of trust, or that defendant would not have taken deed from Whitely, and executed the notes and mortgage, had he been so informed, is not sufficient to destroy the validity of the notes and mortgage. The conveyance from Whitely, whereby he obtained the legal title to and possession of the land, would constitute a valid consideration. The defendant knew then as well as now of his claim and rights under the imputed contract with his father. There is scarcely any ground of pretense that Whitely, by any trick and deception or representation, practiced any fraud upon defendant, which in

equity or law would avoid the notes. Leaving out of view the testimony of Whitely, that defendant knew all about the declaration of trust and the purpose for which the land was being conveyed by him to defendant, and accepting as true the defendant's own statement, there was no conduct on the part of Whitely upon which any imputation of fraud could be based. The substance of the defendant's statement is that Whitely did not inform him of the trust, but said he held the title with full authority to convey. All of which, in fact and law, was true. There is no failure of title in the deed from Whitely to defendant, and no breach of any covenant. The defendant was *sui juris*. He was not *non compos mentis*. If he made an improvident bargain, and bought land which in equity already belonged to him, he has no one to blame but himself. He is not an imbecile, that he should call upon the court for protection.

But, looking further into the equities of this case, the defense is without merit. The whole transaction between defendant and his father, upon which he predicates his equitable title to the land, prior to the deed from Whitely, rests *in pais*. There was no written memorandum to take the case out of the operation of the statute of frauds. It requires no citation of authorities to support the proposition that the proof of a parol agreement in such case should be so clear and persuasive as to leave no reasonable doubt in the mind of the chancellor as to its precise terms. Outside of the deposition of the defendant, there is no evidence of any meeting and agreement between defendant and his father respecting the terms of the alleged gift. The defendant is clearly an incompetent witness to speak of this contract in this controversy. *Chapman v. Dougherty*, 87 Mo. 617. Whatever doubt existed on this subject is now removed by the late amendatory statute of Missouri. Laws Mo. 1887, p. 287. See, also, section 858, Rev. St. U. S. It is true that defendant shows by other witnesses that on or about the time Eli Paxson was in Missouri, purchasing this land, he stated he was buying it for his two sons, Henry and Maris, and that he intended to give it to them. And it may be conceded to defendant that if in consideration of said promise he removed with his family from the state of Ohio to Missouri, and took possession of said land, and occupied and improved it in expectation of the fulfillment of said promise, and had not voluntarily abandoned the same, he would have been entitled, as against his father and those in privity with him, to a specific performance. *Halsa v. Halsa*, 8 Mo. 303; *Rumbolds v. Parr*, 51 Mo. 592. But the subsequent conduct of the defendant strips him, in contemplation of equity, of every vestige of such right as a defense to this action. As evidence that the father did not regard the existence of such obligation, after living less than two years upon this land with his son, he returned to the state of Ohio, and gave written notice to defendant to quit and surrender the possession to his son-in-law. Thereupon the defendant left the premises, in March, 1871, without one word of objection or protest; and shortly thereafter returned himself to Ohio, living near his father, seeing him frequently; and from that day to the date of taking the deed from Whitely it does not appear that he

ever asserted or set up any claim whatever to this land. It is incredible to believe that if he entertained in his own mind even the thought or belief that he had any equitable right to this land, he would enter upon negotiations with Whitely for the purchase thereof, without suggesting the right he now sets up. Mr. Whitely deposes that the defendant was fully informed, prior to any negotiations leading to the sale of the land and the execution of the mortgage, of the existence of said declaration of trust, and the precise circumstances under which Whitely held the same; and that defendant frequently advised and consulted with him as to the best means of managing and disposing of the property to accomplish the purposes of the trust. We can discover nothing in the character of Mr. Whitely, or in his relations to this case, to justify the court in discrediting his testimony. He was acting throughout as the trusted friend and trustee of the father, Eli Paxson, to aid and provide for him in the adversity of old age. He had no personal interests or ends to subserve in the matter; and as proof confirmatory of his testimony, the defendant took from him a quitclaim deed, in which deed direct reference was made to the trust, as testified to by Whitely. Defendant must be presumed to have known the contents of the deed under which he took title. *Orrick v. Durham*, 79 Mo. 178. As said by ATWATER, J., in *Daughaday v. Paine*, 6 Minn. 452, (Gil. 304:) "It is contrary to reason and good sense that a party should be excused from knowing the contents, and the whole contents, of his title deeds." Not only this, but the defendant obtained possession of the land under the Whitely deed after having been out of possession for nine years; and after he was readmitted he remained silent for five years more, until this foreclosure suit was brought. During this time he permitted, without notice of claim or protest, the trustee Whitely to settle up his trusteeship, and distribute the proceeds of the sale of this land in pursuance of the trust; actually taking himself one of the notes from the trustee as his distributive share of the estate, and tacitly suffered the plaintiff Mr. McManness to become the purchaser of one of the notes in suit at its full value, as shown by the depositions. This conduct is wholly inconsistent with his defense. He has not exhibited the willingness, eagerness, and promptness required to entitle him to a standing in a court of equity as for a specific performance. Decree for complainants.

SHIELDS *et al.* v. MCAULEY *et al.*

(Circuit Court, W. D. Pennsylvania. December 24, 1888.)

1. WILLS—TRUSTS—PRIVATE UNDERSTANDING WITH DEVISEE.

It is a settled principle that if a testator make a devise in terms absolute, but upon a private understanding had with his devisee, whether by the latter's express promise or his assent implied from his silence, that he will apply the devised estate to some purpose designated by the testator, a trust arises which a court of equity will enforce, unless unlawful in itself.

2. SAME—BEQUESTS TO CHARITIES.

Mary McAuley died seised of a house and lot on Duquesne Way, Pittsburgh, which she had acquired under the will of her brother, James; and also possessed of a large personal estate. As respects the latter, she died intestate, but she left an instrument of writing signed by her, and which has been admitted to probate as her will, in the words following: "By request of my dear brother my house on Duquesne Way is to be sold at my death, and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women. MARY MCAULEY." Held, that said instrument was operative as a valid declaration of the terms of a trust upon which Mary McAuley held said property, and therefore it was not affected by the act of assembly of April 26, 1855, which avoids bequests, devises, or conveyances for charitable uses unless made by deed or will, attested by two witnesses, at least one calendar month before the death of the testator or alienor.

3. DESCENT AND DISTRIBUTION—NEXT OF KIN—COUSINS.

In the distribution of the personal estate of a decedent under the intestate laws of Pennsylvania, as between first cousins and second cousins, the former take to the exclusion of the latter.

In Equity. Suit to contest the validity of a will and for administration of estate of decedent.

Knox & Reed, for complainants.

Thomas Patterson, for devisees.

D. F. Patterson and *John W. Donnon*, for first cousins.

V. M. Watson and *S. Schoyer, Jr.*, for second cousins.

Before McKENNAN and ACHESON, JJ.

PER CURIAM. 1. James McAuley, who died on the 9th day of January, 1871, by his will dated and executed November 26, 1870, made large bequests to his sisters Margaret and Mary, and also devised to them a house and lot on Duquesne Way, in the city of Pittsburgh. Margaret died in 1871, a few months after her brother, and thereupon her interest in said property passed to her sister Mary, who died January 6, 1886, seised of said real estate, and leaving also a large personal estate. As respects the latter, she died intestate, but she left an instrument of writing, signed by her, (the body thereof being also in her hand-writing,) of which the following is a copy:

"By request of my dear brother, my house on Duquesne Way is to be sold at my death, and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women. MARY MCAULEY."

On January 12, 1886, this instrument was admitted to probate as the will of Mary McAuley. The two named beneficiaries are corporations of the state of Pennsylvania, and charitable institutions, within the

meaning of the act of assembly of April 26, 1855, which avoids bequests, devises, or conveyances to any body politic, or to any person, in trust for religious or charitable uses, unless made by deed or will, attested by two credible, and at the same time disinterested, witnesses, at least one calendar month before the decease of the testator or alienor. Hence the next of kin of Miss McAuley contest the validity of the disposition of the proceeds of said real estate made by said instrument.

While there is no direct testimony to fix the precise date when said instrument was executed, there is circumstantial evidence quite sufficient to warrant a finding that it was much more than one calendar month before Miss McAuley's decease. But then the want of attestation by two witnesses remains as an objection against giving full effect to the paper, if it is to be treated simply as the will of Miss McAuley. Must it be so regarded? Or (as maintained by the learned counsel for the beneficiaries) may it be accepted as a valid declaration on the part of Mary McAuley of the terms of a trust upon which she held the property? It is a settled principle that if a testator make a devise in terms absolute, but upon a private understanding had with his devisee, whether by the latter's express promise or his assent implied from his silence, that he will apply the devised estate to some purpose designated by the testator, a trust arises which a court of equity will enforce, unless unlawful in itself. *Lewin, Trusts*, *70; *Wallgrave v. Tebbs*, 2 Kay & J. 313, 321; *Tee v. Ferris*, Id. 357; *Springett v. Jennings*, L. R. 10 Eq. 488; 3 Redf. Wills, 485; 1 Story, Eq. Jur. § 256; *Hoge v. Hoge*, 1 Watts, 163; *Church v. Ruland*, 64 Pa. St. 432, 442. In our judgment such a trust is shown here. The instrument in question manifestly was designed to carry out the purpose of James McAuley, the execution of which he had confided to his devisee. The paper, both in its scope and aim, is unlike an ordinary will. It deals with nothing but the Duquesne Way house. As to everything else Miss McAuley was content to die intestate. But that particular property had been devoted by her brother to charitable purposes, to take effect at her death. Evidently he had communicated his intention to her, and she had accepted the trust. All this, we think, is plain upon the face of the paper. "By the request of my dear brother, my house on Duquesne Way is to be sold at my death, and the proceeds to be divided," etc. It was, then, his intention Miss McAuley sought to effectuate. Clearly, she was acting in fulfillment of a sacred confidence. True, she herself uses the word "request," but undoubtedly her understanding was that an obligation had been imposed on her. In *Colton v. Colton*, 127 U. S. 319, 8 Sup. Ct. Rep. 1164, the court says:

"It is an error to suppose that the word 'request' necessarily imports an option to refuse, and excludes the idea of obedience as corresponding duty. * * * According to its context and manifest use, an expression of desire or wish will often be equivalent to a positive direction, where that is the evident purpose and meaning of the testator."

Miss McAuley, who had perfect knowledge of her brother's intention, and fully understood her own duty, having undertaken to carry out his purpose by this instrument of writing, it is not for her next of kin to

question the existence of a trust thus recognized by her, or to gainsay her deliberate act. James McAuley's will was executed more than one calendar month before he died. Whether the understanding with his devisee was entered into contemporaneously with the signing of his will, or before or after, is not known. There is, however, nothing to indicate that the arrangement was made within one month before his death, nor is this alleged in the bill. In *Manners v. Library Co.*, 93 Pa. St. 176, it is said that the act of April 26, 1855, being in derogation of the common-law right of conveyance, the averments of a bill must be so distinct and clear as to bring the case within the terms of the law. Certainly a court of equity will not assume illegality in this trust, but, in furtherance of the beneficent intention of the donor, will rather make every reasonable presumption favorable to its validity. In respect to the second named charity, "The Home for Protestant Destitute Women," there is a misnomer; the true title being, "The Home for Aged Protestant Women;" but this is not material, as it clearly appears that this is the institution intended. *Society's Appeal*, 30 Pa. St. 425.

2. In awarding the personal estate of the decedent (Mary McAuley) to the first cousins to the exclusion of the second cousins, the master followed the decision of the supreme court of Pennsylvania in *Brennenman's Appeal*, 40 Pa. St. 115. The precise question was involved and directly ruled in that case; and it is conceded that, if we follow that ruling, the master's distribution must be confirmed. That decision has never been qualified or questioned by the supreme court. As it gives a construction to the Pennsylvania statutes of distribution in cases of intestacy, it is binding upon this court here, even were our own judgment different. *Leffingwell v. Warren*, 2 Black, 599. But, in truth, we entertain no doubt whatever as to the correctness of the decision. In our opinion it is clearly in accordance with the terms and intent of the statutes

HEDGES *et al.* v. DIXON COUNTY.

(Circuit Court, D. Nebraska. January, 1889.)

RAILROAD COMPANIES—MUNICIPAL AID—EXCESSIVE ISSUE—EQUITY—POWER TO SCALE.

Where a county's issue of bonds for donation to a railroad has been held void in a court of law, as in excess of the constitutional limit of indebtedness, equity has no power to scale down the issue to the limit, and enforce it against the county, the contract being indivisible, and void *in toto*, and there being no executed consideration to support an implied promise.

In Equity. Bill by Daniel T. Hedges and others to scale down and enforce an issue of the bonds of defendant county, said issue having been held void as in excess of the constitutional limit of indebtedness of the county. Defendant demurs.

J. M. Woolworth, for complainant.

A. J. Poppleton, J. B. Barnes, and J. M. Thurston, for respondent.

BREWER, J. The facts in this case are these: In 1876, Dixon county, the defendant herein, issued \$87,000 of its bonds as a donation to the Covington, Columbus & Black Hills Railroad Company. The amount of such issue exceeded 10 per cent. of the assessed value of the property of the county, by reason whereof it has been finally adjudged by the supreme court that the bonds were void. *Dixon Co. v. Field*, 111 U. S. 81, 4 Sup. Ct. Rep. 315. This bill is brought by the complainants, who own nearly all of the bonds thus issued, praying that they may be scaled down to an amount equal to 10 per cent. of the assessed valuation of the property of the county at the time of the issue, and to that extent held as valid obligations of the county, and a decree entered against it therefor. The complainants offer to accept such reduced amount in satisfaction, and tender their bonds for cancellation on payment thereof. They also pray that the holders of the other bonds, when known, be brought before the court and impleaded in this bill, and given the same rights. To this bill the defendant demurs on the ground that it states no ground of action.

Conceding that the bonds, as they stand, are void, and that no recovery can be had thereon in a court of law, complainants insist that a court of equity has power to scale them down to an amount equal to that that the county might lawfully have issued, and enforce them when thus scaled down. It is said that the vice of this transaction is only in the matter of excess; that a court of equity may expunge the vice, and enforce the contract thus freed from taint. Counsel for complainants concedes that he has been unable to find any precedent for such a proceeding, and his confession of inability is satisfactory evidence that no such precedent exists; so that the question must be determined by reference to the general principles of law; and here it may be remarked that the difference between courts of law and those of equity is mainly one of forms and remedies, rather than in the matter of absolute rights and obligations. If a contract be pronounced absolutely void in a court of law, it must expect the same denunciation in a court of equity. Courts of equity, like those of law, must accept contracts as they are made, and have no power to make contracts for parties. If the contracts which parties attempt to make are void because in defiance of some statute or common law, they are void alike in either court, and neither court can change a void into a valid contract. Now, the contract in this case, in its inception, was on the part of the county a single and indivisible obligation; that is, an attempted donation of \$87,000 to the railroad company. The bonds are merely evidences of the contract, the contract standing behind them, and, whatever separate and divisible obligations of the county exist after the issue of the bonds, the contract in the first instance was single and entire. Now that was an attempted donation of \$87,000 to the railroad company. Such donation the county had no power to make, and, after it had finished its action, nothing which the promisee, the other party to the contract, could do could give validity

to the obligation of the county. It was either good or bad, dead or alive, when it left the hands of the promisor. Take this illustration: If, in a state where usury avoids the entire contract, a usurious note be given, that note is void, and no willingness of the payee, no act of his, can transform that invalid into a valid contract. Of course it would be very satisfactory if the promisee, by consenting to a reduction of the interest, could give validity to a void promise, vitality to a dead contract. So here, if the promisee, the railroad company, could reduce the extent of the promise, it doubtless would be satisfactory, but it would be thereby making a contract, or attempting to make a contract, different from that which the promisor proposed. The fact that 87 bonds were issued, instead of one, in no manner changes the primary obligation attempted to be assumed by the county.

Neither is this a case where there is an equity to compel payment by the county on the ground that it has received something, for the bonds were donated, and no implied promise can be based upon the matter of value received. Counsel cites the case of *Daviess Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897, in which the county having authorized the issue of bonds to the amount of \$250,000, the county officers issued \$320,000, and the county was held liable for the first \$250,000; but the cases were not at all parallel. In that the principal had proposed a valid contract. It had done that which it had a right to do, and the wrong or misconduct of its agents, the county officers, was held not to invalidate that which the county had lawfully authorized. In this there is no breach of duty charged upon the county officers. The agents have not departed from their instructions. The trouble lies in the action of the principal itself. Its action was unauthorized, and, being without warrant of law, or rather in defiance of law, created no valid obligation.

It is unnecessary to add more. This court can make no contract for the parties. It must take the contract which they made. That contract was one that the county was not authorized to make. The bonds were void as adjudged in a court of law, void in whole and in part, and they must be so adjudged in a court of equity; and, the county having received nothing of value, no equitable obligation can be enforced against it. The demurrer will be sustained, and, the defect being one that cannot be remedied, a decree must be entered dismissing the bill.

HUMPHREYS *et al.* v. ST. LOUIS, I. M. & S. RY. CO.

(Circuit Court, S. D. New York. January 24, 1889.)

1. RAILROAD COMPANIES—CONTRACTS—ULTRA VIRES.

A railroad company, a corporation of Ohio, Indiana, Illinois, and Missouri, which had equipped its road under an agreement with a car trust, leased the road and equipments to defendant, a railroad company, which, to induce the car trust to leave the equipments on the road, agreed to pay the balances unpaid by its lessor at certain times, in consideration of which payments the car trust agreed to transfer and assign all its interest to defendant. All the states in which the company was incorporated, except Indiana, provided for the lease of one railroad by another. The laws of Missouri provided that the lease should not be binding until at a meeting of the stockholders, called for that purpose, a majority assented thereto in writing, or until the holders of a majority of the stock assented thereto in writing, and a certificate, signed by the president and secretary, was filed with the secretary of state. No meeting was called of defendant's stockholders, but a certificate was filed, signed by the president, who owned nearly all of the stock, and the secretary, and the road was operated by defendant without any objection from its lessor. *Held*, in an action by the car trust on its agreement with defendant, that defendant could not plead *ultra vires* as to the lease.

2. FRAUDS, STATUTE OF—AGREEMENT TO PAY DEBT OF ANOTHER.

The defendant having obtained the use of the equipments by its agreement to pay the balance unpaid by its lessor, the consideration was the use of the property and the right to acquire title by such payment, and the contract was a direct undertaking, and not a guaranty, within the statute of frauds.

At Law.

George De Forest Lord and *James B. Townsend*, for plaintiffs.

John F. Dillon, *Thomas J. Portis*, and *Rush Taggart*, for defendant.

WHEELER, J. This cause has been heard by the court upon written waiver of a trial by jury. The plaintiffs are trustees of an association called by the name of the "New York & Pacific Car Trust Association," for the purpose of buying, selling, and leasing railroad equipment and rolling stock, to be sold or leased to companies owning or operating railroads. The articles of association provide that the capital stock should be issued in series of certificates representing the property, from time to time, to be classified by letters, and based upon successive contracts for equipment and rolling stock and leases thereof, and for authority in the trustees to contract with the Wabash, St. Louis & Pacific Railway Company, for the lease to the said company, and their successors, from time to time, of equipment and rolling stock, a separate lease to be made of each series of equipment and rolling stock which might be delivered to the trustees under the articles of association, upon specified terms and conditions. Pursuant to this authority, the trustees entered into an agreement with the Wabash, St. Louis & Pacific Railway Company, a corporation of Ohio, Indiana, Illinois, and Missouri, which recited this authority, and witnessed that the trustees, as well in consideration of the sum of one dollar to them paid by the said Wabash, St. Louis & Pacific Railway Company, parties of the second part, at and before the sealing and delivery thereof, the receipt of which was thereby acknowledged, as

of the rent, sums of money, and covenants thereafter mentioned to be paid, kept, and performed by the said parties of the second part, had let and leased, and by those presents, under and by virtue of the said recited agreement, did let and lease, unto the parties of the second part and their successors, for the use of the parties of the second part in their railroad business, all and singular the railroad equipment and rolling stock, more particularly set forth in the schedule or inventory thereto annexed, with their fixtures and appurtenances, for the term of five years from and after the 1st day of December, A. D. 1879, unless sooner terminated, as thereafter provided, at and for the rent or sums of money, for the rent or hire of the said railroad equipment and rolling stock, as thereafter set out, to be paid to the said lessor quarter-yearly during the said term, as follows: For the first quarter, the sum of \$101,250, and specifying a further sum for each of the other 19 quarters, respectively; that the first quarterly payment should be made on the 1st day of March, A. D. 1880, and thereafter the said quarterly payments should be made on the 1st days of the months of June, September, December, and March, in each year during the said term; together with further sums incidental to the contract; and that the Wabash, St. Louis & Pacific Railway Company, in consideration of the premises, did by those presents covenant and agree with the said lessors as follows: That they, the said lessee, should and would pay to the said lessors the said rent and sums of money specified, on the days and times and in the manner aforesaid, and should and would, at their proper cost and expense, keep and maintain the said equipment and rolling stock in good order and repair, and cause the same to be numbered and lettered as follows, on the body thereof, thus: "New York & Pacific Car Trust Association, No. ———," and on the bottom side rail: "N. Y. & P. C. T. A. Series A;" and should and would replace, at their own cost, any of the said equipment and rolling stock that might be destroyed from any cause whatever during the continuance of the lease by other equipment and rolling stock of equal value and of like material, character, and construction; and should not allow the name or designation of any railroad to be placed on such equipment and rolling stock except as "lessee;" and should and would, at their own cost and expense, insure said equipment and rolling stock in such amount and in such manner as should be satisfactory to the said trustees, to whom the losses, if any, should be made payable; and that the trustees should be entitled to hold the policies; and that in case the said lessee should make default in the payment of any part of the said rent or any of said sums of money for more than 30 days after the same should become due and payable, or should fail to keep the said equipment and rolling stock in good, serviceable condition, or to keep the same insured as thereinbefore provided, or to perform any of the covenants provided to be performed on their part, the said trustees might, on the request or demand of the managers of the association, declare the said lease terminated, and by their agent enter upon the railroads and premises of the said railroad company and take all the said railroad equipments and rolling stock, and withdraw the same from the said railroads

and premises, and might also take and withdraw the said equipment and rolling stock, wheresoever the same might be found; and upon such retaking thereof the said trustees should hold and dispose of the same in such manner, at public or private sale, for cash or upon credit, as the said trustees, with the approval of the board of managers of the association, might deem most beneficial to the trust, and apply the proceeds thereof to the payment of the expenses of the trustees, insurance expenses, and taxes accrued or to become due, the expense of managing and maintaining the property, and to the rent then due, together with the interest thereon, and also to the payment and satisfaction of all installments of rent thereafter to accrue or become due, and should hold the said railway company responsible for any balance of the said rent then unpaid; and if such sale should yield any surplus the same should be paid to the railway company; and such retaking by the said trustees should not be a bar to the recovery of the rent, and the necessary taxes and expenses aforesaid; that upon the payment of all the rent and sums of money, as therein provided, then and in such case upon the payment by the said lessee to the said lessors of the further sum of one dollar, the said lessors should and would forthwith sell the said equipment and rolling stock to the said lessees, and that all the said equipment and rolling stock thereby leased should thereupon become the absolute property of the said lessees, and that neither the said lessors nor their *cestuis que trustent*, should have any further control over or interest in the same, and that the said trustees should have and hold the said railroad equipment and rolling stock and the said lease, and all the right, title, and interest therein, and should collect, receive, hold, and apply the rents and sums of money to be paid therefor and thereunder, as above provided, for the use and benefit of the holders of certificates of stock in the association, until all the said rent and sums of money should be paid, as in the said lease provided; and when, and as soon as the said rent and sums should be paid, all the said railroad equipment and rolling stock and their fixtures and appurtenances should thereupon, as above provided, be sold and transferred to and become the absolute property of the railway company, and neither the said association, nor the holders of the said stock, nor the said trustees, should have any further control over or interest in the same.

The equipment provided for in this agreement, designated "Series A," was delivered to and taken possession of by the Wabash, St. Louis & Pacific Railway Company under the terms of the agreement. Like agreements were made for three other series in succession, designated respectively "B," "C," and "D," and the equipment provided for therein was in like manner delivered and taken possession of. The agreement in respect to Series D was modified as to the rate of interest and times of payment. Default was made in respect to payments provided for in each of the agreements. Afterwards an agreement for a lease of the roads and equipment of the Wabash, St. Louis & Pacific Railway Company, including all this equipment and rolling stock, to the defendant, a corporation of Missouri and Arkansas, was made between these two companies. The stock of the defendant consisted of 220,700 shares, of which 219,459

shares were held and stood on the books of the company in the name of Jay Gould, trustee, and he was president of the company. On the 10th day of April, 1883, a lease of the roads and equipment pursuant to that agreement was made and executed by the officers of the respective companies, and on the part of the defendant, among others, by Jay Gould, president. This lease was filed in the office of the secretary of state of Missouri on the 28th day of April, 1883, with these certificates:

"The undersigned, president and secretary of the Wabash, Saint Louis & Pacific Railway Company, certify that the annexed instrument, bearing date April 10, 1883, is a certain original indenture of lease by and between the Wabash, Saint Louis & Pacific Railway Company and the Saint Louis, Iron Mountain & Southern Railway Company, and that the holders of a majority of the stock of the Wabash, Saint Louis & Pacific Railway Company have assented thereto in writing.

[Seal]

"JAY GOULD, President,

"Wabash, Saint Louis & Pacific Railway Company,

"O. D. ASHLEY, 2d Secretary,

"Wabash, St. Louis & Pacific Railway Company."

"The undersigned, president and secretary of the Saint Louis, Iron Mountain & Southern Railway Company, certify that the annexed instrument, bearing date April 10, 1883, is a certain original indenture of lease by and between the Wabash, Saint Louis & Pacific Railway Company, and that the holders of a majority of the stock of the Saint Louis, Iron Mountain & Southern Railway Company have assented thereto in writing.

[Seal]

"JAY GOULD, President,

"Saint Louis, Iron Mountain & Southern Railway Company.

"A. H. CALEF, Secretary,

"Saint Louis, Iron Mountain & Southern Railway Company."

Whether the defendant took possession of the roads, equipment, and rolling stock of the Wabash, St. Louis & Pacific Railway Company under this lease is a disputed question of fact upon the evidence. The respective offices of each company were filled mostly by the same persons; and many of the executive agents of each were respectively the same. Mr. Amos H. Calef, who was secretary and treasurer of the defendant company from 1881, and became such of the other in May, 1883, was called as a witness by defendant, and gave evidence tending to show that such possession was not taken. The plaintiffs offered in evidence a letter signed by him as such officer, and directed to the president and directors of the other company, dated May 10, 1884, which stated among other things, that "under the indenture of lease between the Wabash, St. Louis and Pacific Ry Co. and this company, dated April 10, 1883, the lines of the lessor company have been operated for a period of about thirteen months." It was received, subject to objection. Without considering this letter as evidence of the fact stated in it, or otherwise than as affecting the testimony of that witness, upon all the other evidence and circumstances it is found that these roads and the equipment and rolling stock were brought, by force of the lease, which was at that time recognized as valid by all, within the control and management of the defendant company. In view of the situation, and to induce the trustees to let the equipment and rolling stock remain in use upon the roads, the defendant entered into an

agreement with these trustees, dated June 26, 1883, and signed by Jay Gould, president, and A. H. Calef, secretary, which, after reciting the making of the agreements in respect to the equipment and rolling stock between the trustees and the Wabash, St. Louis & Pacific Railway Company, proceeds thus:

"Whereas, the said railway company is not in default as to each of said agreements by reason of the non-payment of certain of the sums mentioned therein; and whereas, the second party hereto has leased the railroads and equipments of said Wabash, St. Louis & Pacific Railway Company, and is desirous of preserving intact the said equipment for use in the operation of said railroads: Now, therefore, it is agreed by and between the parties as follows: *First.* The second party hereby assumes and agrees to pay to the first party the several sums remaining unpaid by the said Wabash, St. Louis & Pacific Railway Company at the times and in the manners following, provided the same are not sooner paid by the said railway company, that is to say: The principal of each of said installments of rent at the expiration of three years from the date when the same would otherwise respectively fall due, and during the three years and thereafter the interest on each and all of said installments quarterly, as required by the terms thereof, until the principal debt is paid. The second party further agrees with the first party that it will promptly and fully make good any default of the said railway company hereafter to keep and perform any and all of the remaining stipulations and covenants which the said railway company has in and by the said agreements, or any of them, agreed to keep and perform. *Second.* The first parties further agree that when and as the extended payments shall mature and become due, if the same or any of them are not paid by said railway company, then, upon receiving the money therefor from the second party, the first parties will use the funds in the purchase of, and hand over and deliver to the second party, certificates issued under the various car trusts above mentioned, corresponding at par to the amount paid by the second party under the guaranty hereinbefore stated; the second party holding the said certificates, with all interest accruing and thereafter to accrue upon, in the same manner, and with the same rights, and with the same security, as appertained thereto in the hands of the holders whose certificates they purchase; and the first parties shall give to the second parties, for any payment the second party may make on account of either principal or interest, receipts which will show that the second party have bought the rights of the holders of the certificates under the car trust to the extent of such payment, with the same rights, power, and authority as were possessed by the holders of the certificates on account of which principal or interest shall have thus been paid by the second party, and binding the first parties to hand the certificates over to the second party so soon as the first parties shall have received the same. And the first parties further agree that whenever the second party shall have paid to them any sums now or hereafter due upon any of said agreements, and not paid by said railway company, and the first parties shall also have received the entire sum which by the terms of such agreement the first parties are entitled to receive, then the said first parties will assign and transfer to the second party the said agreement and all the right, title, and interest of the second party thereon."

Thereupon the equipment and rolling stock were left to remain within the control of the defendant, in use upon the roads covered by the lease.

On May 19, 1884, the defendant company informed the Wabash, St. Louis & Pacific Railway Company that the net earnings of the roads had been insufficient to pay the interest, rentals, and other fixed charges;

that under these circumstances the St. Louis, Iron Mountain & Southern Railway would undertake to continue its advances, and it would be necessary for the Wabash, St. Louis & Pacific Railway Company to ask the holders of the junior bonds of its main lines and of the leased and acquired lines, which were said to be not self-sustaining, to fund their coupons for such a period as would enable the business to grow up to the expense and interest charges; that if the Wabash Company could accomplish this, the St. Louis, Iron Mountain & Southern Company would continue to operate the lines of the former under the lease, and in connection with the Missouri Pacific System; and that its managers felt great confidence that within a reasonable time the profit would increase sufficiently to exceed its fixed charges. Upon receiving this information, the officers of the Wabash, St. Louis & Pacific Railway Company, some of whom were also officers of the defendant company, took steps to secure the appointment of receivers of the roads and property of the former; and on the 29th day of that May such receivers were appointed, one of whom was one of the plaintiff trustees, and they immediately took possession of the roads and property, including this equipment and rolling stock, without objection on the part of the defendant. The plaintiffs intervened in the receivership proceedings to obtain payments of installments falling due of the receivers, and succeeded to some comparatively small extent, and after the expiration of three years called upon the defendant for payment of the sums unpaid. Payment was refused, and successive suits were brought upon this agreement for installments falling due, and these actions have been consolidated into this suit.

The defenses set up and urged are that the lease is *ultra vires* and void, and that the contract depends upon that, and falls with it; that the contract is itself *ultra vires* and void; that it is within the statute of frauds; that it is a mere guaranty of the contract of the Wabash, St. Louis & Pacific Railway Company, without consideration; that, as such guaranty, no cause of action would accrue upon it until all other remedies should be exhausted. That one railway company cannot lease its road and franchises to another, or acquire those of another by lease, without statutory authority from the jurisdiction in which they are situated, is not disputed in this case, and seems to be well settled. *Thomas v. Railroad Co.*, 101 U. S. 71; *Railroad Co. v. Railroad Co.*, 118 U. S. 290, 630, 6 Sup. Ct. Rep. 1094, and 7 Sup. Ct. Rep. 24. That these things may be done with such authority follows, and also is not questioned. The Revised Statutes of Missouri of 1879 provide by section 790 that—

“Any railroad company organized in pursuance of the laws of this or any other state * * * may lease or purchase all or any part, of a railroad, with all its privileges, rights, franchises, real estate, and other property, the whole or a part of which is in this state, and constructed, owned, or leased by any other company, if the lines of a road or roads of said companies are continuous at a point either within or without this state, * * * provided that no * * * such lease * * * shall be perfected until a meeting of the stockholders of said company or companies of this state * * * shall have been called by the directors thereof, at such time and place, and in such manner, as they shall designate, sixty days’ public notice thereof having

been previously given, and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof, signed by the president and secretary of said company or companies shall have been filed in the office of the secretary of state."

The laws of Illinois of February 12, 1855, (Priv. Laws, 304,) that—

"All railroad companies incorporated * * * under the laws of this state shall have power to make such contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, * * * as shall be necessary and convenient for carrying into effect the object of this act."

The Revised Statutes of Ohio, by section 3300, that—

"Any company may lease or purchase any part or all of a railroad constructed by another company, if the lines of road of such companies are continuous or connected, and not competing, upon such terms and conditions as may be agreed upon between the companies."

Therefore, under some circumstances which might exist, the defendant could lawfully acquire the roads of the St. Louis, Wabash & Pacific Railway Company, and all of them, by lease, except that part in Indiana. *Railroad Co. v. Railroad Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094. The only condition required as to Missouri and Ohio is that the roads should be continuous or connected; and none appears to be required as to Illinois. At the time of the lease trains of all the roads ran to and from a union depot in St. Louis. To do this, trains of the defendant crossed a track of the Missouri Pacific Railway Company, running in the same direction, by being switched onto it from one side and passing along on it 134 feet, and then being switched off on the other side; and trains of that part of the roads of the Wabash, St. Louis & Pacific Railway Company east of the Mississippi river passed over the track of a bridge and tunnel company across the Mississippi river to the depot, by right acquired by lease. They connected otherwise by their own tracks. These breaks, such as they were, separated parts of their own roads, and not the roads of these parties, from one another. These methods of crossing the track of another road and the river do not appear to break the connection between the two roads, within the meaning of these statutes; and these lines are found upon the evidence of this situation and these circumstances, as a matter of fact, to have been connected and continuous. The holders of a large majority of the stock of each company appear to have assented to the lease at meetings when that subject was considered, but not at any meeting called and held for that purpose. No vote at any meeting was required by the laws of Missouri, if the holders of a majority of the stock assented to the lease in writing, and the proper certificates were filed in the office of the secretary of state. The propositions voted upon were in writing, and the voting was by written ballots. This is argued to have been an assent in writing to the lease; but the ballots were not signatures, and were cast to accomplish corporate, and not individual, action. This does not seem to amount to the assent in

writing contemplated by the statute. No other assent of the holders of a majority of the stock of the two companies is shown otherwise than by the certificates. Those appear to be designed to furnish authentic evidence of the fact of assent; and whether the plaintiff is required to go beyond them, or the defendant is entitled to go behind them, is doubtful. However that may be, the president of the defendant, who signed the certificate held almost the whole of the stock of that company. There could be no majority without him. The statement by him in the certificate, that a majority had assented, implies that he had assented. Blanks for such assent were attached to the lease, and not signed. The statute does not require the assent to be in any particular form or place. If the certificate is true, and it is to be so regarded, it appears to prove that the president had somewhere made such an assent, or considered the certificate, as amounting to one. In either case, one was made which was satisfactory to him, both as stockholder and president, and was evidenced in the manner required by the statute. The lease was therefore well executed in behalf of the defendant as lessee, and not *ultra vires* on that part. It was not disputed, but was yielded to on the part of the lessor, however defective the execution of that part may have been. This rolling stock and equipment was personal property, which might be sold or bailed by parol and delivery. The leases were sufficient to pass the right of the Wabash, St. Louis & Pacific Railway Company to that when accompanied by delivery. The defendant therefore had, by the contract of lease, well made on its part, and by concession and sufferance on the part of the lessor, this road to operate, and the possession of this equipment and rolling stock to operate it with, subject to the rights of the plaintiffs, when this contract was made. It provided a mode for retaining the possession of, and gradually acquiring the title to, the rolling stock and equipment. Nothing appears to be more clearly within the scope of the corporate powers of a railway corporation than the procurement of equipment and rolling stock for the roads it has to operate. Had the defendant at that time bought or hired engines and cars for this use, it could no more have resisted payment for them than it could for the services of train-men employed by it to run the trains, or of track-men employed to keep the track in repair. The fulfillment of this contract would procure the use of necessary engines and cars, and ultimately the title to them. The defendant had in fact taken upon itself the operating of the roads, which made the rolling stock and equipment desirable and necessary, and represented to the plaintiffs that it had by the terms of the contract. The ability to make such contracts, under such circumstances, whether the underlying title of the defendant was valid or not, is shown in *Zabriskie v. Railroad Co.*, 23 How. 381; and *McCluer v. Railroad Co.*, 13 Gray, 124. In the former case Mr. Justice CAMPBELL said in delivering the opinion of the court:

"A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

In the latter, which was an action upon a contract of carriage over the Methuen Branch Railroad, that the defendant was operating under a lease said to be *ultra vires* and void, HOAR, J., said:

"The decision of this court in the recent case of *Langley v. Railroad Co.*, 10 Gray, 103, rests upon grounds wholly distinct from those upon which this action is based. The court there decided that the Boston & Maine Railroad, being the owners of the Methuen Branch Railroad, and authorized to run cars over it as common carriers of passengers and freight, could not, without the authority of the legislature, lease that road to a corporation created by another state, and transfer their powers and duties to such corporation, so as to discharge themselves from liability for injuries to persons or property which might arise in the use of the road. But if the plaintiff in the present action might have had a remedy, at his election, against the Boston & Maine Railroad, he is not therefore precluded from seeking it against the party with whom he directly contracted. The defendants, so far as any evidence showed, were competent to hire and use the Methuen Branch Railroad, if they could find any party that would permit them to use it, and put them in possession. They were in the actual possession and use of it, without obstruction from the Boston & Maine Railroad of the commonwealth; and they received the plaintiffs' property through their agents, and agreed that it should be safely kept, and transported to its destination. It is no answer to a breach of that agreement, to deny the validity of their own contract for the use of the road."

This contract does not appear to be void from any want of corporate authority to make it. The questions made in respect to the consideration, construction, and effect of the contract are to be determined in view of the situation out of which it grew, and to which it is to be applied. The contracts between the plaintiffs and the Wabash, St. Louis & Pacific Railway Company, in respect to this equipment and rolling stock, are in the instruments called "leases," and they are sometimes said to be "contracts for conditional sales," and at other times, "mortgages." Neither of these names would seem to be apt to describe them fully, and perhaps they partake somewhat of the nature of such instruments as each of these terms is usually applied to. The title to the property was not to pass until payment, and in that respect they resembled conditional sales. The use of the property by the conditional purchase was provided for on compensation, and in that respect they would have the qualities of a lease, so far as that name is applicable to agreements for the use of personal property. And they provided for security on the property in the hands of the so-called "lessee," and in that respect were like mortgages. In all aspects they fixed the right of the plaintiff to retake the property on default. A default had been made, and the property was subject to the right of the plaintiffs to remove it at once; and the lease passed the right to redeem to the defendant, subject to the rights of the plaintiffs. If the lessor redeemed, the defendant would have the property of the lessor under the lease. If the defendant fulfilled the contract, it would have the property as purchaser. The undertaking of the defendant to pay what should remain unpaid at the prescribed times was an agreement to pay the price of the use and ownership of the property which it would have of the plaintiffs. What the lessor should pay, it would pay for itself. The reference to what should

remain unpaid was for the purpose of fixing the amount to be paid by the defendant, and not to express an agreement to see that the defendant paid. The consideration was the use of the property to be had, and the ownership of it to be acquired. Such an agreement to pay money towards the price of property received was early held not to be within the statute of frauds. *Williams v. Leper*, 3 Burrows, 1886; *Castling v. Aubert*, 2 East, 325; *Edwards v. Kelly*, 6 Maule & S. 204. These considerations lead to the conclusion that the contract is not a mere guaranty, but a direct undertaking, on which the plaintiffs have the right to proceed against the defendant in the first instance.

The evidence tending to show that the lease was not executed according to the laws of the several states in which the road was situated, as well as evidence showing that the stock of the defendant corporation held by Jay Gould, trustee, was in fact held for the Missouri Pacific Railway Company, was received subject to objection, without passing definitely upon its materiality, to make the case complete. The Missouri Pacific Railway Company is a corporation of Missouri, and as such appears to have had authority to hold the stock, and to assent to the lease, either by itself or through a trustee. The presumption is that the act of the trustee was authorized or approved by that company, if anything in that behalf was necessary; and this presumption is not rebutted.

The argument made in behalf of the defendant, that want of power to take a lease of the roads would involve want of power to operate them, or to provide means for operating them, although sound in law, does not appear to be well founded in the actual situation. The defendant was not without power by the laws of its *situs* to take title by lease or otherwise of all of those roads. The laws of Missouri already recited appear to have conferred ample authority to acquire title to them in any manner in which it could be obtained; and title could be obtained to all of them in some form, and by lease to all except that part in Indiana, by procuring the execution of conveyances with the required formalities. The defendant accepted such an instrument in that behalf as was made, and that operated to give the defendant the roads. Whether this operation was due to the concession of the lessor, or to the force of the instrument, the defendant acquired the roads with authority to operate them, and to provide for their operation. In this view, the defendant became bound by its contract with the plaintiffs to provide rolling stock and equipment, without reference to the actual validity of the lease as against the lessor. The defendant, as lessee, could not dispute the lessor's title as against the lessor; and still less could it dispute that title as against third parties and strangers to the lease, who had dealt with the defendant on its own representation of the lease. This evidence, therefore, now appears to be immaterial, but the facts shown by it are in the case, to have such weight as may be found to belong to them, if any, in the further progress of the cause. Upon the whole case, as now considered, the plaintiffs are entitled to recover of the defendant the installments for which the actions consolidated into this one were brought. There must therefore be judgment for the plaintiffs.

SHAW v. CRAFT *et al.*

(Circuit Court, N. D. Ohio, W. D. December Term, 1888.)

1. ANIMALS—INJURIES BY—DOGS—PRESUMPTION.

Dogs kept upon a farm are presumed not to be vicious, or to have dangerous habits, and the owner or harbinger is not liable for their vicious acts, unless he had knowledge of such vicious or dangerous habits.

2. SAME—KNOWLEDGE OF VICIOUSNESS.

The owner or harbinger of a dog, known to be in the habit of chasing persons or horses on the road adjoining his premises, is not liable for injuries to persons caused by their horses becoming frightened at the dog, where he has no knowledge that injury has ever resulted from the dog's habits, or of any acts of the dog likely to result in injury, and where he exercises ordinary care to prevent injuries by the dog.

3. SAME.

But after knowledge of such acts of the dog as would be likely to result in injuries to passers along the road, it is his duty to take such measures as will secure the public against danger therefrom in future.

4. NEGLIGENCE—IMPUTED—HUSBAND AND WIFE.

The wife's administrator cannot recover for injuries causing her death, which were occasioned solely by the husband's negligence, but where his negligence only contributes to the injury, and the negligence of defendant directly contributes to the injury, the husband's negligence cannot be so attributed to the wife as to defeat the action.¹

At Law.

Action by James P. Shaw, administrator of Ella J. Shaw, deceased, founded on the Ohio statute authorizing the administrator of any person whose death was caused by the wrongful act of another, to recover damages for the benefit of the husband and children. The plaintiff alleged that on the 27th of October, 1887, as he was passing along a public road near the premises of the defendant Craft, with a buggy and one horse, in which were his wife and two daughters, two dogs of the defendants ran to the road and in it, and viciously barked at and chased his horse, thereby causing him to run away and upset the buggy, and throwing his wife out, and so injuring her that she shortly afterwards died of the injury. He also alleged that the dogs were vicious and dangerous, and in the habit of chasing and pursuing persons passing along the highway, and that the defendants knew of their vicious and dangerous habits, but wrongfully allowed them to run at large.

Hamilton & Ford, for plaintiff.

C. A. Layton and *E. D. Potter*, for defendants.

WELKER, J., charged the jury, among other matters: 1. That dogs upon a farm, being regarded as domestic animals, are presumed not to be vicious, or have bad and dangerous habits, and the owner or harbinger is not liable for their vicious acts unless he had knowledge of such vicious

¹The negligence of a man who invites a woman to ride in a buggy with him, he keeping full control of the horses, and the woman having no reason to doubt his ability and care, cannot be imputed to her in an action by her against the municipality for injuries resulting from obstructions negligently left in the street. *Town of Knightstown v. Musgrove*, (Ind.) 18 N. E. Rep. 452. See, also, cases cited in note.

character. Nor is he to be regarded an absolute insurer that they will not become vicious, and contract habits of pursuing or chasing passers on adjacent highways.

2. That the owner or harbinger of a dog, known to him to be in the habit of barking at and chasing persons or horses on the road adjoining his premises, but without knowledge that injury had been done thereby, or such act of the dog in so doing as would be likely to produce injury, is only required to exercise reasonable and ordinary care to prevent injury being done by such dog to passengers along the road. This ordinary care is such as a reasonably prudent person would or should exercise under like circumstances. Failing to exercise such ordinary care and diligence would be negligence, for which such owner or harbinger would be liable, if injury is done by such dog.

3. But if the owner or harbinger has knowledge that his dog has been in the habit of viciously chasing or pursuing passers-by in the public road adjacent to his premises, and injury has resulted therefrom, or his dog had been guilty of such acts, with reference to persons or teams passing along such highway, so that injury might have thereby resulted, then, with such knowledge, it would be the duty of such owner or harbinger to take such necessary measures as would secure the public against danger from such future conduct and acts of the dog, and, failing to do so, would be liable for injuries committed or produced after such knowledge.

4. That Means, who was the owner of one of the dogs, would be liable with Craft, the harbinger thereof, if he had the same knowledge, and would be required to exercise the same care and diligence as the harbinger; and that Craft, as the mere harbinger of such dog, with the knowledge before stated, would also be liable for injuries caused by him.

5. That if the injury which produced the death of Mrs. Shaw, was occasioned solely by the carelessness of the driver of the buggy,—her husband,—the defendants cannot be held liable for the injury thus produced. If, however, her husband's negligence only contributed to the injury, then his negligence cannot be attributed to the intestate, and must not be regarded as her negligence, so as to defeat this action, where the negligence of the defendants directly contributed to the injury.

Verdict for the plaintiff. Damages, \$1,500.

DICKSON v. LEHNEN.

(Circuit Court, E. D. Missouri, E. D. January 30, 1889.)

1. LANDLORD AND TENANT—UNLAWFUL DETAINER—FRAUDULENT LEASE.

Where a tenant, after the expiration of his original term, claims the right to hold the premises under a subsequent lease by his landlord to a third person, the landlord, in an action of unlawful detainer against the tenant, may show that such subsequent lease is void for fraud, such showing not being an inquiry into the merits of the title, which is prohibited by Rev. St. Mo. § 2443.

2. SAME—APPEAL—SUPERSEDEAS—EFFECT.

The subsequent lease having been decreed to be void, to the tenant's knowledge, before he acquired any claim thereunder, it cannot be held to have been valid when the action of unlawful detainer was brought, because an appeal had been taken and a *supersedeas* bond given, the decree having been afterwards affirmed.

3. SAME—RES ADJUDICATA.

Such decree, having been affirmed, is competent and conclusive evidence of the invalidity of the lease.

4. SAME—ESTOPPEL—REPRESENTATIONS BY ATTORNEY.

The opinion of the landlord's attorney as to the effect of the appeal and *supersedeas* bond, on the right of the subsequent lessee to sublet the premises, concerns a question of law upon facts of which the tenant had full knowledge, and does not estop the landlord.

5. SAME—BURDEN OF PROOF.

The tenant has the burden of proving representations of the landlord's attorney which are alleged to estop the landlord.

6. SAME—SURRENDER OF POSSESSION TO SUBSEQUENT LESSEE.

A lease to commence on the expiration of a prior lease being of an executory character, and Rev. St. Mo. § 3080, permitting an attornment only with the landlord's consent, or to one who has acquired his estate and seisin by deed or execution sale, the prior lessee has no right to surrender the possession to the subsequent one without the landlord's consent, especially after a controversy as to the validity of the subsequent lease has arisen, and the lessee therein has been warned not to take possession.

At Law.

This was an action of unlawful detainer under section 2420 of the Revised Statutes of Missouri, which declares *inter alia* that "when any person shall willfully, and without force, hold over any lands, tenements, or other possessions after the termination of the time for which they were demised or let to him, or the person under whom he claims, * * * such person shall be deemed guilty of an unlawful detainer." Plaintiff's ancestor, Edwin H. Farnsworth, heretofore leased 800 acres of land situated in Montgomery county, Mo., to Thomas H. Summers for a term of eight years ending January 1, 1886. Defendant became the assignee of the lease, and entered into possession of the demised premises, and remained in possession to the end of the term. Subsequently, on April 7, 1879, Farnsworth granted another lease for the same premises to one S. A. Kempinsky for the term of 10 years, to commence on January 1, 1886, when the first lease terminated. Farnsworth died April 27, 1879, and thereafter this plaintiff, who was his devisee, brought suit against Kempinsky in the state court to cancel and annul the last-mentioned lease on the ground of fraud. A decree annulling the same was rendered by the state circuit court on June 8, 1885, from which decree

the defendant therein prosecuted an appeal to the state supreme court, giving a *supersedeas* bond. The decree of the circuit court was affirmed by the supreme court in November, 1888. 9 S. W. Rep. 618. Pending the appeal, and on October 15, 1885, Kempinsky leased said premises to the defendant Lehnen for a term of 14 months, to commence January 1, 1886, when the lease under which defendant then held expired. At the time of the subletting last referred to, defendant knew of the suit affecting the Kempinsky lease, and had been a witness on the trial of the same in the circuit court, and was aware that it was pending on appeal in the supreme court. On December 24, 1885, plaintiff notified Kempinsky that any possession taken by the latter, or by persons claiming through him under the pretended lease of April 7, 1879, then in litigation, would be against plaintiff's will and consent. On January 23, 1886, defendant being still in possession, not having surrendered the premises to plaintiff, and claiming to hold them under Kempinsky, plaintiff made written demand of defendant for possession, and, the demand not being complied with, subsequently, on February 6, 1886, brought this action of unlawful detainer. The complaint was originally filed before a justice of the peace in Montgomery county, was thence taken to the circuit court of the county by writ of *certiorari*, and thence removed to the federal court on the ground of diverse citizenship.

James O. Broadhead and G. B. Macfarlane, for plaintiff.

D. P. Dyer and David Goldsmith, for defendant.

THAYER, J., (*after stating the facts as above.*) As this action is brought under a local statute, the various questions that have been discussed must be decided in strict conformity with the law of the state as interpreted by its highest courts. The main contention on the part of the defendant seems to be that the court has no power in this proceeding to determine whether the lease granted by Farnsworth to Kempinsky on April 7, 1879, was valid or invalid, as that would involve a trial of title, as to which no inquiry can be had in actions of forcible entry and detainer. Section 2443, Rev. St. Mo. It follows, of course, as a corollary from this proposition, that in the opinion of defendant's counsel the record of the decree of the circuit and supreme courts of the state, annulling the lease in question, is not admissible in evidence. If that view is correct, the result would be, in my opinion, that the defendant would have no right to introduce the Kempinsky lease, on which he wholly relies to justify his holding over after the termination of the lease under which he originally entered. The legislature, by prohibiting inquiry into the merits of title in this class of cases, could not have intended to allow a tenant, who has willfully held over after the termination of a given lease, to justify his act under a subsequent lease or deed executed by the lessor, and at the same time to prohibit the lessor or his heir from showing that such subsequent lease or deed was a forgery, or had been obtained by fraud, or had never been delivered. The construction of section 2443, *supra*, contended for by defendant's counsel, would logically confine the proof strictly to the questions whether the

defendant was a tenant of the plaintiff, and had held over after the end of his term; and neither party would be allowed to proceed a step beyond that point. As defendant admits both of these facts, he has no defense to the action if the position assumed is tenable. The fact is that it has often been held in this state that a tenant, when sued for an unlawful detainer committed by holding over, may show that since the date of his lease the lessor has parted with his reversion by a voluntary conveyance of the same, or that he has been divested of the same by a sale *in invitum* under execution upon a judgment, and that he (the tenant) has attorned to the vendee or purchaser under execution, as section 3080, Rev. St. Mo., permits him to do. *Kingman v. Abington*, 56 Mo. 46; *Pentz v. Kuester*, 41 Mo. 447; *Higgins v. Turner*, 61 Mo. 250; *Gunn v. Sinclair*, 52 Mo. 327. Such a defense has never been regarded as an inquiry into the merits of the title, within the meaning of section 2443, *supra*, and it is not made such by permitting the lessor to go a step further, and show, as against his tenant, that the deed invoked by the latter, and under which he has attorned or attempted to attorn, is a forgery, or was void *ab initio* for fraud. Under the decisions in this state there is a well-marked distinction between cases where a tenant merely holds over, and for that is guilty of an unlawful detainer, and cases where possession is obtained by a disseisin,—that is, by force, or by an original wrongful entry without force. In cases of the latter kind the question of title cannot be raised. The trial is confined strictly to proof or disproof of the acts amounting to a disseisin. But in cases of the former kind, where a tenant holds over, defendant may, as before shown, give in evidence deeds executed by his lessor; and when this is done an inquiry into the validity of such conveyances is, in my opinion, proper. *May v. Luckett*, 54 Mo. 438; *Same v. Same*, 48 Mo. 472. As defendant can only justify a holding over by an attornment made under a certain class of deeds, and cannot set up an outstanding title hostile to his lessor, there cannot, as a matter of course, be a general inquiry into the merits of title in this class of suits.

It is next insisted for the defendant that the Kempinsky lease must be held to have been valid when his suit was begun, notwithstanding the fact that six months before that time it had been adjudged by the circuit court to be null and void, because an appeal had been taken from the decree, and a *supersedeas* bond given. The appeal undoubtedly stayed for the time being the execution of the decree. It had no other effect. It did not operate to vacate the decree, and certainly it did not make that a valid lease at any time which was finally adjudged to be void *ab initio* on the ground of fraud. The decree of the state circuit court (the same having been affirmed in the supreme court) is offered in this case as conclusive evidence of a fact affirmed by the plaintiff, namely, that the lease in question never was a valid instrument, and it is competent for that purpose. The second contention of the defendant's counsel is accordingly overruled. When this suit was brought, and when his term expired, on January 1, 1886, and when he took a lease of Kempinsky, on October 15, 1885, defendant had knowledge that plaintiff claimed that

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the lease of April 7, 1879, was void, and that it had been so held by the state circuit court. In the light of these facts there appears to me to be no merit in the plea that the case should be treated precisely as it might be if defendant's lessor, Kempinsky, had held a valid lease, and had been entitled to possession of the premises in dispute on January 1, 1886. Defendant appears to have taken the chances, with full knowledge of all the facts, that the title which he elected to recognize would prove valid.

It is next insisted that plaintiff's attorney and agent, Mr. Hughlett, made representations to defendant, before he took a lease from Kempinsky, as to the latter's right and power to make a valid lease, which representations should estop the plaintiff from denying defendant's right to hold over under the lease from Kempinsky. Of this contention it is only necessary to say that there is much conflict of evidence as to the nature of the alleged representations, and the burden is on the defendant to show what they were. I conclude that Mr. Hughlett went no further in that matter than to express, an opinion as to the effect, the giving of an appeal-bond by Kempinsky had on his right to execute leases pending the appeal; and, even if it be conceded that the opinion expressed was in support of such right, it appears to me that it concerned a question of law only, arising on a state of facts as well known to defendant as to Mr. Hughlett, and that in giving such advice the latter cannot be regarded as acting for the plaintiff, and that for both reasons the plaintiff is not estopped, in the manner claimed, or in any manner.

In addition to the points already considered, notice must be taken of the point made by plaintiff's counsel, that the lease granted to Kempinsky on April 7, 1879, being for a term to commence nearly six years thereafter, did not vest him with any estate, even if it had been valid, but merely gave him a future right of entry upon the demised premises, which right could only be enforced by suit in ejectment, or by an action for damages for failure to give possession, if prior to the commencement of the term the lessor or his heir notified the lessee not to enter. There can be no doubt that at common law and under the laws of this state a lease to commence in future does not, like a deed, vest the lessee with an estate. Such an instrument creates only an *interesse termini*. It is of an executory character, and does not even give the lessee a constructive possession. Until actual entry with the lessor's consent, possession remains with the holder of the title, if there is no actual occupant. *Austin v. Mining Co.*, 72 Mo. 541, and cases cited; *Michau v. Walsh*, 6 Mo. 346; 1 Washb. Real Prop. (4th Ed) 442; 4 Kent Com. (11th Ed.) 106; 1 Greenl. Cruise, 243; Wood, Landl. & Ten. §§ 224, 225. Such being the nature of a lease to commence in future, I am of the opinion that defendant had no right in any event to surrender the possession to Kempinsky, without first obtaining his landlord's consent, and that he certainly had no right to so surrender the possession after a controversy as to the validity of Kempinsky's lease had arisen, and the latter had been warned not to take possession.

Defendant's duty was to restore possession to his landlord, under whom he had entered, or to his heir. If he had vacated the premises Kempin-

sky would have had no right to take possession in opposition to the wishes of the plaintiff. *May v. Lockett*, 48 Mo. 472. Section 3080, Rev. St. Mo., before alluded to, only allows a tenant to attorn to a stranger with consent of his landlord, or to some one who has acquired the lessor's estate and seisin since the letting, by a deed executed by the lessor, or by virtue of a sale under an execution against him. The statute does not recognize the tenant's right to surrender the premises in his charge, or to attorn, to a mere lessee, whose term is to begin after the tenant's term expires, and who has no estate by virtue of his lease, until he is let into possession by the owner of the premises.

There will be a judgment for plaintiff. The damages are assessed at \$2,970, and the monthly value of the rents and profits at the sum of \$110.

SWEET *et al.* v. RECHEL.

(Circuit Court, D. Massachusetts. January 26, 1889.)

NUISANCE—ABATEMENT—COMPENSATION—POLICE POWER.

Act Mass. June 1, 1867, provides that for the purpose of abating a nuisance the city of Boston may purchase or otherwise take lands within a certain district, and that the title of all land so taken shall vest in the city; and that a party whose land is taken may agree with the city upon the damage done, and the amount thereof shall then be paid to him by the city. *Held*, that the title to lands taken under such act vests in the city, though no compensation has ever been made to the owner; the taking of the lands being under the police power of the state.

At Law.

Thomas A. Jenckes and James E. Leach, for plaintiffs.

Geo. B. Bigelow and S. J. Elder, for defendant.

COLT, J. This is a writ of entry, brought to determine the title to certain real estate situated in the city of Boston. The case was heard upon an agreed statement of facts. The defendant claims to derive title from Peleg Tallman, Jr., the father of the plaintiffs, under a guardian's deed executed in 1844, and he also claims title under a deed from the city of Boston, dated March 14, 1870. The plaintiffs contend that no title was conveyed by either of these instruments, and that the title to the property is in them as heirs at law of Peleg Tallman, Jr. As the defendant seems to rely more upon the deed from the city of Boston, let us first consider the grounds upon which its validity is attacked. On June 1, 1867, the legislature of Massachusetts passed an act entitled "An act to enable the city of Boston to abate a nuisance existing therein, and for the preservation of the public health in said city." This act provided that the city might purchase or otherwise take the lands and buildings within a certain district known as the "Church-Street District," and that the title of all land so taken should vest in the city of Boston. It further provided that a

party whose land was taken might agree with the city upon the damage done, and that he should then be paid the amount by the city. It further provided that any person entitled to any estate in the land so taken might within one year bring a bill in equity, setting forth the claims for damages against the city of Boston, or the Boston Water-Power Company, or any other corporation or person, by reason of any wrongful act or omission in causing diminution in the value of the land at the time of said taking, and praying an assessment of damages against such parties. The land in controversy was taken under this act, and subsequently, on March 14, 1870, the city, for a valuable consideration, deeded the land to the defendant. The main contention of the plaintiffs is that no title to the land passed under this act. They do not deny the constitutionality of the act, because that question has already been settled by the supreme court of the state in *Dingley v. City of Boston*, 100 Mass. 544, but they say no title to the property passed until compensation was given, and that, as nothing was ever paid by the city to the real owners, the city never acquired any title, and that consequently nothing was conveyed by the deed of the city to the defendant.

In determining the question now raised it must be borne in mind that the object of this act was the abatement of a nuisance. The land was not taken under the right of eminent domain, but under the police power of the state. This case, therefore, is not parallel to that of *Kennedy v. Indianapolis*, 103 U. S. 599, upon which the plaintiffs largely rely. In *Bancroft v. City of Cambridge*, 126 Mass. 438, the court, in the construction of a similar act for the abatement of nuisance, use the following language:

"It was not passed to delegate the right of eminent domain, but under the police power of the commonwealth. Laws passed in the legitimate exercise of this power are not obnoxious to constitutional provisions, merely because they do not provide compensation to the individual who is inconvenienced by them. He is presumed to be rewarded by the common benefits secured. Instances of its exercise are found in all quarantine and health regulations, and in all laws for the abatement of existing and prevention of threatened nuisances. It has been many times recognized and applied in the decisions of this court."

But, as already stated, this act has been construed by the supreme judicial court of Massachusetts in *Dingley v. City of Boston*, and the court there held, not only that the act was constitutional, but that land taken under the act vested the fee in the city as absolute owners. To be sure, in that case the question of compensation was not directly raised or passed upon, but it logically follows from the conclusions of the court in that case that the plaintiffs have no right to maintain this action. If the act was constitutional, and a fee vested in the city under its provisions, then clearly by that decision no remedy was left to the owners except the assessment of damages as provided in the act. The construction of a state statute by the highest court of the state is conclusive upon the federal courts. For these reasons I am of opinion that the city of Boston derived title to the lands in controversy under the act of 1867, and that by the deed from the city the defendant subsequently became the owner of

the property. The conclusion here reached renders it unnecessary to enter upon any inquiry as to the validity of the guardian's deed. Judgment should be entered for the defendant, and it is so ordered.

In re WILLIAMS.

(District Court, D. South Carolina. January 23, 1889.)

1. WITNESS—ATTENDANCE AND FEES—IN FEDERAL COURTS.

A person, under subpoena as a witness for the United States, attended court. The case was continued, and the witnesses were verbally instructed to attend at the next term. In the mean time he removed his residence into another state. Without further summons, he attended court, and was used as a witness by the United States. *Held*, that he was entitled to mileage from his place of residence.

2. SAME.

A witness for the United States, voluntarily coming to and attending court on the verbal instructions of the district attorney, is entitled to *per diem* and mileage, notwithstanding that his residence is out of the district, and more than 100 miles from the place at which the court is held.

(*Syllabus by the Court.*)

On Application for Compensation as Witness.

B. A. Hagood and R. W. Memminger, Jr., for applicant.

H. A. De Saussure, Asst. U. S. Dist. Atty.

SIMONTON, J. Williams was served with subpoena to attend the July term of this court in *United States v. Howard* in behalf of the government. He attended, and was registered by the district attorney. The case was continued to the October term. All the witnesses in behalf of the government were discharged with instructions to return at the next term. In October Williams attended, was again registered, and, the case of Howard having been continued, he was, with the other witnesses, discharged under instructions to appear at the January term. In November he went, under his father's instructions, to Jersey City, the residence of his father; he being a minor. He came back to Charleston to attend the January term of this court. He reported himself to the district attorney, and was registered as a witness, giving his residence as Jersey City, and was used at the trial of Howard. He never was bound over as a witness. He received no subpoena except to the July term. He claims his mileage from Jersey City.

With serious doubt of the *bona fides* of this case, I have examined into the facts presented in the affidavits, and have come to the conclusion that Williams came here in good faith, thinking that he was obliged to come, and for the sole purpose of being a witness. Assuming that the exigency of his subpoena was satisfied by his attendance at the July term, and that he has afterwards attended under the verbal instructions of the district attorney, he would, under the practice of this court, sanc-

tioned by the practice of other United States courts, be entitled to his *per diem*. *U. S. v. Williams*, 1 Cranch, C. C. 178; *Dennis v. Eddy*, 12 Blatchf. 196; *Cummings v. Cement Co.*, 6 Blatchf. 509. See, also, *Dreskill v. Parish*, 5 McLean, 241. And if Jersey City is *bona fide* his residence, he is entitled to his mileage, notwithstanding the fact that it is out of this state and district, and is more than 100 miles away from the place for the holding of the court. *U. S. v. Sanborn*, 28 Fed. Rep. 299. Let the order be prepared accordingly.

UNITED STATES v. TWO HUNDRED AND EIGHT BAGS OF KAINIT.

(District Court, D. South Carolina. January 24, 1889.)

1. CUSTOMS DUTIES—VIOLATION OF LAWS—FORFEITURE.

When property afloat is brought ashore in contravention of the revenue laws of the United States, it cannot be forfeited unless the act was done with actual intention to defraud the United States on the part of the owner, or of some person acting under his authority, or who is the agent of the owner, or of the person from whom the owner derives title.

2. SAME.

When property afloat is feloniously taken from the possession of the owner, and is brought ashore in contravention of the laws of the United States, and then seized by the officers of customs, it will not be forfeited as against the true owner.

(Syllabus by the Court.)

Information under Sections 2872-2874, Rev. St.

H. A. De Saussure, Asst. U. S. Dist. Atty.

Smythe & Lee and Bryan & Bryan, for claimant.

SIMONTON, J. The facts of this case, as found by the testimony, are these: The Norwegian bark Swaren came to this port from Bremen, with a cargo of kainit, a non-dutiable article. She was duly entered in the custom-house. An inspector went aboard of her. She discharged her cargo at the wharf of the Etiwan Phosphate Company, the owners of the cargo. The master and inspector reported that the cargo was fully discharged. The vessel left the Etiwan wharf, and dropped down the stream about a mile and a half, opposite to Marshall's wharf. While in that position, at night, in small boats, the 208 bags of kainit in question were brought from the ship to the wharves, and concealed in the city of Charleston. This was done with intent to unlawfully appropriate property of the Etiwan Phosphate Company. The kainit was seized by the officers of the government, and this libel and information filed. The Etiwan Phosphate Company file their claim as owners of the property. The question, then, is, where property afloat is unlawfully taken from the possession of its owner, and is brought ashore in contravention of the revenue laws of the United States, must the property be forfeited, and the innocent owner remanded to his application to

the treasury department for relief? Whatever doubt may have existed on this subject, it has been removed by the act of 1874, (18 U. S. St. at Large, 189,) which makes an actual intention to defraud an essential question in suits to enforce forfeiture under the custom laws. *Sinn v. U. S.*, 14 Blatchf. 550; *Lewey v. U. S.*, 15 Blatchf. 1. The question of fact which I must pass upon is "whether the alleged acts were done with an actual intention to defraud the United States." 1 Supp. Rev. St. p. 80, § 16; *The Purissima Concepcion*, 24 Fed. Rep. 358. This means an actual intent on the part of the owner, or of some person acting under his authority, or being his agent, or under whom he derives title. *U. S. v. Diamonds*, 30 Fed. Rep. 364. In this case the master and stevedore of the vessel had informed the claimant that all the cargo was discharged. Without the knowledge of the claimant, they concealed 208 bags of kainit in the ship. They left claimant's wharf and service, and then clandestinely and furtively sent the kainit ashore. Under the circumstances stated, the claimants cannot be charged with the consequences of this act, so as to forfeit their property. But the action of the collector in seizing this kainit was founded on probable cause. This action also brought to the knowledge of the true owner the fact that his property had been stolen, and preserved it for him. While the delay in filing the information and libel prevents me from charging the kainit with the heavy bill for storage, it should pay the items of labor, \$2.40, and of drayage, \$10.50. So, also, the filing of the information discovered the facts which exonerate the claimant. Upon payment of these items, and of the costs of court, let the stipulation heretofore entered into by claimant be released.

In re CHAPMAN.

(Circuit Court, N. D. Georgia. January 28, 1889.)

ARMY AND NAVY—ENLISTMENT—MINORS.

Under Rev. St. U. S. § 1117, providing that "no person under the age of 21 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control," the enlistment of a minor without the written consent of his parent or guardian, is invalid and of no legal effect, and the invalidity may be claimed by the minor himself, before or after attaining majority.

Application for *Habeas Corpus*. On appeal from district court.

Application by J. C. Chapman for a writ of *habeas corpus*. On the hearing in the district court, Judge NEWMAN delivered the following opinion:

"It appears in this case that the petitioner, J. C. Chapman, enlisted in the United States army at Atlanta, Ga., when twenty years and eight months old. He is now nearly twenty-three years of age. Some five or six weeks

after his enlistment he deserted from the army, and has since been at large. He had been arrested as a deserter, and was about to be conveyed to Fort Barancas, Fla., from which place he deserted. To prevent his removal, this writ was taken out. His father did not consent to his enlistment; on the contrary, when written to about it by some officer, he objected, though he took no steps at that time to prevent the enlistment. The father subsequently arranged to make some application at the war department for his son's discharge, but, while engaged in correspondence with a member of congress on the subject, his son came home. The question presented is whether or not this soldier can be discharged on his own application, because of his enlistment before he was twenty-one years of age. Sections 1116, 1117, and 1118 of the Revised Statutes are as follows: 'Sec. 1116. Recruits enlisting in the army must be effective and able-bodied men, and between the ages of 16 and 35 years, at the time of their enlistment. This limitation as to age shall not apply to soldiers re-enlisting. Sec. 1117. No person under the age of 21 years shall be enlisted or mustered in the military service of the United States without the written consent of his parents or guardians: provided, that such minor has such parents or guardians entitled to his custody and control. Sec. 1118. No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of any criminal offense (a felony) shall be enlisted or mustered into the military service.' From these sections it will be seen—*First*, that effective and able-bodied men between the ages of sixteen and thirty-five may enlist in the army of the United States, except that no felon, insane or intoxicated person can be enlisted; *second*, the enlistment of a minor under sixteen years of age would be absolutely void; *third*, persons between the ages of sixteen and twenty-one may be lawfully enlisted, except that, if he has parents or guardians entitled to his control, their written consent is necessary. This case comes under the last head, and the contention by the counsel for the petitioner here is that the absence of such written consent on the part of the father renders the enlistment absolutely void, and that it will be so held at any time. I do not think so. I think the enlistment of men from sixteen to twenty-one is valid, where it was free and voluntary, as in this case, as to the enlisted person. The parents or guardians would have the right, of course, during the minority of the enlisted person, to make the question of the validity of the enlistment. This right on their part would cease when the enlisted person became twenty-one years of age. I am inclined to think that the soldier could not make the question at any time, and I am clear that he cannot make it after he has attained the age of twenty-one years. The contract of enlistment between the ages named is not void, but voidable, and that only at the election of the parents or guardians. This question was before Judge WALLACE, of the circuit court of the United States for the Southern district of New York, in the case *In re Davidson*, 21 Fed. Rep. 618. His conclusion is: 'The reasonable conclusion warranted by these sections [the sections quoted above] would seem to be that the contract of enlistment of a minor under sixteen years of age is void; but that, if he is over that age, it is valid, in the absence of fraud or duress as to him; but during his minority is invalid at the election of his parents or guardians.' His further reasoning and conclusions on the subject are, in my opinion, correct, and controlling here. Something was said in evidence by the petitioner as to statements having been made to him about a school in the army, and that he did not see any school. This was not urged in argument, but I allude to it simply to say that even upon this *ex parte* evidence it was insufficient to make a case of fraud to justify the discharge of the petitioner. My conclusion is that he must be remanded to the custody of the officer who holds him on behalf of the military authorities."

Relator appeals.

Thomas W. Birney, for appellant.

Asst. U. S. Dist. Atty. Phillips.

PARDEE, J. The petitioner, J. C. Chapman, enlisted in the United States army at Atlanta, Ga., in 1886, when he was a minor of the age of 20 years and 8 months. At the time he had a father living, entitled to his custody and control, who did not consent to the enlistment. It does not appear whether Chapman represented himself at the time of enlistment as a major, or as a minor without parents or guardian, but the inference is that he did one or the other, as he says he signed all the papers presented to him; and it is difficult to believe, in the absence of evidence to that effect, that the recruiting officer would enlist an admitted minor without inquiry as to his parents or guardian. Soon after enlistment—about two months—Chapman deserted. The desertion continued until December last, when he was arrested in Atlanta. He is now about 23 years of age, and himself sues out the writ of *habeas corpus* on the ground that his enlistment was illegal and void, because without the consent of his father, and that therefore he cannot be held in custody as a deserter. The statutes of the United States governing the question of Chapman's enlistment are found in section 1117 of the Revised Statutes, to-wit:

"No person under the age of 21 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control."

—And in the third article of war, found in section 1342, Rev. St.:

"Every officer who knowingly enlists or musters into the military service any minor over the age of 16 years, without the written consent of his parents or guardians, or any minor under the age of 16 years, or any insane or intoxicated persons, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offense, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct."

By these statutes it appears that the enlistment of a minor into the army of the United States, without the written consent of parents or guardians, if he have any entitled to his control, is not only prohibited, but, when knowingly done by an officer, is an offense punishable with a heavy penalty. In the many adjudicated cases where the effect of a minor's enlistment into the army or navy without the consent of the parents or guardians has been considered, there is unanimity in holding that where the statute requires such consent the enlistment without is illegal and invalid; but there has been some diversity of opinion as to whether the minor himself, so enlisted, could claim his release, either before or after coming of age; some going to the extent that the enlistment, although illegal, was not absolutely void, but could be validated by ratification, either by the minor continuing in the service, receiving pay and rations, after he became of age, or by the consent of the parents or

guardian, given after the enlistment. See *State v. Dimick*, 12 N. H. 194; *Com. v. Cushing*, 11 Mass. 67; *Com. v. Harrison*, Id. 63; *Com. v. Fox*, 7 Pa. St. 336; *Com. v. Downes*, 24 Pick. 227; *In re McNulty*, 2 Low. 270; *Shorner's Case*, 1 Car. Law Repos. 55; *In re Davidson*, 21 Fed. Rep. 618; 4 Op. Atty. Gen. 350; 5 Op. Atty. Gen. 313; *Com. v. Camac*, (*Menges' Case*,) 1 Serg. & R. 87; *Seavey v. Seymour*, 3 Cliff. 439. In the case in hand there is no question of ratification, for the minor deserted before majority, and the father did not consent, but actively opposed enlistment; and the question rather is whether Chapman himself can now take advantage of the illegality. The district judge, in deciding the case, followed the reasoning of the circuit court in the *Case of Davidson*, *supra*, in which Judge WALLACE, circuit judge, takes the position that in contracts of enlistment the minor over 16 years is competent to contract, and that the provision in section 1117, requiring the written consent of parents or guardians, was not for the benefit of the minor, but rather for the benefit of the parents or guardian entitled to the custody and control of the minor, and the learned judge proceeds to say:

"The provision should not be extended to protect a party competent to contract against the consequences of his deliberate agreement, or of his own misrepresentations, unless the language plainly requires such a construction. The language is satisfied by a construction which permits the parents or guardians, who are entitled to the services and custody of the minor, to intervene and assert their rights, if their consent to his enlistment has not been obtained. Several adjudications are to the effect that under section 1117, or former laws of congress of similar purport, the contract of enlistment should be held invalid on the application of the parents or guardian of the minor. *Com. v. Blake*, 8 Phila. 523; *Turner v. Wright*, 5 Phila. 296; *Henderson v. Wright*, Id. 299; *Seavey v. Seymour*, 3 Cliff. 439. None, however, are cited by counsel, or have met the attention of the court, in which it has been decided that the minor, if over 16 years of age, can assert the invalidity of his contract. The case of *Menges v. Camac*, 1 Serg. & R. 87, arising under the act of March 16, 1802, is directly in point. The statute in that case was similar in its provisions to section 1117, and the court held the minor bound by his contract; that the parent alone could assert its invalidity, and therefore refused to discharge the minor upon *habeas corpus* at his own application."

In 4 Op. Atty. Gen., *supra*, Mr. Nelson, in responding to a communication of the secretary of the navy, says:

"An infant is not bound by the contract of enlistment after he attains his full age. He may repudiate it. The contract with regard to him is voidable, and may or may not be carried into full execution, at his election. When made, he had no will in legal contemplation. It was made, moreover, with the consent of his guardian, who had a right to enter into it for his benefit; but such authority ceased with the expiration of his minority, and he was then fully competent to affirm or disaffirm the contract made on his behalf."

In 5 Op. Atty. Gen., *supra*, Mr. Crittenden, in response to inquiries from the secretary of war with regard to the secretary's duty in discharging minors enlisted without the consent of the parent or guardian, says:

"That the enlistment of the soldier was without the consent of his parent or guardian is the cause stated in the statute for the discharge of the minor. The parent or guardian must make application, and furnish the proof as to

the age of the soldier, at the time of the enlistment. If the person, who was a minor at the time of enlistment, has since attained to his full age of 21 years, then he is capable to choose and act for himself. To apply for his discharge upon evidence that his enlistment was during his minority, and upon the allegation that such enlistment was without the consent of his parent or guardian, he proving the affirmative of infancy at the time of enlistment, and that his father was then living, or that he then had a guardian, would thereby put the burden of proof that the parent or guardian had consented to such enlistment upon the government."

In *Re McNulty, supra*, Judge LOWELL held that the minor himself during minority might claim the invalidity of the contract. The *Case of Menges, supra*, relied upon by Judge WALLACE as a case in point, turned upon the question whether the parent's ratification, five or six days after, validated the enlistment. In giving his opinion, Chief Justice TILGHMAN, in speaking of the required consent, says: "Before such consent given, the minor or the parent may demand his discharge, and the law forbids the holding of him." I have examined all the cases cited, and considered the reasoning of those judges holding that the enlistment binds the minor before and after attaining majority, and am unable to agree thereto. It is a well-settled doctrine of every system of jurisprudence that whatever is done in contravention of prohibitory law is null and void. I think that, in accordance with this principle, the enlistment of a minor without the written consent of his parent or guardian, if he has one entitled to his services and control, is invalid, and of no legal effect, and, on principle and authority, that the invalidity may be claimed by the minor himself before or after attaining majority, or by any person entitled to his control or services. A judgment will be entered in this case, reversing the judgment of the district court, and adjudging the writ of *habeas corpus* absolute, and directing the petitioner's discharge from custody, and the cancellation of the bonds given for his appearance pending the appeal. Costs to follow judgment.

UNITED STATES v. GLEASON.

(District Court, D. South Carolina. January 15, 1889.)

EVIDENCE—PROOF OF HANDWRITING—WEIGHT.

The value to be given to the opinion of a witness as to the authorship of handwriting is to be determined by the opportunity and circumstances under which he has acquired his knowledge. If he is an illiterate man, or one whose business seldom brings him into contact with writing, his opinion is entitled to much less weight than if he were an educated man, accustomed to correspondence, and to seeing people write.

Indictment of Dennis F. Gleason for sending indecent and threatening postal-cards through the mail.

L. F. Youmans, U. S. Dist. Atty.

Buist & Buist, for defendant.

SIMONTON, J., (*charging jury.*) The defendant is indicted for sending through the mail an indecent and threatening postal-card. The card is produced, duly stamped, and a letter-carrier testifies that he received it at the post-office, and delivered it. The government seeks to fasten the guilt on defendant by proof of the handwriting, which it is alleged is that of the defendant. Two witnesses have been introduced for that purpose. Neither of them saw the defendant write the card in question. Both testify that they have seen him write, and from this experience swear to the handwriting. I am requested to charge you with respect to such evidence. As a general rule a witness can only testify as to facts within his personal knowledge. Questions of handwriting are among the exceptions to this rule. Whether or not a paper is in the handwriting of a person, if none of the witnesses actually saw him write it, is a matter of opinion; and the witnesses can speak as to their opinion. In such cases the jury pass upon two questions. The first is as to the credibility of the witness; the second is as to the value to be given to his opinion. This last question depends upon his opportunity and capacity of acquiring the knowledge of the handwriting. Has he seen it under such circumstances as to satisfy the jury that he knows it? In other words, it is not the expression of the opinion which is to satisfy the jury. They must conclude from the facts stated by the witness, the times, places, opportunity, and circumstances under which he acquired his knowledge, whether he really knows it or not. In this connection the jury should consider the capacity and experience of the witness. If he be an illiterate man, or one whose business seldom brings him into contact with writing and written documents, his opinion would be entitled to much less weight than if he be an educated man, himself a penman accustomed to correspondence, and to seeing people write; and this, even if he be in no sense an expert. You have seen these witnesses. You have heard in minute detail all the means of knowledge they had of the handwriting of the defendant. Your verdict will depend upon your conclusion from their testimony.

UNITED STATES v. GOWDY.

(District Court, E. D. South Carolina. January 12, 1889.)

CLAIMS AGAINST UNITED STATES—FALSE AFFIDAVIT.

It is not a ground for quashing an indictment drawn under Rev. St. U. S. § 5479, for aiding and procuring one to make a false affidavit for the purpose of procuring a pension, that the affidavit was in fact made before a proper officer, as that section applies also to the offense of using a genuine but false instrument, knowing it to be false, with intent to defraud the United States.

Indictment under Rev. St. § 5479. On motion to quash.

H. A. De Saussure and C. M. Furman, Asst. U. S. Attys.

T. M. Gilland and J. A. Kelly, for defendant.

SIMONTON, J. Defendant is indicted under section 5479, Rev. St. The charge in the indictment is that he procured and aided one Mary Conyers to make an affidavit stating certain things which are false, for the purpose of obtaining a pension and arrears of a pension as the widow of a soldier of the war of 1812. The motion proceeds upon the ground that this section 5479 does not apply to a case in which the affidavit used was in fact taken before the proper officer, even though the statements made in it are false. In the case of *U. S. v. Staats*, 8 How. 41, the statute of 3d March, 1823, was construed. This statute was subsequently amended by act of 8th June, 1872, by the insertion of the word "affidavit" among the other writings mentioned in the statute, and is incorporated in the Revised Statutes as section 5479. In that case it was held that the act punished not only the crime of forging certain instruments, or altering them when forged, but also the offense of using a genuine but false instrument, knowing it to be false, in support of a claim with intent to defraud the government. This case is decisive of the point made. The motion to quash is refused.

TONDUEUR v. CHAMBERS *et al.*

(Circuit Court, W. D. Pennsylvania. January 10, 1889.)

1. PATENTS FOR INVENTIONS—VALIDITY—FALSE STATEMENT AS TO CITIZENSHIP.

It is not a valid defense to a suit for the infringement of letters patent granted under the Revised Statutes that the patentee in his application therefor made oath that he was a citizen of the United States, when he was not; such misstatement as to his citizenship having been made innocently, through mistake, without any improper design whatever.

2. SAME—PATENTABILITY—GLASS-ANNEALING PROCESS.

Letters patent No. 258,156, dated May 16, 1882, for improvements in glass-annealing furnaces, granted to Cleon Tondueur, sustained, and the defendants adjudged to infringe the same. Following *Tondeur v. Stewart*, 28 Fed. Rep. 561.

In Equity. Bill for infringement of patent.

W. Bakewell & Sons, for complainant.

George Harding and *George J. Harding*, for respondents.

ACHESON, J. This is a suit for the alleged infringement by the defendants of letters patent No. 258,156, for improvements in glass-annealing furnaces, granted to Cleon Tondueur, the plaintiff, on May 16, 1882; a patent which this court already has had occasion to consider in the case of *Tondeur v. Stewart*, 28 Fed. Rep. 561, where there was a decree in favor of the patentee. The present defendants, however, were not parties to that suit, and as some new proofs have been adduced by them, this case has been heard as if none of the questions involved had ever been passed on, and the conclusions I am about to announce have been reached after a re-examination of the grounds of the former decision, and a careful consideration of the case in all its branches.

The patent discloses a device for transporting the sheets of glass from the flattening wheel to the discharging end of the annealing chamber, tunnel, or leer, consisting of two sets of parallel bars (designated d and d') extending lengthwise through the leer, and elevated above the bottom thereof, the bars of the respective sets being arranged side by side, and alternately between each other, one set reciprocating longitudinally and conveying the glass, and the other set supporting the glass at certain times, whereby the sheets of glass are supported in and carried through the leer, in substantially the same horizontal plane. The specification shows and describes a series of transverse shafts to support the two sets of bars, each shaft being provided with two sets of arms, E' and E'' , the arms, E' , carrying grooved wheels, upon which the reciprocating or transmitting bars, d' , rest, and whereby they have a free rectilinear motion back and forth in the leer; while the supporting bars, d , are made fast to the arms, E'' , by a hinge-joint. By means of a lever connected with one of the shafts, one set of bars is raised, and the other is lowered simultaneously to the extent altogether of about one inch, and thus the glass is shifted from one set of bars to the other. But, touching the motion of the bars, d , the specification states, and the fact is, that it "is very small," (being limited to the short distance the lever moves the arm, E''), and "has no effect on the progress of the glass through the tunnel." The described operation of the device is this: The ends of the reciprocating bars, d' , having been pushed into the flattening furnace, and a sheet of glass placed thereon, the operator at the outer end of the leer draws the bars, d' , outward, the width of the sheet. Then, by a motion of the lever, he lowers the bars, d' , and raises the bars, d , and thus the sheet is transferred from the bars, d' , to the bars, d , upon which it rests while he pushes the bars, d' , back into the furnace. He then reverses the lever, and the bars, d' , take up the sheet. A second sheet is then placed on the inner ends of the bars, d' , and the two sheets are moved down the leer, and deposited on the bars, d , and the bars, d' , are again pushed back. This operation is repeated until a series of sheets extends throughout the leer, when they are discharged from the outer end, one by one, at each reciprocal movement of the bars, d' . The patent has five claims, but infringement of the first claim only is here asserted. That claim is as follows:

"(1) The combination of the bars, d , d' , arranged side by side, and alternately between each other, the set, d , supporting the sheets of glass while the bars, d' , are pushed towards the leer or flattening wheel, a , and the set, d' , supporting the sheets of glass, and moving them onward and through the tunnel, substantially as set forth."

The answer denies that the plaintiff was the first and original inventor of what was patented to him, and also denies infringement.

To sustain the former defense the defendants rely, not only upon the patents to Biévez and Bowen, which were mainly relied on to defeat the suit in *Tondeur v. Stewart*, *supra*, but also upon letters patent dated November 25, 1873, granted to J. B. Boulicault, and several French patents, particularly the patent to A. M. Bouvy. Now, in respect to the

first two mentioned patents, I can discover no good reason for departing from the conclusion upon the question of anticipation expressed in the opinion of the court in the earlier case. Of the Boulicault patent it must be said that the drawings and specification, in so far as they have any relation to the particular matter here in controversy, are obscure. Moreover, there is some positive testimony tending to show that the construction thereby contemplated was a failure in practice; and so, also, there is evidence—especially the testimony of Henry L. Dixon, a furnace-builder and practical expert—which strongly impresses the conviction on my mind that the Bouvy device is impracticable for the proper annealing of sheets of glass. But, aside from these considerations, I think it can be confidently affirmed that not one of the several patents set up as anticipatory shows two sets of bars, one of them (the conveying set) having a reciprocating rectilinear motion, and the other set supporting the glass while the first set is pushed back into the furnace, which is an essential characteristic of the plaintiff's device. Notwithstanding, then, what prior inventors may have achieved, I am of the opinion that Tonduer's device possesses patentable novelty. And this conclusion is strongly sustained by the plaintiff's proofs,—abounding and uncontradicted,—showing the great utility of his patented invention, and its immediate and very general adoption. The leers which had been commonly in use were the car-leer, in which the sheets of glass are transported through the annealing tunnel on cars, and the hearth-leer, in which the sheets are moved along the floor of the leer, resting thereon except at the instant of transfer from place to place. But the plaintiff's improvement wrought a great change in the practice of the art to which it appertains. Glass manufacturers generally have abandoned the old methods of transporting the glass through the annealing tunnel, and have adopted the plaintiff's device, and a large number of them in various parts of the country have taken licenses from him; and, undoubtedly, the plaintiff's device secures more uniform and thorough annealing,—resulting in a great saving of glass from breakage,—and also quicker work, than any device or method previously employed for the like purpose. Now, while such facts as these may not be decisive of the question, they certainly go far to establish patentability, and to justify the determination of the court as above expressed. *Smith v. Vulcanite Co.*, 93 U. S. 486; *Loom Co. v. Higgins*, 105 U. S. 580; *Valve Co. v. Valve Co.*, 113 U. S. 158, 179, 5 Sup. Ct. Rep. 513.

Coming, then, to the question of infringement, we find that the defendants use two sets of elevated bars, and that the only difference (alleged to be material) in construction or mode of operation between their device and that described in the plaintiff's specification is, that in the defendant's leers the bars which support the sheets of glass while the reciprocating bars are pushed towards the flattening wheel are stationary, and the vertical movement for shifting the glass from one set of bars to the other is performed by the reciprocating bars alone. Is this difference sufficient to relieve the defendants from the charge of infringing the first claim of the patent? Certainly the variation is practically un-

important. As was said in *Tondeur v. Stewart, supra*, most clearly the defendants' stationary bars perform the identical supporting function which the plaintiff's bars, *d*, perform,—the only function, be it observed, assigned to those bars by the first claim. Then, again, it is evident that for the supporting of the sheets of glass by the bars, *d*, and the supporting and moving of them by the bars, *d'*, (the particular matters covered by the first claim,) it is altogether immaterial whether the vertical movement is divided between the two sets of bars, or is executed by the bars, *d'*, alone. The difference is not in principle, but in mere arrangement. In all essential particulars the plaintiff's described device and that employed by the defendants are alike. They operate in substantially the same way, and produce the same beneficial results. This, however, is not all; for not only do the defendants use and enjoy the substance of the plaintiff's invention, but their bars come within the very terms of the first claim of the patent. Therefore, to escape the charge of infringement, the defendants are under the necessity of contending that the first claim of the patent shall be construed to mean two sets of movable elevating bars. To sustain this view, much stress is laid upon certain passages of the specification which treat of the shifting movement of the bars, *d*, and *d'*, and also upon the disclaimer to be found in the patent, in the words following :

"I am aware that movable bars and fixed temporary rests for the glass have long been in public use to move sheets of glass through an annealing tunnel; therefore I do not claim these."

Now, it may well be that the patentee considered the simultaneous change in the elevation of the two sets of bars as the most advantageous mode of shifting the glass from set to set, and this feature he has taken care to cover by the second claim of the patent. But the first claim calls for no such limitation as is insisted on, and its language is free from ambiguity. Why, then, should the court import into the claim a qualification not expressed,—something wholly unnecessary to the therein described operation,—when the only practical effect would be to deprive a worthy inventor of the benefit of his patent?

The disclaimer was considered in the case of *Tondeur v. Stewart, supra*, and the judgment of the court was against giving to it the effect here contended for. To that conclusion I must adhere. I will not repeat, or much enlarge on, what was said upon this subject in the former opinion. The disclaimer is to be read with reference to the prior state of the art, and it may and ought to be construed so that it may harmonize with the plainly-expressed terms of the first claim of the patent. The claim follows directly upon the heels of the disclaimer, "but what I do claim is: (1) The combination of the bars, *d*, *d'*," etc. The specification describes two sets of bars,—one set having a temporary supporting function, and the other set supporting and moving the sheets of glass through the leer. The first claim of the patent is for the combination of these two sets of bars arranged and co-operating in the manner and for the purpose defined. The claim should be interpreted with reference to the actual invention. The reasonable presumption is that, having a just

right to cover and protect his whole invention, the patentee intended to do so. *Winans v. Denmead*, 15 How. 341. The construction of patents should be liberal, so as to secure to inventors what they have created, if it can be done consistently with the language used. *Turrill v. Railroad Co.*, 1 Wall. 491; *Klein v. Russell*, 19 Wall. 433. Guided by these just principles, I must reject the construction the defendants would put on the first claim of the patent, and hold them to be infringers thereof.

But the defendants make the further defense (which was not set up in the prior suit) that the letters patent sued on are null and void, upon the ground that in the application for his patent the plaintiff made oath that he was a citizen of the United States, which he was not. The answer does not allege, nor is there any evidence to indicate, that the plaintiff was guilty of any fraud, or that his oath was willfully false. On the contrary, it satisfactorily appears that he acted under an honest mistake, and with no improper design whatever. The plaintiff left Belgium, his native land, in the year 1881, and came to the United States with the avowed intention of making this country thenceforth his permanent place of residence and citizenship; and he ignorantly supposed that by virtue of his residence, and the residence of his family, here, he became a citizen. This mistake he did not discover until a long time after the grant of his patent. Now, the question raised, it will be perceived, is not whether the letters patent are voidable, for the cause assigned, at the suit of the government. The position taken is that the patent is a nullity. In support of the proposition, the defendants cite the case of *Child v. Adams*, 1 Fish. Pat. Cas. 189, in which a similar defense was sustained by Judge GRIER. But that case arose under and was governed by the patent act of 1836, which allowed the grant of letters patent to aliens only upon peculiar conditions, to which citizens were not subject. 5 St. at Large, 117. By that act the patent fee payable by a citizen was \$30 only, whereas an alien was required to pay at least \$300, and, if a British subject, \$500; and by the stringent language of the act the fee was to be paid before the application for a patent could be considered by the commissioner. Section 9. Then, again, an alien patentee was compelled "to put and continue on sale to the public, on reasonable terms, the invention or discovery for which the patent issued." Section 15. It was, therefore, under that act, of the highest importance that the applicant should truly disclose his citizenship; and section 6 required that before any inventor should receive a patent he should "make oath, * * * of what country he is a citizen." The decision cited was expressly put upon the ground that an alien, whether through ignorance or intention, falsely swearing that he was a citizen, in order to procure a patent, not only failed to perform a condition upon which his right to a patent depended, but committed a fraud upon the government. But the law governing the present case, *i. e.*, the patent act of 1870, as embodied in the Revised Statutes, abolished all such discriminations against aliens, and placed them upon the same footing as citizens, in respect to the grant of letters patent for inventions, and the enjoyment of the privileges thereby secured. Rev. St. §§ 4886, 4920,

4934. Therefore, under the law as it stood when the plaintiff applied for and obtained his patent, the mistake in his statement as to his citizenship operated, and could operate, neither to his advantage, nor to the detriment of the government or the public. Furthermore, it is well worthy of notice that while section 4892, Rev. St., requires the applicant for a patent to "make oath that he does verily believe himself to be the original and first inventor," etc., in respect to citizenship, the language is, "and shall state of what country he is a citizen." This change in phraseology seems to be intentional and to dispense with the necessity of an oath as to citizenship. At any rate, the citizenship of the applicant for a patent is no longer a matter of any real importance, and a mistake touching the same is harmless. I feel quite justified, then, in declining to apply to this case the rule which prevailed in *Child v. Adams*, *supra*. In the absence of express statutory provision avoiding a patent for a misstatement as to citizenship, it would be going to an extreme length—and, indeed, in the face of well-settled equitable principles—for the court to hold that a mere mistake in that regard, innocently made, and working no sort of harm, should have such effect. In *Manufacturing Co. v. Canning Co.*, 27 Fed. Rep. 78, where it was urged that a patentee was estopped to deny that his American patent was for the same invention before patented by him in a foreign country, by reason of his having made oath that such was the fact in his application for the former, it was held that, if the inventor was laboring under a mistake as to this point, his rights ought not thereby to be defeated or abridged. At an early day Judge STORY held, in *Whittemore v. Cutter*, 1 Gall. 429, that an error in the form of the oath of an applicant for a patent was immaterial; and in *Crompton v. Belknap Mills*, 3 Fish. Pat. Cas. 536, the court said that even the entire failure to make the oath would not invalidate the patent. Upon the whole, then, I am of the opinion that the misstatement in the plaintiff's oath as to his citizenship is not an available defense to this suit. Let a decree be drawn in favor of the plaintiff.

CORBIN CABINET LOCK CO. v. EAGLE LOCK CO.

DUER v. CORBIN CABINET LOCK CO.

(Circuit Court, D. Connecticut. January 22, 1889.)

PATENTS FOR INVENTIONS—NOVELTY—CABINET LOCKS.

Letters patent No. 138,148, issued April 23, 1873, to E. G. Gory, for an improvement in locks for drawers, cover, in connection with a cavity cut out by a router, rounded at the bottom, and, if desired, dovetailed throughout, a lock with a front-plate of reduced size, rounded at the bottom, a back-plate of the same shape as the front, but a little larger, and side-walls engaging with the dovetail, the key-post being cut down flush with the back-plate, and all projections of the selvage beyond the plates and walls cut off. The improvements shown by reissue No. 10,861, of July 1, 1883, to F. W. Mix, letters

No. 316,411, of April 21, 1885, to H. L. Spiegel, owned by complainant, and letters No. 262,977, of August 22, 1882, to M. L. Orum, owned by defendant, are the practical removal of the side-walls by extending the front and back plates laterally to form spaces on the sides of the case engaging with a rib left in the cavity, so that a better fit can be obtained by bending the edges of the back-plate to suit the dovetail, the extension of the front-plate beyond the back-plate to fit a countersunk recess around the cavity, which allows the restoration of the former length of the key-post, and the extension inward of the top-plate or selvage, so as to cover the increased depth of cavity required for the key-post. Complainant and defendant both sold locks having the extended front-plate fitting the countersunk recess, (not shown in the reissue,) but without side-ribs, under a rectangular selvage, (as shown in the Spiegel patent of 1885,) and the spaces between the plates, (not shown in the Orum patent.) *Held*, that the fact that this lock had commended itself to the public favor was no proof of the inventive novelty of either of their patented improvements, which were *prima facie* the product of mere mechanical skill.

In Equity.

Bills by the Corbin Cabinet Lock Company against the Eagle Lock Company, and by A. Adgate Duer against the Corbin Cabinet Lock Company, for injunctions against the infringement of certain patents.

Charles E. Mitchell, for the Corbin Cabinet Lock Company.

Benjamin F. Thurston and *Wilmarth H. Thurston*, for the Eagle Lock Company and A. Adgate Duer.

LACOMBE, J. The questions raised in these cases are so closely connected that they may best be disposed of in a single opinion. The patents under which the respective parties claim all relate to what are known in the trade as "machine" locks, a term apparently referring to the method of their insertion in the wood-work of the drawer or door to which they are attached. They are locks for furniture, such as are used on bureau or desk drawers, the doors of wardrobes and washstands, etc., being of the general class of goods known as "cabinet locks." Prior to 1873 the only style of cabinet lock known was the common lock, with which every one is familiar, such as have been used on bureaus, washstands, and the like for very many years. All parts of this old style lock were rectangular, or square-cornered. In order to insert one of them in a drawer it was necessary to form a recess to receive its several parts. Owing to the shape of these parts of the lock, and the consequent rectangular character of the recesses made to receive them, it was absolutely necessary that they should be cut by hand, for the reason that any machinery for the purpose must necessarily be of a revolving character, the result of such revolution being to leave the recess so formed rounded or semi-circular in shape. After the recesses were cut, and the lock fitted in them, it was secured in place by screws, (usually two or four in number,) also inserted by hand-labor. The formation of these recesses by hand was slow and expensive, requiring skilled workmen, and consuming much time. With the development of improved methods and machinery for the manufacture of the lock, its cost was steadily reduced, but the cost of applying it remained practically the same, with the result that a time came when the cost of applying the lock by the old method was almost as great, if not greater, than the cost of the lock itself. This was a serious matter to the furniture makers, and the problem of

reducing the cost of applying the lock was one calling for solution. It was of course known that mortises or cavities could be made by machinery very rapidly, and very cheaply, but the difficulty was to fit lock to cavity, without any hand-chiseling, and to dispense with the necessity of the screws (driven by hand-labor) to secure it when fitted.

In 1873 (April 22d) a patent for improvement in locks for drawers, etc., was issued to E. G. Gory. It is known as letters patent No. 138,148. Gory cut out, with a revolving tool known as a "router," a cavity rounded at the bottom, and (if desired) dovetailed throughout. He made his lock to fit this cavity so that it could be slid in from the top. This he accomplished by reducing the size of his front-plate, rounding it at the bottom, so as to conform to the shape of the cavity face; by extending his back-plate or cap-plate so that it was of the same shape as the front-plate, but a little larger; uniting the front and back plates by walls, which thus completely encased the mechanism, and engaged with the dovetail of the cavity. He also cut down the key-post flush with the back-plate, and cut off all projections of the selvedge beyond the plates and their connecting walls. To insert the Gory lock it was necessary only to cut the dovetailed cavity with a routing machine gauged to correspond with the size of the lock, which was then slipped into the cavity. It was there supported against movement downward or sideways by the engagement of the sides and bottoms of its two plates and their connecting walls with the surrounding woodwork; against movement inwards by the back-plate resting against the base of the cavity; against movement outwards by the engagement of the back-plate and the connecting walls with the dovetail of the cavity. Thus, also, the use of screws and hand-labor in driving them was dispensed with. In this Gory patent both parties have an interest. Neither disputes its novelty and invention. It seems to cover a distinct advance in the art, and there is nothing in the record which would warrant a finding that his invention was not patentable. It is with its modifications that these suits are concerned.

The Corbin Cabinet Lock Company, plaintiff in the first and defendant in the second action, is the owner of two patents: No. 241,828, May 24, 1881, to Henry L. Spiegel, (reissued as No. 10,361, to F. W. Mix, July 31, 1883,) for improvements in cabinet locks; and No. 316,411, April 21, 1885, to Spiegel, for new and useful cases for locks. It claims that locks made by the Eagle Lock Company infringe the first claim of the reissued patent, and all the claims of the later patent. The Eagle Lock Company and A. Adgate Duer (whose interests are the same) control patent No. 262,977, dated August 22, 1882, to Morris L. Orum, for an improvement in lock cases. The single claim of this patent it is contended that the Corbin Lock Company infringes. The improvements on Gory's invention, which are claimed to be shown in these patents, are briefly: (1) The practical removal of the connecting walls between the front and back plates. This is effected by extending these plates laterally, still preserving their shape (conformed to the rounded cavity.) By this means, in lieu of the connecting and engaging walls of Gory, there

were formed spaces or grooves on the opposite sides of the lock-case. Into these spaces there interlocks a projection, or rib, left in the cavity by the router. Projecting rear and front plates are found in the old style locks. (2) The extension of the front-plate beyond the back-plate, its projecting edges being adapted to fit a countersunk recess around the routed cavity. (3) The extension inward of the top-plate or selvedge, so as to cover the increased depth of cavity required for the extended key-post. The advantage of the first of these improvements (the side extension of the plates) is apparently that the lock fits better, at least when used with a Gory dovetail. The side edges of the back-plate may be readily bent closer to, or forced further apart from, the front-plate, being thus accommodated to the slight changes of form and size of the dovetail produced by heat or moisture; and by nipping the wood more vigorously they hold the lock more solidly than would the engaging connecting walls. The advantage of the second of these improvements is that, as the front-plate in its countersunk cavity effectually prevents the inward motion which in Gory's patent was resisted only by the encased lock resting on the base of the cavity, the key-post which he cut off may be restored to its former length, a restoration assisted by the third modification. The first of these improvements consists in the reduction of the surface which engages with the wooden dovetail, so that, instead of impinging upon it (by means of the side walls) for the entire depth of the case, its only engagement is at the edge of the back-plate. So simple a mechanical modification, in view of the fact that in the old style both back and front plates were often extended beyond the case, can hardly be considered invention. So, also, the insertion of an extended front-plate in a countersunk recess was a not uncommon contrivance in the old style. When secured in its place by screws it supported the lock firmly, giving room for an extended key-post, and it but accomplishes the same purpose when held there not by screws, but by the inward pull of the back-plate or dovetailed side-walls engaging on the wooden dovetail. Neither of these modifications, therefore, seems to evidence more than ordinary mechanical skill.

Each party, however, contends that there is invention in the improvement exhibited in its patent, and both point to the history of the art for corroboration of that contention. It seems that locks made on the model shown by Gory were not, at the time Spiegel and Orum patented their contrivances, in actual use in the trade. What efforts, if any, were made to introduce them to notice does not appear. The principle, however, on which they operated—a principle destined, as one of the witnesses puts it, “to revolutionize the art”—had been discovered and made known, and, subject to Gory's monopoly, was at the service of those who used locks in drawers and cabinets. To make the lock fit into a routed cavity without hand-chiseling, and to support it against movement, without the use of screws by the engagement of its parts with the surrounding wood-work, was, for all that appears in the case, the discovery of Gory. To that extent the field of invention was occupied as against subsequent inventors.

The improvements respectively claimed for the patents in suit are the extension of the key-post to its original length, (Gory cut it off flush with the plate,) and the substitution of intervening spaces between the plates for the inclined and engaging side-walls of the Gory encased lock. It appears that the new lock was immediately adopted by the trade. Its sales have constantly and rapidly increased, and it is steadily displacing the old style lock. To this circumstance each side appeals as decisive upon the question of patentability. The fact that any new device has commended itself to the public as practicable and desirable, and a better one than those which had preceded it, no doubt affords a safer criterion of inventive novelty than any subsequent opinion of an expert or intuition of a judge. The difficulty in the present case, however, lies in the application of that criterion. The lock which has thus won the public favor is the lock neither of the Orum nor of the Spiegel patents. The locks sold by both companies (they are substantially alike) have the extended front-plate fitting into a countersunk round-bottom recess, (not shown in the Spiegel reissue,) and adapted to hold the lock so as to give clearance for an extended key-post, but without side-ribs under a rectangular selvedge (as shown in the Spiegel patent of 1885,—a mode of fitting which forbade the entire abandonment of hand-cutting.) They have also the intervening spaces between the plates, (not shown in the Orum patent,) securing, as it is claimed, a better fit. There is evidence to show that both of these modifications have contributed to commend the new lock to the public favor. That it would have succeeded with either one alone, however, the evidence does not show. The proof of acceptance by the public, therefore, falls short of the measure required to demonstrate, in the case of either patent standing alone, the inventive novelty of what seems *prima facie* to be the product of ordinary mechanical skill. Usual decree for the defendant in each case.

UNTERMAYER *v.* FREUND *et al.*

(Circuit Court, S. D. New York. January 15, 1889.)

1. PATENTS FOR INVENTIONS—DESIGN PATENT—NOVELTY.

Letters patent No. 15,121 granted July 1, 1884, for a design for watch-cases, which consists of a central conventional star, in which any ornament may be set, placed upon a larger star of leaves, having diamond-shaped projections between their points, both stars being in bas-relief, *held* not void for want of novelty.

2. SAME.

If a design presents a different impression upon the eye from anything which precedes it, if it proves to be pleasing, attractive, and popular, if it creates a demand for the goods of its originator, even though it be simple, and does not show a wide departure from other designs, its use will be protected.

-In Equity. Bill for infringement of a patent for a design.

Rowland Cox, for complainant.

Frederic H. Betts and Samuel R. Betts, for defendants.

COXE, J. This is an equity action of infringement, founded upon letters patent No. 15,121, granted to the complainant July 1, 1884, for a design for watch-cases. The design consists of a central conventional star, in which any ornament may be set, placed upon a larger star of leaves, both stars being in bas-relief. Between the points of the star of leaves are diamond-shaped projections. The design was the result of considerable effort and industry. It shows some genius, and it soon became popular with the public, and a source of profit to those who adopted it. The claims are as follows:

"(1) A design for watch-cases, consisting of the conventional star, A, and the larger star, B, the points of which represent leaves, the star, A, occupying the central field of the star, B, all being in relief, substantially as shown and described. (2) A design for watch-cases, consisting of the conventional star, A, and the larger star, B, composed of leaves, and having between its points ornamental projections, C, the star, A, occupying the center of the star, B, all being in relief, substantially as shown and described. (3) A design for watch-cases, consisting of the star, A, containing the ornament, D, the larger star, B, representing leaves, and having between its points the ornamental projections, C, and the star, A, occupying the center of the star, B, all being in relief, substantially as shown and described."

The defenses are anticipation, lack of invention, and non-infringement of the second and third claims. The claims would have to be unreasonably restricted to give the slightest plausibility to the defense of non-infringement. The two designs look alike, and an ordinary purchaser could not detect the difference. The defendants in their circular of February 10, 1887, admit that they have made the design of the patent, and assert that they have a right to make it, and will continue to do so. Infringement is clearly established. Has novelty been negatived? The patent is *prima facie* evidence that the complainant was the first inventor. *Lehnbeuter v. Holtzhaus*, 105 U. S. 94. He who asserts to the contrary must prove it beyond a reasonable doubt. The *onus* is upon him. The record discloses the usual conflict upon this subject. The witnesses do not agree. After the testimony has been read and weighed, the mind has not a decided impression either way. It is in doubt. This is peculiarly a case where light could be thrown upon the controversy were the court permitted to see the witnesses, and observe their manner while testifying. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression. To state the proposition as fairly as the defendants can expect, the issue upon this branch of the case is involved in uncertainty. If the defendants' right to recover a sum of money in an ordinary action at law depended upon their establishing the affirmative of this issue, a verdict in their favor would, probably, not be disturbed by the court. If, however, the complainant's conviction of a crime depended upon the establishment by the prosecution of the same proposition, a verdict of guilty could hardly be sustained. The jury most certainly would declare that they were not satisfied beyond a

reasonable doubt that prior use had been established. The court had occasion to comment upon this rule in somewhat similar circumstances in the case of *Thayer v. Hart*, 20 Fed. Rep. 693, 22 Blatchf. 229. What was there said need not be repeated.

The question of invention is a perplexing one. It is balanced in well-nigh even scales, and a decision either way would have much in reason and common sense to commend it. The prior art shows badges made with a central raised star of silver placed upon a larger star of similar material, the lower star being chased into a form somewhat resembling leaves. Badges with a star of tinsel placed upon a larger star of silk were well known, as was a design for the center of a watch-dial resembling the star of leaves and the ornamental projections of the patent, but without the conventional star and the central ornament. The defendants also introduced a large number of tracings from drawings found in volumes belonging to the Astor library. These show designs for pavements, ceilings, spandrels, panels, railings, pedestals, embroidery, carpets, and marquetry. All these, being drawings, are of course flat, though some show cross-sections indicating that the originals were in relief. None were designed for watch-cases; and none, if put on a watch-case, would be mistaken for the complainant's design. None, if made now for the first time, would infringe; none can be said to anticipate. It is probably true that an expert with the patent before him can select from these drawings every separate feature of the design, often finding two or more of them in similar juxtaposition. The drawings would not, however, suggest the design to one who had not seen it before. A design requires invention, but a different set of faculties are brought into action from those required to produce a new process, or a new machine. In each case there must be novelty, but the design need not be useful in the popular sense. It must be beautiful. It must appeal to the eye. The distinction is a metaphysical one, and difficult to put into words. A flying wheel, a wheel revolving rapidly between two outstretched wings, presents a pleasing object to the eye; a graceful pattern for the handle of a spoon or fork may attract many purchasers, and yet it cannot be said that the embodiment of these designs requires an exercise of the "intuitive faculty of the mind" in the sense that this faculty is exercised in inventions like the telephone, or the safety-lamp. The policy which protects a design is akin to that which protects the works of an artist, a sculptor or a photographer by copyright. It requires but little invention, in the sense above referred to, to paint a pleasing picture, and yet the picture is protected, because it exhibits the personal characteristics of the artist, and because it is his. So with a design. If it presents a different impression upon the eye from anything which precedes it, if it proves to be pleasing, attractive, and popular, if it creates a demand for the goods of its originator, even though it be simple, and does not show a wide departure from other designs, its use will be protected. In the active competition of trade a dealer is fairly entitled to the advantage, slight though it be, which attends such enterprise, and a rival in business should not be permitted thus openly and defiantly to invade the ter-

ritory of another. It is so easy for every dealer, with the wide universe before him, to select a design of his own; the appropriation by him of the design of his neighbor is usually so unnecessary and unwarrantable that the law is seldom relaxed for his advantage. It is impossible to read the literature upon this subject without being convinced that the courts, though applying the same rules, have looked with greater leniency upon design patents than patents for other inventions. From the nature of the case it must be so. A design patent necessarily must relate to subject-matter comparatively trivial. The object of the law is to encourage those who have industry and genius sufficient to originate objects which give pleasure through the sense of sight. The case of *Miller v. Smith*, 5 Fed. Rep. 359, is exactly in point. It is seldom that two cases are so nearly parallel upon the facts. There the design for lockets, sleeve-buttons, etc., consisted of a rustic letter in relief, ornamented with leaves placed on the line of the letter. The patent was upheld, although the prior art disclosed flat drawings of similar letters, and also rustic letters having branches and sprays of leaves springing from and around them. If there is any difference in the two designs, the preponderance of originality would seem to be in favor of the one in hand. There is no room to doubt that the decision would have been the same had Miller's design been of a rustic letter placed upon a larger letter of leaves, instead of leaves placed upon a rustic letter. To adopt the language of Mr. Justice CLIFFORD, when speaking of proofs very similar to those offered by these defendants:

"Nothing of the exact kind is shown in these exhibits, nor is there anything which can be regarded as proof that the thing patented was known to others before the invention patented was made by the patentees. Many attempts are made to prove that fact, but the proofs all fall short of meeting the requirement."

Upon the authority of this decision the doubt which is entertained upon this question must be resolved in favor of the patent. See, also, *Gorham Co. v. White*, 14 Wall. 511; *Simpson v. Davis*, 12 Fed. Rep. 144; *Foster v. Crossin*, 23 Fed. Rep. 400; *Wood v. Dolbey*, 19 Blatchf. 214, 7 Fed. Rep. 475; *Street v. White*, 44 O. G. 1291, 35 Fed. Rep. 426. There should be the usual decree for the complainant.

SCHMID v. SCOVILL MANUF'G Co.

(Circuit Court, S. D. New York. January 26, 1889.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM—CAMERAS.

Letters patent No. 270,183, granted January 2, 1888, to William Schmid, for a combination with a photographic camera of a finder camera, "preferably located in the upper outer corner" of the camera case, are void for want of novelty. There was no invention in placing the finder in a new position, no new result being achieved, especially when the location is left entirely optional by the specification.

2. **SAME—AGGREGATION.**

To place a finder camera on a photographic camera, each working independently of the other, is not combination, but aggregation merely.

3. **SAME—NON-INFRINGEMENT.**

The claim, if sustained at all, must be strictly confined to the apparatus described, and this defendant does not use.

4. **SAME.**

In letters patent No. 369,818, granted September 13, 1887, to William Schmid, for an improvement in photographic cameras, the claims are for a rotary shutter having an opening coinciding with the main tube of the camera, and having a pulley on its hub, connected by a cord with a pivot-arm, at one end of which is a sliding spring, capable of adjustment on a fixed rail. The separate elements, and rotary shutter having such an opening, and having on its hub a pulley on which was wound a string, connected with a spring-arm, the tension of which was varied by varying the length of the string, were old. *Held*, that the patent must be limited to the particular apparatus described, and is not infringed by the device covered by letters patent No. 877,554, granted February 7, 1888, to M. Flammang, which has a spring rigidly attached at one end, and connected at the other end directly, and not by means of the pivot-arm, with a cord which winds on the pulley.

5. **SAME—Costs.**

A complainant who sues on two patents and is defeated on one is not entitled to costs.

In Equity.

Bill by William Schmid against the Scovill Manufacturing Company for the infringement of a patent.

Goepel & Raeger, for complainant.

Stearns & Curtis and *Edwin H. Brown*, for defendant.

COXE, J. The complainant charges the defendant with infringement of letters patent No. 270,133, and No. 369,818, granted to complainant, respectively, on the 2d of January, 1883, and on the 13th of September, 1887, for improvements in photographic cameras. In the first of these patents, No. 270,133, the object of the inventor was to enable the photographer, without the use of a tripod or covering cloth, to center the image of the object to be photographed upon the photographic plate by means of a *camera obscura*, so that he is able, if he so desires, to take a photograph while holding the camera under his arm. This finder camera is preferably located in the upper outer corner of the camera case, and is so adjusted that when the object to be photographed is centered there, the image from the photographing lenses will be properly centered also on the photographic plate. The third claim only is involved. It is as follows:

"(3) The combination, with the described camera, of the supplementary tube and lens, J, together with the deflector, K, and the plate, L, arranged relatively to the photographing lenses of the camera, as described, so that when the image of an object to be photographed is seen centered on the plate, L, an image of the same object will be thrown by the said photographic lenses properly centered upon the photographic plate placed in the apartment, A'; all as specified."

The defenses are want of novelty and non-infringement. The complainant concedes that photographic cameras, *camera obscuras*, and combined and interchangeable photographic cameras and finder cameras were

well known at the date of the invention. It was old, also, to place a finder camera on top of or below a photographic camera, and to affix a small finder camera to the top of a larger photographic camera. It is conceded, further, that to arrange two well-known cameras in this manner is aggregation merely. The complainant also admits that there is no invention in placing a finder on the case inclosing the photographic camera, but he insists that it required an exercise of the inventive faculty to place the finder in the case. Clearly, then, the only possible argument in support of patentability is found in the new location for the finder camera. To place the finder in this new position, without accomplishing a new result, does not constitute invention, especially in view of the fact that by the terms of the specification the location of the finder is left entirely optional. "It is preferably located in the upper outer corner of the part, B," but may be placed elsewhere, if desired. Wherever placed, its operation is the same. No new result is obtained by locating it inside the case. It operates inside, precisely as it did outside. The functions of both cameras are unchanged. Each does its work independently of the other. The complainant's arrangement may be more convenient, but that is all. A man does not become an inventor because he takes a spy-glass from the roof and sets it in his attic window. Furthermore, the claim is for an aggregation. There is no more combination between the two cameras than there is between the field-glass with which the artillerist reconnoiters the enemy's works, and the gun which he subsequently trains upon them; no more than there is between the finder telescope with which the astronomer explores the heavens, and the great refractor which he turns upon the desired object. It is thought, therefore, that the claim is void for lack of patentable novelty, but, if sustained at all, it is clear, in view of the prior art, that it must be strictly confined to the apparatus described, and this the defendant does not use.

The invention secured by the other patent, No. 369,818, "consists of a photographic camera in which a rotary shutter having an opening is passed quickly over the main tube when the retaining mechanism is released, which is accomplished at different speeds by a pivot-arm connected to the hub of the shutter, a sliding spring capable of adjustment on a fixed rail, and suitably operating mechanism." All the claims are involved. The defense is non-infringement. The first claim is for a combination, of which the following are the principal elements: *First*, a rotary shutter having an opening coinciding with the main tube of the camera; *second*, a pulley on the hub of the shutter; *third*, a pivot-arm, connected by a cord with the pulley; *fourth*, a spring applied at one end of the pivot-arm; *fifth*, mechanism for increasing or decreasing the tension of the spring. The other claims are still further limited by the introduction of other and minor features. Not only are the separate elements of this combination old, but it was old, in a photographic camera, to combine a rotary shutter with an opening coinciding with the main tube, a pulley on the hub of the shutter, and a spring-arm, connected by a string, which was wound upon the pulley. By shortening

or lengthening this string the tension of the spring was increased or diminished, and a more or less rapid exposure was thus obtained. The complainant must be limited to the particular apparatus described and claimed. Others had revolved rotary shutters in photographic cameras by similar mechanism, and he is in no position to invoke protection from the doctrine of equivalents. His was but one in a series of improvements. *Bragg v. Fitch*, 121 U. S. 478, 7 Sup. Ct. Rep. 978; *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. Rep. 1343. Thus construed, the claims are not infringed by "Complainant's Exhibit, Defendant's Shutter." This exhibit shows a spring rigidly attached at one end, the free end connecting directly with a cord, which winds on the hub-pulley. The pivot-arm, which is an important element of all the claims, is entirely omitted. So is the sliding spring, and the fixed rail. For the defendant's combination a patent—No. 377,554—was granted February 7, 1888, to M. Flammang. As to the shutter previously made by the defendant, and found in the "Complainant's Exhibit, Defendant's Camera," infringement is conceded. There should therefore be a decree for the complainant upon letters patent No. 369,818, for an injunction and an accounting, restricted, however, to the last-mentioned exhibit. As the complainant has been defeated upon letters patent No. 270,133, he is not entitled to costs.

FERNOLINE CHEMICAL CO. v. CAROLINA OIL & CREOSOTE CO.

(*Circuit Court, E. D. North Carolina. January 15, 1889.*)

PATENTS FOR INVENTIONS—INFRINGEMENT—APPARATUS FOR DISTILLING TURPENTINE.

In reissued letters patent No. 10,689, to J. D. Stanly, for an apparatus for distilling and purifying turpentine, the claims are for a fire-box; an arch over it, and under the retort; a retort chamber above the arch; and spaces above and below the retort, connected at one end. The products of combustion pass from the fire-box underneath the rear end of the arch; thence horizontally along the under side of the retort, to the front end, whence they ascend vertically at the side of the retort to a space above it; thence backward along the top of the retort to the chimney. In the apparatus constructed by defendant under letters patent No. 333,750, June 5, 1886, a longer retort is heated from opposite ends by two furnaces, each heating one-half. In the space between the arch and retort, in each furnace, vertical partitions pass more than half way around the retort, terminating at alternate sides. The products of combustion escape at the side and rear end of the arch and the middle of the retort, the passages deflecting them upon the walls of the furnace, instead of upon the retort. They then ascend, and at the top of the chamber meet one of the partitions, and are made to descend to the heated arch, where another partition causes them again to ascend, the process being repeated until they escape at a chimney at the forward end. *Held*, that the Stanly patent protects at most the manner of delaying the products of combustion for equalizing the temperature, and is not infringed by defendant's apparatus.

In Equity. Bill to restrain the infringement of a patent, and for an account.

Stickney & Shepard, W. T. Dortch, Strong, Grey & Stamps, and R. B. McMaster, for complainant.

S. F. Phillips, M. S. Hopkins, and Battle & Mordecai, for defendant.

SEYMOUR, J. This is a bill in equity, filed by the Fernoline Chemical Company, to restrain the infringement of a patent, and for an account. The letters patent under which plaintiff claims are reissued letters No. 10,689, granted to one James D. Stanly. The original patent bears date October 31, 1882, and is numbered 266,909. Reissue patent 10,689 is for an apparatus for distilling turpentine, and for the purification of the crude products of the distillation thereof. It relates to a process by which pine wood is placed in an oven or retort, subjected to heat, and the vapor thus caused to issue from the wood conveyed into receptacles, in which it is condensed and distilled. The apparatus consists of a heating structure, a retort for containing the wood, and the construction for condensation. The controversy is with respect to the heating structure, and the means adopted to convey the heat to and distribute it about the surface of the retort. The defendant is engaged in the business of manufacturing oil from pine wood by distillation. Before the date of original patent, 266,909, Stanly had taken out two other patents for distilling turpentine and producing oil and other products from wood, numbered, respectively, 130,598, and 131,312, dated August 20 and September 10, 1872. On the 21st of February, 1882, and therefore earlier than the issuing of plaintiff's patent, he had sold to defendant's assignors, Hanson and Smith, the exclusive right to use said inventions (and all improvements that might be made thereon) in the state of North Carolina. The invention so purchased not proving, as defendant alleges, practically satisfactory, by reason of the furnaces failing to heat the retort evenly, by too great a consumption of fuel, and by burning the bottom of the retort, Hanson and Smith devised sundry improvements, which were patented by letters numbered 333,750, granted June 5, 1886. The apparatus used by defendant, and alleged by plaintiff to be an infringement on its patent, is constructed, as defendant claims, on the plan of the last-mentioned patent, which is itself an improvement on the patents which it holds under assignment from Stanly. The claims made by Stanly in the specification forming part of the reissued patent 10,689 are a fire-box; an arch located over the fire-box and under the retort; a retort chamber above the arch, in which is located the retort; and spaces above and below the retort, separated for the greater length of the chamber, but connected at one end. The object of the arch over the fire-box, and of the separation of the spaces above and below the retort containing the pine wood, is to equalize, as far as may be, the heat applied to all parts of the retort. The products of combustion are kept from the retort by the arch, under which they pass to its rear beneath the arch, escaping from the latter at the rear end. Thence they pass horizontally along the under side of the retort, between the retort and the arch, to the front end, where they ascend, through vertical passages at the sides of the retort, into a space above the same. They then pass rearward, along the

top of the retort, to the chimney, which is at the back end of the apparatus; that is to say, the heat passes backwards under the arch before impinging upon the retort, thence forward over the arch and under the retort, thence backward over the retort to the chimney. The original Stanly patent, No. 180,598,—one of the two the right to use which was purchased by defendant's assignor,—was, according to the specification, an improvement in the process and apparatus whereby spirits of turpentine are distilled from pine wood. It provides, as does plaintiff's patent, a process whereby pine wood is placed in a retort, subjected to heat, and its vapor conveyed into receptacles, and condensed. The fire is placed directly under the retorts. The apparatus now used by defendant provides for an equalization of the heat applied to the retort by means of forcing it to pass under an arch, and through flues surrounding the retort.

Before considering what the court deems the substantial difference between the mode in which the heat is applied to the retort in the plaintiff's and the defendant's inventions, I will state that the testimony shows that plaintiff's patent rests for its validity upon a very narrow margin of invention. Arranging spaces around vessels of various forms for the purpose of retarding and regulating the process of heating such vessels, and the use of arches above fires to protect retorts from the action of flames, were both old in art at the time of the invention covered by plaintiff's patent. What it is entitled to protection in, if anything, is the manner in which the products of combustion are delayed in being carried around the retort; that is, its mode of equalizing the heat, and its combination of contrivances for effecting its purpose.

In defendant's apparatus the fire-box is, as in plaintiff's, covered by an arch. The retort is longer than that used by plaintiff, and is heated from opposite ends, by two furnaces, each heating the retort from its end to the middle. In each furnace there is a space entirely around the retort between the outer surface and the surrounding masonry. In this space there are vertical partitions passing alternately over and under the retort. Each partition passes a little more than half way around the retort, and the ends terminate at the side of the retort. These vertical partitions divide the space around the retort into an indirect flue or passage extending upwards and downwards, repeatedly, from the top to the bottom of the retort. At the rear end of each furnace—that is, under the middle of the retort—the arches are provided with openings extending outward into the chamber which contains the retort. The arch extends continuously to the rear wall. The openings through which the products of combustion escape into the chambers surrounding the retort are situated at the side and inner end of the arches, and deflect them so that they do not directly impinge upon the retort, but are directed more immediately to the side walls of the furnace. The result of the mechanical arrangement described is that the products of combustion, after passing along under the arch and through the flues into the chambers surrounding the retort, and impinging upon the side walls of the apparatus, immediately ascend to the upper part of the chamber. On reaching it,

being impelled forward by the draft, they meet a partition extending down from the roof of the chamber, and are thrown down to the upper surface of the protecting arch, where they come in contact with a surface heated by the direct action of the flames. Again impelled forwards, they strike another partition, are thrown upwards, and then, upon reaching the top of the chamber, are again diverted downwards, and again upwards, until they escape through chimneys situated at the forward ends of the apparatus. I do not place any stress upon the fact that two furnaces are used in defendant's and only one in plaintiff's apparatus; but for other reasons I cannot consider the former as substantially the same structure as the latter. The use of vertical, instead of horizontal, partitions has the effect of changing the method of heating the retort. The products of combustion in the case of the vertical partitions immediately surround the upper as well as the lower part of the retort, while under the Stanly patent they pass under the entire length of the retort before reaching its upper surface. Again, the heat in defendant's apparatus, after surrounding both the lower and upper part of the retort, is twice thrown down against the lower hot arch, where its temperature may be renewed. Again, the flames in defendant's furnace are diverted from the retort when they first emerge from under the arch, instead of directly impinging upon it, a fact which tends to increase its durability. These differences are, it would seem, sufficient to relieve defendant from the charge of infringing upon the plaintiff's method of producing the result aimed at, and are substantial improvements. The result itself I do not consider as covered by either patent.

I have laid no stress on the alleged tests, to which so much testimony is directed. Defendant's trial was *ex parte*. In that of plaintiff the facts that no damper was placed in the smoke-stack of defendant's apparatus, and that the wood used in it was 20 per cent. lighter than that used in plaintiff's retort, deprive the tests of all title to confidence. The bill is dismissed.

MORSE v. KNAPP *et al.*

(Circuit Court, D. Connecticut. January 15, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—DRESS-FORMS.

In the device described in letters patent No. 233,240, to John Hall, dated October 12, 1880, for an adjustable dress-form, the upper of two series of oppositely inclined braces are hung by their inner ends to an adjustable collar on the standard, and, extending obliquely downward, are hinged to the respective ribs. The braces of the lower series are hinged to a lower adjustable collar, and, extending obliquely upward, are hinged to the ribs at the point of hinging of the upper series. The expansion of the form is effected by elevating the lower collar, and is governed by the opposing action of the upper series. Claim 2 is for the double braces, collars, and rests, in combination with the standard and ribs, substantially for the purpose set forth. *Held* infringed by a form having a series of braces extending obliquely downward from a screw-collar on the standard to the ribs to which they are hinged, to

which braces, midway of their length, are hinged another series of braces extending thence obliquely upward at a different angle to a higher and stationary collar.¹

In Equity. On motion for an attachment.

The suit is by Charles A. Morss against William H. and Charles L. Knapp, to restrain the infringement of a patent.

Charles F. Perkins and Payson E. Tucker, for complainant.

John K. Beach and John Dane, Jr., for defendants.

SHIPMAN, J. This is a motion for attachment of the defendants for contempt of this court, by reason of the alleged violation of its final decree granted at the April term, 1888, whereby they were enjoined against the infringement of the second claim of letters patent No. 233,240, to John Hall, dated October 12, 1880, for an adjustable dress-form. In the suit of the present plaintiff against Ufford *et al.*, upon this patent, before the circuit court for the district of Massachusetts, Judge COLT sustained the validity of said claim, and granted an injunction against its infringement. 34 Fed. Rep. 37. The defendants in this case were the real defendants in the Massachusetts case. The Uffords were their agents and were nominal parties. When this case for the same infringement was reached in this court,² (the counsel being the same as in the Massachusetts case,) no argument was made, as it was known that I regarded the questions as already adjudicated between the parties by the final decree in the First circuit. The question of infringement in both cases turned upon the equivalence of the defendants' devices with the sliding blocks and the rests of the Hall patent. Thereupon the defendants modified their form with respect to the braces, which were not in dispute in the original case, and placed the new form upon the market. The plaintiff then brought a bill in equity in the First circuit against the Domestic Sewing-Machine Company, which had become the defendants' selling agents for this new alleged infringement of the same claim of the patent, and upon motion for a preliminary injunction, and after hearing, Judge COLT, on August 4, 1888, granted the motion.³ The sewing-machine company was notified of the injunction order on August 25th. In that case, also, the Knapps were the real defendants, and had knowledge of

¹ Same patent involved in *Morss v. Manchester*, 32 Fed. Rep. 232.

² Not reported. See 35 Fed. Rep. 213.

³ *MORSS v. DOMESTIC SEWING-MACHINE CO.*
(Circuit Court, D. Massachusetts. August 4, 1888.)

In Equity. On motion for a preliminary injunction.

Suit by Charles A. Morss against the Domestic Sewing-Machine Company, to restrain the infringement of letters patent No. 233,240, issued to John Hall, October 12, 1880, for improvements in dress-forms.

C. F. Perkins and P. E. Tucker, for complainant.

John Dane, for defendant.

COLT, J. This is a motion for a preliminary injunction. In *Morss v. Ufford*, 34 Fed. Rep. 37, this court, upon final hearing, sustained the validity of the second claim of the Hall patent of October 12, 1880, for improvements in dress-forms, and held that defendants infringed. It does not appear to be denied that the real party in interest as defendant in that suit was the present defendant, who is the sole or principal agent for

said injunction. They continued to manufacture in this district, and to sell the new dress-form; and for the alleged violation of the decree of this court this motion for attachment is made.

As the order in the First circuit for a preliminary injunction, not being a final decree, does not work a technical estoppel against the defendants, it becomes necessary to re-examine and to decide the same question which was before Judge COLT. It may be said, however, that when the circuit court for the district of Massachusetts had enjoined against the use of the modified form, in a suit wherein the manufacturers were the real and active defendants, and had an intimate knowledge of the proceedings, the subsequent manufacture by them, in Connecticut, of the same form, if it was an infringement, was not an ignorant or a thoughtless or a hasty one. The invention is an improved dress-form, "by means of which every part of the device is rendered adjustable, so that it may be applied to a dress of any size or style, and fill it out perfectly." The principle of the invention is the expansion or adjustment of a skeleton frame radially, in all directions, from a common center. A central pole, or standard, supports the entire form. In the part which supports the skirt, upright, thin, elastic ribs are held towards the standard by elastic bands secured to each rib. There are two series of oppositely inclined braces, one above the other. Those of the upper series are hung by their inner ends to a collar on the standard, and, extending obliquely downward, are hinged to the respective ribs. The braces of the lower series are hinged by their inner ends to a lower collar on the standard, and, extending obliquely upward, are hinged to the ribs at the point where the members of the upper series are hinged. The two collars, called "sliding blocks," are adjustable. When the form requires expansion, the lower collar is elevated, which expands the lower series, but the expansion is governed by the opposing action of the upper series, which compels the movement of the ribs to be substantially parallel with the central standard. The second claim is as follows:

"In combination with the standard, *a*, and ribs, *c*, the double braces, *e*², sliding blocks, *f*¹, *f*², and rests, *h*¹, *h*², substantially as and for the purpose set forth."

In the modified form of the defendants, there is a series of braces which are hung by their inner ends to a screw-collar on the central standard, and, extending from the collar obliquely outward, are hinged to the ribs. Above the screw-collar is a second stationary collar, to which wire links or braces are hung, which, extending obliquely downward, but at a different angle from the members of the other series, are hinged to the braces of the other series midway of their length. The double braces of the Hall patent are, in fact, oppositely inclined to each other; and, by reason of this opposing action, the expansion is not like that of a Japanese um-

the Union Form Company of New Haven, Conn., who manufactures the infringing dress-forms. I see no reason, upon the papers before me, to change the conclusions reached in the first case; and under the circumstances I think the plaintiff is clearly entitled to a preliminary injunction. If the opinion in *Morse v. Ufford* is wrong, the defendant has the right to have it reviewed by the supreme court on appeal. Injunction granted.

brella, but the ribs continue substantially parallel with the standard, and the expansion radiates in all directions. The sole question in regard to the modified form is whether its double braces have the opposite inclination to each other of the Hall braces. There is nothing in the claim or in the specification of the Hall patent which demands that the two sets of braces should continuously hang in absolutely different directions. If there was, the defendants' new form would not infringe, because its two sets of braces hang downwardly. It is necessary that the braces should oppose and control each other by opposing action, so as to compel radial expansion or contraction in all directions from the central standard. The two sets of the defendants' braces hang downward in the same general direction, but at different angles, and the difference in the angles is so great that the upper set always operates against and counteracts the movement of the lower set. The outer ends of each set cannot move "towards or away from the standard without changing the distance between the inner ends," and as this distance changes, radial expansion in all directions changes. The different sets of braces in the two forms perform the same function by the same mechanical means.

I find that the defendants have been guilty of contempt by continuing a manufacture and sale which they had adequate reason to know was in violation of the decree of this court, and should pay a fine of \$50 and the costs of this application and of the affidavits within 30 days from the date of the order; and, if not paid on or before the expiration of said time, the defendants stand committed until the same be paid; and that, when paid, the sum be paid over to the plaintiff in reimbursement.

REIN *et al.* v. CLAYTON *et al.*

(Circuit Court, E. D. Michigan. January 12, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION—BEFORE ISSUE OF PATENT.

A court of equity has no jurisdiction to enjoin the infringement of an invention before a patent has been issued, notwithstanding an application for the same has been made, and is still pending in the patent-office.

(Syllabus by the Court.)

In Equity. On motion for an injunction.

This was a bill to enjoin the use of an invention belonging to plaintiffs, for which they had not yet obtained a patent. The bill averred the plaintiffs to be the joint inventors and owners of an invention of an improvement in plumbers' and jewelers' furnaces, for which they had made application for a patent on September 11, 1888. A copy of the application, with the specifications, drawings, and claims, was annexed to the bill. The bill, which was filed October 11, 1888, further averred that the plaintiffs had been diligently prosecuting their application, which was still pending; that they were the original and first in-

ventors of said improvement; and that they were informed by their solicitors that the same was new and patentable. Following this were the usual averments of infringement.

Alexander Brown, for plaintiffs.

George W. Radford, for defendants.

BROWN, J. We are confronted upon the threshold of this case with the important question whether an inventor can maintain a bill for an injunction before the issue of a patent. The question has been directly decided in but a single case, viz., *Butler v. Ball*, 28 Fed. Rep. 754; and it is upon this case alone that plaintiffs rely for the maintenance of this suit. The learned judge, who delivered the opinion in this case, does not discuss the question upon principle, but cites two authorities as settling it in favor of the jurisdiction. The first case (*Evans v. Weiss*, 2 Wash. C. C. 342) was an action at law against a person who had made use of plaintiff's invention for some years prior to the passage of a special act granting him a patent for such invention, and the question was whether he was liable as an infringer, for using the improvement after he had received notice of the granting of plaintiff's patent; and the court held that he was, notwithstanding a proviso in the special act that "no person who shall have used the said improvements, or erected the same for use, before the issuing of said patent, shall be liable therefor." In delivering the opinion Mr. Justice WASHINGTON observed "that the right to the patent belongs to him who is the first inventor, even before the patent is granted; and therefore any person who, knowing that another is the first inventor, yet doubting whether that other will ever apply for a patent, proceeds to construct a machine, of which it may afterwards appear he is not the first inventor, acts at his peril, and with a full knowledge of the law that, by relation back to the first invention, a subsequent patent may cut him out of the use of the machine thus erected." It is entirely clear that in saying that the right to the patent belongs to the first inventor, even before the patent is granted, he refers only to the plaintiff's property in his invention, and his right to a patent therefor, and not to his right to enjoin an infringer before the patent is issued. The real question was whether the defendant, who had purchased the patented article before the patent was issued, and was then using it, had the right to continue to use it after the patent was granted, and it was held that he had not. The principle of this case was subsequently affirmed by the supreme court in *Evans v. Jordan*, 9 Cranch, 199. In the other case, also, (*Jones v. Sewall*, 6 Fish. Pat. Cas. 343.) suit was brought upon letters patent, and in opening his opinion Mr. Justice CLIFFORD made the incidental remark that inventions lawfully secured by letters patent are the property of the inventors, and as much entitled to legal protection as any other species of property. "They are indeed property, even before they are patented, and continue to be such, even without that protection, until the inventor abandons the same to the public, unless he suffers the patented product to be in public use or on sale, with his consent and allowance, for more than two

years before he files his application." He is evidently speaking here of the right of an inventor to a patent in case he makes his application within two years after his device has been made public; and this right is a species of property which remains unimpaired during the continuance of the two years. But there is no intimation here that the inventor may apply for an injunction before his right is lawfully secured by letters patent; indeed, the intimation is the other way. He is evidently speaking of the same right of property to which Mr. Justice HUNT alludes in *Manufacturing Co. v. Vulcanite Co.*, 13 Blatchf. 375, 383: "So far as the plaintiff's own use or manufacture is concerned, it needs no act of congress to enable it to make, use, and vend the article, and it obtains no such right from congress. The benefit of the patent law is that the plaintiff may prevent others from making, using, or vending its invention. To itself, to its own right to make, use, or vend, no right or authority is added by those statutes." We think that neither of these cases is authority for the proposition laid down in the case of *Butler v. Ball*.

Let us now examine the question upon principle. At common law there was no special property in an invention, because the policy of the law was opposed to this as to all other monopolies. Walk. Pat. § 159. Indeed, the inventive genius of the English-speaking people did not begin to manifest itself to any considerable extent before the middle of the last century, and it is only within the past 60 years that the business of the patent-office has been considered of any great importance. Patents for inventions were at first treated as a royal prerogative, and granted as a matter of favor, and never as a legal right. They were in fact a branch of that extensive system of monopolies which became so odious during the reign of Elizabeth and her successors, the Stuarts. In the reign of James I. a statute known as the "Statute of Monopolies" was passed, declaring all monopolies contrary to law, and void, except as to patents, not exceeding the grant of 14 years, to authors of new inventions, and some others not material to be noticed here. This was the earliest recognition of the right of an inventor to a monopoly of the manufacture, sale, and use of his invention. It still remained, however, a royal prerogative, which was granted or refused at the pleasure of the crown. This statute was followed by others, securing to the inventor a monopoly, as a matter of right, and providing the proper machinery for procuring and enforcing it. In this country patents have been recognized as existing only by virtue of positive law. The constitution of the United States conferred upon congress the power "to promote the progress of science and useful art by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." The adoption of the constitution was followed the next year by the first federal statute upon the subject, which became the foundation of the patent law of this country. That the right of an inventor to a monopoly is purely a feature of the statute was recognized by the supreme court in *Brown v. Duchesne*, 19 How. 183, 195, in which Mr. Chief Justice TANEY observed:

"But the right of property which the patentee has in his invention, and his right to its exclusive use, is derived altogether from these statutory provisions; and this court have always held that an inventor has no right of property in his invention, upon which he can maintain a suit, unless he obtains a patent for it, according to the acts of congress; and that his rights are to be regulated and measured by these laws, and cannot go beyond them."

Still stronger language is used by him in *Gayler v. Wilder*, 10 How. 477, 493, in which he says:

"The inventor of a new and useful improvement certainly has no exclusive right to it, until he obtains a patent. This right is created by the patent, and no suit can be maintained by the inventor against any one for using it before the patent is issued. But the discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner the law requires. * * * The monopoly did not exist at common law, and the rights, therefore, which may be exercised under it, cannot be regulated by the rules of the common law. It is created by the act of congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes."

And in the recent unreported case of *Marsh v. Nichols*, [9 Sup. Ct. Rep. 168, 15 Fed. Rep. 914,] appealed from this court, in which the point decided was that a patent not signed by the secretary of the interior is absolutely void, it is said:

"The invention is the product of the inventor's brain, and, if made known, would be made subject to the use of any one, if that use were not secured to him. Such security is afforded by the act of congress, when his priority of invention is established by the officers of the patent-office, and the patent is issued. The patent is the evidence of his exclusive right to his use of the invention. It therefore may be said to create a property interest in that invention. Until the patent is issued, there is no property right in it; that is, no such right as the inventor can enforce. Until then there is no power over its use, which is one of the elements of a right of property in anything capable of ownership."

A similar observation was made by Judge SHEPLEY in *Machine Co. v. Tool Co.*, 4 Fish. Pat. Cas. 284, 294. "An inventor," says he, "has no right to his invention at common law. He has no right of property in it originally. The right which he derives is the creature of statute and of grant." See, also, *Sargent v. Seagrave*, 2 Curt. 553, 555.

The power of a court to deal with patents is now regulated by the fifty-fifth section of the patent act of 1870, incorporated into Rev. St. § 4921, which declares that "the several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions, according to the course and principles of the courts of equity, to prevent violation of any rights secured by patent, on such terms as the court may deem reasonable." It is impossible to deduce from this language any recognition of a power to grant such injunction before the right has been "secured by patent." Indeed, if it does not absolutely inhibit that power, it points very strongly in that direction. While no court has decided that it would not grant an injunction after application for but prior to the issue of a patent, it has been frequently held that after a patent has been surrendered no action will lie upon it, and all actions founded upon it

abate, notwithstanding an application for a reissue for the same be pending. *Moffitt v. Garr*, 1 Black, 273; *Peck v. Collins*, 108 U. S. 664. This particular defect has since been remedied by the act of 1870, declaring that the surrender shall take effect upon the issue of the amended patent, but the principle of these decisions is not affected. Now, if a bill will not lie upon a patent surrendered, though an application for a reissue be pending, it is impossible to see upon what ground it can be sustained before any patent whatever has been issued.

There are also certain practical difficulties in the way of assuming jurisdiction of a bill like the one under consideration. Courts of justice have no original cognizance of the subject of inventions. Congress has provided a commissioner of patents, has furnished him with a library of such scientific works and periodicals, both foreign and American, as may aid him in the discharge of his duties, with copies of models of all patents heretofore granted, together with a large corps of intelligent and experienced assistants, whose duty it is to examine every application; to compare it with patents previously issued, (that two may not be issued for the same invention;) to correct the specifications and claims; to give notice to the patentee of interferences; and to determine questions of priority between rival inventors of the same device. It is a matter of common knowledge that the commissioner is in the habit of limiting, altering, and expunging claims, and that it is impossible to say, after the specifications and claims have been filed, in what shape, and with what limitations, they will emerge from the patent-office. It is absolutely impossible for courts of justice to deal with questions of this description. We are asked in this case to assume that a patent will be issued covering five different claims, yet we have no assurance whatever that, if a patent be issued, any one of these claims will be allowed in the language in which it is couched. Besides, the effect of assuming cognizance of a patent before the patent is granted would be to extend the life of the patent beyond the statutory period of 17 years, by the time, which may be months, and even years, during which the application is pending in the patent-office.

The jurisdiction of courts to determine the validity of patents is purely appellate. It is conferred upon the theory that, application for patents being made *ex parte*, in the pressure of business, patents may be granted by inadvertence or mistake, or rival claimants may not have an opportunity of being heard; and because there is no other method provided by law of determining whether persons using similar devices are or are not infringers upon the rights of the patentee. It is obvious that when parties are represented by experienced counsel, and witnesses are examined with that care and deliberation which is only attainable in judicial proceedings, a correct result is much more likely to be reached than upon the hurried examination of an examiner in the patent-office. These considerations, however, do not by any means justify us in anticipating his decision, or intermeddling in any way with his action before it has been consummated by the issuance or refusal of the patent.

A decree will therefore be entered denying the injunction, and dismissing the bill for want of jurisdiction.

LICHTENSTEIN *et al.* v. GOLDSMITH.

(Circuit Court, D. Massachusetts. January 28, 1889.)

1. TRADE-MARKS—WHAT WILL BE PROTECTED.

A label consisting of the head of an elk, with the word "Elk" printed in large letters upon the face of the label, together with the words printed on it, "Patented by the Elk Cigar Factory, June 15, 1875," sufficiently indicates origin and ownership, to be a valid trade-mark, when applied to a box of cigars, which is also stamped with the district in which the cigars are manufactured.¹

2. SAME.

The fact that the owner of the trade-mark also allows the boxes to be labeled with the names of the dealers to whom the cigars are sold, does not amount to a deception or false representation, so as to invalidate the trade-mark.

3. SAME.

The fact that such labels are put on different brands of cigars is also immaterial, it appearing that these brands are designated by something which distinguishes one from another, so that no deception is practiced.

In Equity. Bill for infringement of trade-mark.

George L. Huntress, for complainants.

Edward H. Pierce, for defendant.

COLT, J. The complainants are the owners of a trade-mark consisting of the head of an elk, with the word "Elk" printed in large letters upon the face of the label, and this mark has been used by them for a number of years upon boxes of cigars. The defendant brands certain boxes of cigars made by him with substantially the same device. In view of the close identity of the two devices, the defendant cannot deny infringement, but he places his defense on other grounds. I will consider those which are most important.

It is said that the trade-mark is invalid because it does not designate origin or ownership. This is manifestly unsound. The original design contained the letters "A. L. & Bro.," standing for A. Lichtenstein & Brother, and, as now used, it has the words printed on it, "Patented by the Elk Cigar Factory, June 15, 1875." There is also stamped upon the box the district in New York in which the factory is located. Since 1875 these cigars of the Elk brands have been made by A. Lichtenstein & Bro., or their successors, A. Lichtenstein, Son & Co., and their factory has been known as the "Elk Cigar Factory." It seems to me that the trade-mark sufficiently indicates origin and ownership.

Again, it is said that the complainants deceive the public, in that they allow the boxes to be labeled with the names of dealers to whom the cigars are sold, or for whom they are made. But this is shown to be a custom in the cigar trade, and I do not think it results in any deception or false representation. All these cigars are in fact made at the Elk Factory, and they are so stamped, and when the public buy them, they are

¹Concerning what will be protected as a trade-mark, see *Manufacturing Co. v. Stone Co.*, 35 Fed. Rep. 896, and note; *Brown Chemical Co. v. Stearns*, post, 360, and cases cited.

purchasing a genuine Elk cigar, made by these complainants; and I do not see that the additional label put on the box in accordance with a custom of the trade is in any just sense such a false representation as should invalidate the trade-mark.

It is further urged as a defense that the complainants make different brands of cigars, all of which are called "Elk." But if, as appears, these brands are designated by something which distinguishes one from the other, then no deception is practiced. I see no reason why this trade-mark should not be used in good faith on different brands or grades of cigars all of which are made by the complainants.

The defendant also claims that the complainants gave him permission to use this trade-mark on the goods sold by him, but the evidence does not, in my opinion, sustain his position. This seems to me a case where the defendant has wrongfully appropriated a trade-mark belonging to others, and in none of the defenses brought forward can I find any justification for his action. Let an injunction issue as prayed for. Injunction granted

BROWN CHEMICAL CO. v. FREDERICK STEARNS & CO.

(Circuit Court, E. D. Michigan. January 7, 1889.)

1. TRADE-MARKS—"IRON BITTERS."

The words "Iron Bitters," being indicative of the composition of the article so called, cannot be claimed as a trade-mark.¹

2. SAME—DISHONEST COMPETITION IN TRADE.

If one person can, by superior energy, by more extensive advertising, by selling a better or more attractive article, or by greater frankness in disclosing the ingredients of his compound, outbid another in popular favor, he has a right to do so, provided he does not attempt to palm his goods off as those of another. This right is not impaired by an open avowal of his intention to compete with the other, or even to drive him out of the market. But he has no right, however honest his personal intentions, to use so much of his rival's name or trade-mark as will enable any dishonest trader, into whose hands his own goods may come, to sell them as the goods of his rival.

3. SAME.

Hence where plaintiff was the proprietor of a preparation known as "Brown's Iron Bitters," and defendant of another, called "Iron Tonic Bitters" which it falsely stated to be made by "Brown & Co., New York," it was held that such statement should be enjoined.

(*Syllabus by the Court.*)

In Equity.

This was a bill to restrain the illegal use of plaintiff's trade-mark. The bill alleged that the plaintiff many years ago adopted as a designation for a medicinal preparation the words "Brown's Iron Bitters," which designation it has since continuously used. That the preparation is now and has been known to consumers, and identified by the name "Iron

¹In general, as to what words will be protected as a trade-mark, see *Manufacturing Co. v. Stone Co.*, 35 Fed. Rep. 896, and note; *Indurated Fibre Co. v. Fibre Ware Co.*, *post.*, —, and note.

Bitters;" the word "Brown's" being often omitted, or lost sight of. That, in order to distinguish its said medicine, plaintiff adopted a package consisting of a bottle of amber-colored glass, rectangular in shape, having one of its sides flat, and the other three depressed to resemble panels, upon which it applied a white label, having upon it in conspicuous characters the words "Iron Bitters," with other descriptive and ornamental matter. That this bottle and label were placed in a carton or box of paste-board, around which was placed an exterior label or wrapper with the words "Iron Bitters" conspicuously displayed, so as to attract the attention of consumers, and it avers that by reason of these facts plaintiff claims an exclusive right to the use of the words "Iron Bitters," and to the other features whereby its medicine is identified. That whether it has an exclusive right in the premises or not, the defendant, which is a Michigan corporation, has entered upon an unlawful and unfair competition, by putting up its goods so that the packages resemble those of the plaintiff's, and selling them under the name of "Iron Tonic Bitters." That the defendant adopted and used a form of package corresponding in many particulars to those used by the plaintiff, its purpose being to sell the article upon the reputation established by the plaintiff for its iron bitters. The answer denied that the bottle was distinctive in its character, and averred that the shape and form of the bottle were not important. It also averred that defendant has never in any manner imitated the plaintiff's package; that it is a corporation organized to carry on the business of manufacturing pharmacists, and for the object of doing a legitimate business according to known and established *formulæ*, in opposition to all secret, quack medicines, for which reasons it has always been careful to avoid the use of any wrapper, label, or package which could possibly be mistaken by any person for those of any manufacturer of secret medicines; that it has made a preparation called "Iron Tonic Bitters," made in accordance with the formula for bitter wine of iron, a standard and recognized medical preparation, which it has put up in bottles differing materially from plaintiff's; that it has never sold its "Iron Tonic Bitters" so that the bottle could be seen by the purchaser, but has put it in a carton or box, which has been inclosed in a wrapper which does not in any way resemble that of the plaintiff.

Rowland Cox, for plaintiff.

Geo. H. Lothrop, for defendant.

BROWN, J. We had occasion several years ago, in the case of *Burton v. Stratton*, 12 Fed. Rep. 696, to make a somewhat careful examination of the law of trade-marks, and then found the following propositions abundantly sustained by authorities.

1. That words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark.

2. That a court of equity will enjoin unlawful competition in trade by means of labels of peculiar design or colors, or packages of distinctive

shapes, intended to enable the defendant to pass his goods off as those of the plaintiff.

(1) Under the first of these rules, we are satisfied that no monopoly can be claimed of the words "iron bitters," which are indicative of the composition of the article, and were so held in *Chemical Co. v. Myer*, 31 Fed. Rep. 453.

(2) The evidence that the defendant designed to compete with the plaintiff in the sale of iron bitters, and, if possible, to supplant it in the market, is abundant; but the evidence that this was done by any unfair or illegal means, or by an endeavor to induce the public to buy its goods under the impression that they were buying the goods of the plaintiff, is quite inconclusive. If one person can by superior energy, by more extensive advertising, by selling a better or more attractive article, or by greater frankness in disclosing the ingredients of his compound, outbid another in popular favor, he has a perfect right to do so. Nor is this right impaired by an open avowal of his intention to compete with the other, or even to drive him out of the market. It is the policy of the law to encourage competition in business, and to discourage monopolies where they are not protected by law, provided it be accomplished by open and honorable methods of dealing. Apparently for the purpose of competing with the plaintiff, the defendant announced in its catalogue that it had "no patents, no trade-marks, no secret processes;" that one of the features of its business was to put up what are known as non-secret medicines, and to put them up avowedly to replace quack, secret, or patented nostrums in the sales of retail druggists; simulating them in those points deservedly popular, but not imitating or copying them otherwise. This leading feature of its business it amplifies at considerable length, and sets forth the reasons why, in its opinion, such methods would be more profitable to its customers. With regard to the preparation in question, it announces: "Our Iron Tonic Bitters is an elegant preparation; a pleasant bitter and appetizer; replaces perfectly the patented nostrums called 'Harper's Iron Tonic,' and 'Brown's Iron Bitters.'" These bitters it put up in bottles of similar shape and color to the plaintiff's, but of larger size, and with a wholly different label,—so different, indeed, that it is scarcely claimed to be an infringement. Upon this label the words "Iron Tonic Bitters" are conspicuously displayed, with the name of the defendant as manufacturer, and with a notice that it is put up according to the recognized formula for bitter wine of iron. This bottle was packed in a paper box or carton, which was itself inclosed in a label wholly different in design from that of the plaintiff; indeed, there is no similarity in the different packages, except in the bottles, which are of a shape akin to many containing medicinal preparations, and could never deceive an intending purchaser, as they are not visible until they are withdrawn from the carton. Plaintiff insists, however, that the similarity in shape and color of the bottles is of itself sufficient evidence of an intent to deceive, and relies in that connection upon the case of *Food Co. v. Baumbach*, 32 Fed. Rep. 205. In this case, however, the defendant adopted an unusual style of bottle, viz., a cham-

pagne bottle, with a label and wrapper sufficiently resembling plaintiff's label and wrapper to deceive the general public, bearing the words, "Standard Nerve Food." The case differs from the one under consideration in the fact that the bottle was of unusual shape for preparations of that description, and there was no evidence that the bottle was packed in a carton so as to conceal its shape from the purchaser. Upon the whole, we think the evidence is quite insufficient to show any unlawful competition upon the part of the defendant, or any such imitation of its packages, labels, or wrappers as would induce any one to believe he was buying the preparation of the plaintiff.

(3) In a few cases, and to accommodate a particular dealer, the words "Brown & Co., N. Y. City," were printed upon the bottom of the label in the place of the name of the defendant. The evidence upon this point tends to show that the witness Powell visited a druggist in Hamburg, Iowa, and asked for a bottle of Brown's Iron Bitters. He was informed by a member of the firm that they kept the bitters, and was referred to a clerk, who handed him one of the defendant's packages, and told him that it was Brown's Iron Bitters. On being asked if he didn't know that the article was made by the defendant, he acknowledged that he did, and said that he knew it was not the article made by the plaintiff. In explanation, the defendant states that one Snodgrass, of whom the Hamburg druggists were the successors, in November, 1882, sent an order for goods, not embracing any Iron Tonic Bitters, on which he directed to be printed the name of Brown & Co., of New York, and that this practice has since been followed without notice or special attention on defendant's part. This appears to be a common practice among country dealers, as it enables them to do a jobbing business, which they could not do, if their own name, or that of the real manufacturer, was on the goods. While this explanation relieves the defendant from the charge of a fraudulent design on its part, and there is no evidence that any one was ever actually deceived by this label, or thereby induced to buy defendant's preparation under the belief that it was plaintiff's, one can easily imagine that the effect of it might be to mislead intending purchasers, and perhaps induce them to think they were buying Brown's Iron Bitters. Indeed, the evidence of Powell in this case indicates that the Hamburg druggists endeavored to palm off the package upon him as manufactured by the plaintiff. To such efforts, whether innocent or not, the defendant has no right to lend itself. We believe the rule stated by Lord Watson in *Johnston v. Ewing*, L. R. 7 App. Cas. 219, 232, to be a wholesome one: "But no man, however honest his personal intentions, has a right to adopt and use so much of his rival's established trade-mark as will enable any dishonest trader into whose hands his own goods may come to sell them as the goods of his rival." To this extent, and to this only, we think plaintiff is entitled to its injunction; but, as the number sold appears to be small, we do not think it worth while to put the parties to the expense of a reference to a master to compute damages. A decree will be entered in accordance with this opinion, but without costs to either party.

JENNINGS v. JOHNSON.¹

(Circuit Court, D. Maine. April 26, 1888.)

1. TRADE-MARKS—PROPRIETARY MEDICINE LABELS—INFRINGEMENT.

"Johnson's Anodyne Liniment" had been sold for more than 50 years in bottles of a certain size and style, having a blue wrapper, and a purplish label bearing a certain description and a *fac simile* of the name of A. Johnson, the original proprietor. Defendant's article was called "Johnson's Anodyne Liniment," and appeared in the same size bottles, with a similar blue wrapper, and a label differing but little from that of the genuine article, except in a not very marked difference in color, and bore the *fac simile* of defendant's name, "F. E. Johnson." There was evidence of actual deception. *Held*, that defendant should be restrained from the sale of his article in such form.

2. SAME—RIGHT TO USE LABEL.

Plaintiff having been a member of the firm which prepared the liniment, and having purchased its business, may properly state on his labels that the liniment is prepared by such firm.

3. SAME—ACTION FOR INFRINGEMENT.

Plaintiff having become sole proprietor of the business of preparing the liniment from the original proprietor through several mesne purchases, he has such a proprietary right as entitles him to maintain the suit for an injunction.

In Equity.

Suit by Stephen Jennings against Frank E. Johnson to restrain the sale of liniment in a form resembling that in which plaintiff's liniment is sold.

Causten Browne and A. P. Browne, for complainant.

W. H. Clifford, for defendant.

COLT, J. The plaintiff in this case is the owner of a remedy known as "Johnson's Anodyne Liniment," and this suit is brought to enjoin the defendant from putting up and offering for sale a liniment of his own manufacture, in a form so closely resembling that of the plaintiff's article that the public are liable to be deceived thereby, and a portion of the plaintiff's business unlawfully taken away. The liniment was first prepared by Abner Johnson, about the year 1810. In 1846 he took his son, Thomas Johnson, into partnership. In 1848 the business was conducted by Thomas Johnson and his brother, I. S. Johnson, the father having died that year. In 1849, Thomas Johnson died, and the business was then carried on by I. S. Johnson until 1866, when he sold a part of his interest to the complainant. This continued until 1876, when the complainant bought out the entire interest of I. S. Johnson, and became the sole proprietor of the business.

Upon the evidence I think the complainant has shown such a proprietary right to this business, and to the use of the bottles, labels, and wrappers with which this medicine has been associated and identified, as entitles him to maintain this action against this defendant, and therefore

¹Publication delayed because of failure to receive copy of opinion at the time it was filed.

the first defense of want of sufficient title in the complainant falls to the ground.

Upon the question of injunction I entertain no doubt. A comparison of the bottles, wrappers, and labels make it apparent that the public would be likely to be deceived in the purchase of defendant's liniment for the genuine Johnson's. Except in the color of the label, the articles look almost identical. The genuine Johnson's Anodyne Liniment has for more than half a century made use of a certain size and style of bottle, a wrapper of a somewhat striking blue color, and a purplish-colored label bearing a certain description, and having a *fac simile* of Dr. Johnson's name written on it. The defendant's liniment, which is also called "Johnson's Anodyne Liniment," appears in the same size bottles, with a similar blue wrapper, and with a label which differs but little from the plaintiff's, except in a not very marked change in color. The *fac simile* of the name signed on the label is F. E. Johnson, in place of A. Johnson. The evidence goes to prove that the public are actually deceived into buying one liniment for the other, and a comparison of the form in which both liniments are put up shows that the object that the defendant must have had in the imitation which appears was to deceive the public into buying his liniment for the genuine Johnson's. Clearly he should be enjoined from such unlawful use of that which another has first appropriated.

The plaintiff Jennings was one of the firm of I. S. Johnson & Co. In stating on the label that the liniment is prepared by I. S. Johnson & Co., he merely retains the name of the firm of which he was a member. I cannot see how the public are deceived or injuriously affected by such a course. It is not uncommon, under such circumstances, to retain the old firm name. The facts in the case of *Medicine Co. v. Wood*, 108 U.S. 218, 2 Sup. Ct. Rep. 436, were quite different. In the present case I am satisfied that a decree should be entered for the complainant, and it is so ordered. Decree for complainant.

PHILADELPHIA NOVELTY MANUF'G CO. v. BLAKESLEY NOVELTY CO.

(Circuit Court, D. Connecticut, February 1, 1889.)

TRADE-MARKS—INFRINGEMENT.

Plaintiff places its hair-crimpers in a bright red box, having a white label with a black border, and on the label the words, "Madame Louie Common Sense Hair Crimpers. Patented August 5, 1879,"—form a column of four lines above the representation of the head and bust of a woman with curled hair, below which are the words "Friseur Renommee. To hide the crimper, in doing up the hair, turn the ends under." Defendant's hair-crimpers are placed in a bright red box, on which is a white label, bearing the words "The Langtry, Elegantes," in a column of two lines above the representation of the head of a woman with curled hair, at one side of which are the words "One Gross," and at the other side the words "No. 1. Black," and below which are the words "Hair Crimpers." The use of the representation of the woman's head

by defendant's predecessor antedated that by plaintiff's predecessor. *Held*, that there was no such imitation as would authorize a preliminary injunction.

In Equity. On motion for a preliminary injunction.

Bill by the Philadelphia Novelty Manufacturing Company against the Blakesley Novelty Company for the infringement of a trade-mark.

Joshua Pusey, for plaintiff.

John J. Jennings, for defendant.

SHIPMAN, J. This is a motion for a preliminary injunction in a trade-mark case. The bill alleges that the plaintiff is the manufacturer of hair-crimpers, and is the owner of a distinctive trade-mark, and peculiar manner and style of putting up, marking, and boxing said crimpers, in order to designate its own manufacture, as follows:

The crimpers are put up in packages of one dozen, wrapped in a paper wrapper of a peculiar shade of tan color, and around each of said packages is placed a small rubber ring. One dozen of these packages is placed within a paste-board box of a bright red color on the outside, and white on the inside, and on the lid of the box is pasted a white label with a black border, and, as a distinctive trade-mark, in the center the head of a woman, with hair curled, together with the words, "Madame Louie Common Sense Hair Crimpers," and that the defendant is using said trade-mark and putting up its crimpers in boxes, style, color, and appearance similar to the boxes, packages, wrappers, etc., of the plaintiff, and in imitation thereof, and which are designed to mislead and deceive the public into the belief that the defendant's hair-crimpers are the manufacture of the plaintiff. The defendant's crimpers are put up in packages of a dozen, inclosed in a tan-colored wrapper, and around each of these packages is placed a rubber ring. One dozen of these packages are placed in a paste-board box, of bright red color, and on the lid of the box is a white label containing the following words and design:

	The Langtry, Elegantes.	
One Gross.	Head of a woman with curled hair.	No. 1. Black.
	Hair Crimpers.	

The plaintiff's label contains the following:

Madame Louie
Common Sense
Hair Crimpers.
Patented August 5, 1879.

Head and bust of a woman with curled hair.

Friseur Renommee.

To hide the crimper, in doing up the hair turn the ends under.

The inclosing of each little package in a tan-colored wrapper, surrounded with a rubber ring, is not claimed to be an important part of the alleged trade-mark, as the crimpers are ordinarily sold by the box, or are shown to the purchaser in the box. The bright red color of the box,

with the white label and the woman's head, are claimed to be the distinctive features of the trade-mark. The use, by the defendant's predecessor, of the woman's head antedated its use by the plaintiff's predecessor. The case turns upon the alleged fact of the imitation of the bright red color of the box and of the white label. Upon final hearing, after testimony that purchasers have been deceived, I may come to a different conclusion, but an inspection of the two boxes shows that their appearance with their respective labels is very different. The dissimilarity between the labels, and the difference in the shape of the boxes, as they are presented to the eye, are so great that it does not seem that anybody would mistake one for the other. The motion is denied.

DANACE v. THE MAGNOLIA *et al.*

(Circuit Court, E. D. Louisiana. January 22, 1889.)

1. ADMIRALTY—JURISDICTION—CONTRACTS.

A contract to stow or load a vessel is not a maritime contract, and not enforceable in admiralty.

2. SAME—PLEADING AND PROOF.

A libel charged that the tug M., through its master, and representing as well himself as the owners of said tug and M. Bros., applied to libelant for the use of libelant's barge, to load the same with merchandise, and a contract was made with defendant; that libelant desired to send with his barge her keeper, which was objected to by defendant as unnecessary and useless, and that said barge, while in the custody and control of defendant, being improperly and insecurely, negligently and carelessly loaded, sunk, and became a total loss to libelant. Held, that on the pleadings M. Bros. could be held liable only as owners or lessees of the tug M., and, the evidence showing that they were not such owners or lessees, no judgment could be given against them.

In Admiralty. Libel for damages. On appeal from district court.

Libel by Nicholas Danace against steam-tug Magnolia and Manson Bros. The decision of the district court was in favor of libelant, and defendants appealed.

Thos. Gilmore & Sons, for appellants.

W. S. Benedict, for appellee.

PARDEE, J. The libel was brought by the owner of the barge Mamie against the steam-tug Magnolia and the firm of Manson Bros., owners or lessees of said tug. It charges, among other things, "that on the 16th day of December, 1887, the said tug Magnolia, through its master, and representing as well himself as the owners of said tug, and the firm of Manson Bros., of this district, applied to your libelant for the use and hire of said barge Mamie, to load the same with merchandise, that is, with 'salt,' in the course of its employment upon the navigable waters of this state, and the contract of hire was then and there made with said defendant at the rate of five (5) dollars per day, as per custom; that your

libelant desired to send with said barge Mamie, in said contract of hire, the keeper or watchman and general custodian of said barge Mamie, and same was objected to by defendant herein as unnecessary and useless; that said barge Mamie, while in the custody and control of the defendant, being improperly and insecurely, negligently and carelessly, loaded, sunk, and became a total loss to your libelant." Libelant prayed for due process against the steam-tug Magnolia, its master, owners, and due personal process against Manson Bros., and for judgment in the sum of \$800. Manson Bros. answered, denying all liability, and particularly denying that they were the owners or lessees of the steam-tug Magnolia, and any privity or obligation of contract between them and the libelant. Thomas Forrester appeared, and claimed the tug as owner, and excepted to the libel, because therein was joined a suit *in rem* and *in personam*. Thereafter the exception came on to be heard, and the court ordered libelant to elect as to whether he would proceed *in rem* or *in personam*, and, in compliance therewith, libelant elected to proceed *in personam* against Manson Bros., defendants, with right reserved of action against said tug Magnolia, if necessary. This election, and the dismissal of the suit *in rem*, left a suit *in personam* against Manson Bros., as owners or lessees of the tug Magnolia.

The evidence in the case shows that Manson Bros. were neither the owners nor lessees of the tug Magnolia; that they had made no specific contract for the use of the tug Magnolia, nor made any contract for the use of the barge Mamie; but shows that they made a contract with one Mr. Leland to transport by the Mississippi river 2,600 quarter bags of salt, equal to about 65 tons in weight, from a landing at Jackson Square to their warehouse, opposite Washington street, all in the city of New Orleans. The said Leland was to furnish the necessary barge and tug. Manson Bros. were to pay \$17 for the service and were to do the loading and unloading themselves. It further appears in the case that, for the purposes of the contract, Leland obtained from the libelant the use of his barge, worth about \$400, and the use of the tug Magnolia; that the salt was loaded on the barge by Manson Bros., and the barge was towed up to the warehouse, arriving too late to unload that day. During the night the barge sunk, and was a total loss. The bulk of the evidence in the case was directed to the question as to whether the barge sunk because of defective loading, or because the barge was unseaworthy. It is very voluminous and conflicting. From my examination of it, I am disposed to concur with the district judge, who found that the barge sunk because it was improperly loaded. From this statement of the case it is easy to be seen that there is not sufficient pleading here to hold Manson Bros. liable in any other capacity than that of owners or lessees of the tug Magnolia. As they were not the owners or lessees of the tug Magnolia, no judgment can be given against them on this state of the pleading. From the facts of the case it appears that the only contract that Manson Bros. made with anybody was to pay freight on delivery of the goods, and to load and unload the goods. As the barge sunk from improper loading, Manson Bros., if liable at all, are liable for improper loading

or stowage of the cargo. By the settled jurisprudence of this circuit, since the decision of Mr. Justice BRADLEY in the case of *The Nex*, 2 Woods, 229, the contract to stow or load a vessel is not a maritime contract, and not enforceable in admiralty. Of course, if the contract, for the violation of which damages are sought, is not a maritime contract, the admiralty is without jurisdiction. Neither on his pleading nor on the facts of the case is libellant entitled to recover in admiralty. A decree will be entered in this case dismissing the libel herein against Manson Bros., with costs of both courts.

KROHN v. THE JULIA.

(Circuit Court, E. D. Louisiana. January 19, 1889.)

ADMIRALTY—JURISDICTION—CONTRACTS.

A libel alleged that the schooner received a certain quantity of charcoal consigned to a place named on account of libellant; that the master contracted to carry the charcoal to the place of destination, there to sell the same, and account to libellant for the price at a given rate per barrel; that the agreement is the general custom among charcoal schooners; that the contract was one of affreightment, whereby the schooner was to transport the charcoal and offer it for sale, under obligation of accounting for the price named; that the schooner sold the charcoal, and refuses to account, the master's receipt being for the charcoal at the stated rate per barrel, "to be paid when sold out." Held that it showed a transfer of the title to the charcoal to the schooner, and not a maritime contract; and that the admiralty court has no jurisdiction.

In Admiralty. Libel on contract. On appeal from district court.

H. P. Dart, for appellant.

Hornor & Lee, for appellee.

PARDEE, J. The libel alleges that on or about the 15th day of January, 1888, the schooner Julia, of New Orleans, whereof Meyer was master, being then in the Tchonticabourg river, Mississippi, designed on a voyage to New Orleans, did receive from libellant 1,330 barrels of charcoal, consigned to order, to New Orleans, on account of libellant; that the said master contracted, in behalf of the said vessel, to carry said charcoal to New Orleans, there to sell the same, and to account to libellant for the price thereof at the rate of 15 cents per barrel; that the agreement thus made is the general and usual custom among charcoal schooners; that said schooner Julia received the 1,330 barrels of charcoal, and brought the same to New Orleans, there sold the same, and now refuses to account for the said proceeds, as covenanted by the said master; that the said charcoal was sold by the said schooner at the price of 15 cents per barrel, and that the sum now due libellant therefor is \$199.53; that libellant received from said schooner Julia the receipt hereto attached as part hereof, at the time of said shipping and said furnishing; that the whole was sold and delivered on the faith and credit of said schooner

Julia, and that the said schooner is liable therefor, and by law libellant has a lien and privilege upon said schooner therefor. The receipt annexed to the libel reads:

"TCHONTICABOURG, January 15, 1888.

"Received on board schooner Julia, from Henry Krohn, one thousand three hundred and thirty barrels of charcoal at 15 cents per barrel, \$199.50; wood, \$1.75; provisions, \$3.05,—all to be paid when sold out."

Afterwards, by leave, the libellant amended his libel, and in said amendment declared "that the contract with the said schooner was a contract of affreightment, whereby the said schooner was to receive on board the said charcoal, and the same to transfer to and deliver at New Orleans, and offer the same for sale under obligation of accounting to libellant for fifteen cents per barrel net." To the libel, as amended, the claimants excepted, on the ground that the court is without jurisdiction in admiralty over the matters and things propounded in said libel. The case in this court stands entirely upon this exception to the jurisdiction.

A careful examination of the libel, as amended, and the contract attached, results in the conclusion that the contract sued on was not a maritime contract. According to the libel as amended, the liability assumed by the schooner was to account for the charcoal at 15 cents a barrel net. It does not appear but that the schooner was at liberty to do whatever its master might think best with regard to the charcoal. He could sell it at the place where he received it. He could carry it to any port that he pleased. His liability, in any event, even in case of loss by peril of the sea, while the charcoal was in transmission to some other port, was the fixed price of 15 cents per barrel net. The declarations of the libellant as to the custom among charcoal schooners, and as to the obligations assumed by the schooner Julia, do not appear to be sufficient to give the written contract any other character than that stamped on its face, *i. e.*, a sale. In the *Hardy Case*, 1 Dill. 460, there was a maritime contract, the affreightment of goods; and therein the jurisdiction in admiralty could well be maintained, although incidentally, in the affreightment contract, was a provision that the ship should collect from the consignee the price of the goods, and should return the same to the consignor, and although the default claimed in the case was in regard to such incidental stipulation. In the present case the best showing that can be claimed for libellant is that in the contract of sale was an incidental stipulation that the goods should be carried to New Orleans, and sold, though compliance or non-compliance with such incidental stipulation would not affect the schooner's liability, or at all change the relation of the parties to the goods.

Being of the opinion that the transaction upon which the suit was brought was one that vested title and ownership at once in the schooner, and was not a maritime contract, I am clear that the exception to the jurisdiction should be maintained. A decree will be entered dismissing the libel, with costs in both this and the district court.

HALL v. OCEAN INS. CO.

(Circuit Court, D. Maine. January 12, 1889.)

MARINE INSURANCE—TOTAL LOSS—SALE—AUTHORITY OF MASTER.

A vessel laden with coal, valued at \$9,000, struck on the beach, on the west side of Block island, about 10 o'clock at night, and in a thick fog. She lay on a sandy beach, with rocks and stones under and around her, nearly on an even keel, and head on to the beach, but so that she was broadside to the sea. On the next morning the wind increased somewhat in violence, and as the tide arose the vessel chafed heavily; and about 10 A. M. bilged, and filled with water. The master applied to a wrecking company, who offered to get the vessel off for \$5,000. The following day the owner's agent arrived. The weather had moderated somewhat. A survey was called, and four days later the vessel was sold at auction for \$610. The vessel was in an exposed condition, and local witnesses testified that a large proportion of coal vessels which are bilged on that part of the island become a total loss. *Held*, that the master was justified in making the sale, and the insurers liable for a total loss, though the vessel was afterwards saved.

In Admiralty. Libel on insurance policy.

Benjamin Thompson, for libellant.

A. A. Strout and S. Park, for respondent.

CARPENTER, J. This is a libel in admiralty, wherein the libellant claims as for a total loss on a policy of insurance signed by the respondents, January 10, 1887, on his twenty-two sixty-fourths interest in the bark *Georgietta*, which went ashore on Block island June 22, 1887. The master called a survey, and in accordance with the advice of the surveyors advertised the vessel for sale, and sold her by auction. Before calling the survey, he communicated with the owners of the bark in Portland, and they sent an agent to Block island, who advised with the master as to the course proper to be pursued. After the vessel was sold, the purchasers hauled her off the beach, and towed her to New London, where she was temporarily repaired. The vessel, therefore, was not made a total loss solely by the fact of her stranding, but she became such, if at all, by means and in consequence of the sale by auction. The question, therefore, is whether the master had authority to make the sale in such manner as to bind the underwriters.

The respondents set up in their answer that the vessel went ashore through the fault of the master and crew, but this defense was not seriously pressed in argument, and I find nothing in the testimony to support it. I also find as matter of fact on the testimony, that the master acted in good faith in the matter of the sale of the vessel. The main argument of the respondents is in support of the position that the master can have no power to sell the vessel so as to bind all parties concerned, including the underwriters, in a case where it is possible that the owners should be notified of the peril of the vessel, and should have an opportunity to direct the master. To this point many decisions have been cited, and the whole question has been very thoroughly and acutely argued. The cases are not altogether in accord, and the rules of decision

laid down at different times will seem to be widely divergent if stress be laid on the literal meaning of the terms employed. But I have come to the conclusion, after very full consideration, that the only test of the power of the master to sell is to inquire whether the vessel was in such a situation that to sell her was the only prudent and wise course. It is said in the cases that the sale must be by necessity; but I do not understand that, in order to show a necessity for a sale, the master must show that no other course was open to him. It is sufficient if he show that there was no other prudent course. This statement of the rule I take to be in accordance with the general line of decision heretofore, and with the reason of the case.

The question then recurs whether the situation of the vessel was such as to make the sale, under the circumstances, and as a matter of prudence, a necessity. The vessel is valued in the policy at \$9,000. On the 17th of June she left Philadelphia with a cargo of coal, bound to Portland. On the 22d of June, at about 7 o'clock in the evening, she was about five miles south from Montauk Point light. The weather was foggy, the wind was about south-west, and there was a heavy sea. From Montauk Point the ship was steered east by north, nothing to the northward, which would have carried her four miles to the southward of the south end of Block island. Shortly after 7 o'clock a thick fog shut down, and continued until about 10 o'clock, at which time the vessel, evidently carried to the northward by the tidal current, struck on the beach on the west side of the island. She lay on a sandy beach, with rocks and stones under and around her, very nearly on an even keel, and nearly head on to the beach at the point where she struck, but so that she was broadside to the sea as the sea was then running. On the next morning the wind increased somewhat in violence, and as the tide rose the vessel chafed heavily on the rocks, so that a few small holes were worn entirely through her bottom. At about 10 o'clock in the forenoon she bilged, and filled with water. The master applied to the manager of the wrecking company on the island, and the best terms he could obtain was an offer to get off the vessel for \$5,000. On the 24th, Captain Merrill, the agent of the owners, arrived on the island. In the mean time the weather had somewhat moderated. On the 25th the survey was called, and on the 28th the vessel was sold by auction for \$610. The purchasers were occupied from June 30th to July 3d in attempts to haul her off the beach, and on the last-named day she came off, and was towed to New London, being kept free from water by a steam-pump which was put on her deck. The cost of getting her off was about \$650. She was strained and leaking badly, but the amount of damage received by her is exceedingly difficult to estimate from the widely varying statements of the witnesses. The special danger in which the vessel lay, while ashore on Block island, arose from her exposed situation, and the liability to an unfavorable change of weather. As she was full of water, it was, of course, impracticable to float her by the unaided exertions of the crew. In those waters the prevailing winds during the summer season are from the westward, and sudden and violent storms of wind frequently arise. It is also

a common occurrence that surf from storms at sea suddenly breaks on the west shore of Block island with force sufficient to break up vessels lying ashore. It is stated by witnesses resident on the island that a large proportion of coal vessels which are bilged on the west shore of the island become ultimately a total loss.

Taking the whole circumstances of the case, I am of opinion that no course was open to the master except to sell the vessel. Had he contracted with the wrecking company for the price offered, they would have been able, as the event was, to get off the vessel, and tow her to a harbor, where she might be repaired. But even in that case, so far as I can understand from the testimony, the sum paid to the wreckers, and the cost of repairs so as to make the bark seaworthy, would together have amounted very nearly to the value of the vessel as she was before she struck. But it is not even on this basis, as I apprehend, that the question is to be decided. The peril of the ship cannot be measured by the ultimate result of the efforts to save her. I am to look at the danger in which she was, rather than to the damage which she received. It is common experience that a ship is in mortal peril for many hours and, in the final result, escapes with no damage whatever. I conclude, therefore, that the libellant is entitled to recover as for a total loss, with allowance for the savings from the sale.

THE JENNIE HAYES.

(District Court, N. D. Iowa. January 18, 1889.)

MARITIME LIENS—WAGES—PENALTIES.

The lien of seamen for wages takes priority over claims of the United States for penalties incurred by the vessel for failure to keep posted the certificate of inspection, to have the name of the vessel painted upon the stern, or to carry sufficient life-preservers, as required by statute; and it is immaterial that the seamen served with knowledge of such failures on the part of the vessel, as the statutes do not impose upon them any duty with respect thereto.

In Admiralty. Libels by United States for penalties, and by seamen for wages. On distribution of fund.

T. P. Murphy, U. S. Dist. Atty

Utt Bros. & Michel and Henderson, Hurd, Daniels & Kiesel, for seamen.

SHIRAS, J. On the 6th day of October, 1887, the surveyor of the port of Dubuque seized the steamer Jennie Hayes, then plying upon the waters of the Mississippi river, for violation of the provisions of the statutes of the United States requiring the net tonnage of the vessel to be deeply carved or otherwise permanently marked on the main beam thereof, as required by section 5 of the act of June 19, 1886; requiring the name and port to which the vessel belongs to be painted on the stern upon a black ground, as provided in section 4334 of the Revised Statutes; re-

quiring copies of the original inspection of the vessel to be kept posted in conspicuous places, as provided for by section 4423 of the Revised Statutes; requiring a life-preserver or float for every cabin and deck passenger which the vessel is authorized to carry, as provided for by section 4482 of the Revised Statutes. Subsequently a libel, in proper form for the enforcement of the penalties provided for such infractions of the statutes, was filed in this court by the United States district attorney, and also libels on behalf of the seamen who had been employed on the vessel. Upon due application, and by consent of all interested, an order was made for the sale of the vessel, and the proceeds realized therefrom was paid into the registry of the court. The evidence taken in the cause substantiates the violations of the statutes in the particulars named, thus showing that the United States is entitled to recover against the vessel the penalties provided in the sections above referred to. It is also shown that certain sums are due to the seamen employed upon said vessel, which were liens upon said vessel when the same was seized and libeled on behalf of the United States; the amount due the seamen exceeding the amount realized from the sale of the vessel after paying the costs of seizure and sale.

The question for determination is as to the priority of the liens. The fact that the government has by purchase, forfeiture, or otherwise become the owner of a vessel does not, *ipso facto*, displace or defeat liens in favor of seamen or material-men, is settled by the decisions of the supreme court in the cases of *The St. Jago de Cuba*, 9 Wheat. 409, and *The Siren*, 7 Wall. 152. It is, however, argued on behalf of the government that these cases recognize the distinction between legal and illegal voyages or ventures, and deny the right to a lien on behalf of seamen who knowingly engage in such unlawful voyage; and that it was unlawful for the Jennie Hayes to ply upon the waters of the Mississippi without complying with the statutory requirements. It may well be that seamen who should knowingly engage as such upon a vessel used in the slave trade, as was the fact in the case of *The St. Jago de Cuba*, should be denied relief when they seek to recover wages for such illegal venture. In such case it would appear that they knowingly and intentionally aided in a violation of the laws of the United States, for which violation they would be liable to punishment, and under such circumstances the services upon which they would base their right to a lien would be illegal. There is no provision in the statute of the United States which declares that a seaman shall be liable to punishment for serving upon a vessel which fails to observe the requirements of the statutes in regard to keeping posted the certificates of inspection, or to have carved upon the main beam the amount of her tonnage, or to have the name painted upon the stern of the vessel. The seamen are not charged with any duty in these respects, nor made liable if the statutory requirements are not observed. If it should be held that seamen serving upon vessels failing to observe these requirements have no lien upon the vessels for their wages, this would, in effect, be inflicting a punishment upon them for such violations of the statutes, when the statutes do not so provide. If, however, the seamen are entitled to

alien for their wages, then such lien, under the rule recognized and enforced by the supreme court in the cases above cited, is superior and paramount to that of the United States. Upon the facts disclosed upon the record in this cause it must be held that the seamen have a lien upon the proceeds of the vessel for the wages due them, and that such liens are entitled to priority over the claim of the government.

EATON v. NEUMARK *et al.*

(Circuit Court, S. D. New York. October 3, 1888.)

SHIPPING—CARRIAGE OF GOODS—DELIVERY—DUTY OF MASTER.

Bills of lading for a consignment of iron rails, of which 88 tons were to be delivered to respondents, and 180 tons to a third person, contained the clause, "vessels not accountable for number of pieces or weight." It appeared that the entire consignment actually weighed 20 tons less than the bills recited; that respondents received 28 tons less than their bill called for, and the other consignee 8 tons more; that the rails were discharged direct from the ship into cars of a railroad company authorized by the consignees to accept delivery; that respondents' agents assisted in selecting what was delivered, accepted it as what they were entitled to, and shipped it away by the cars. *Held*, that though the master may have been indifferent in making the separate delivery, yet, respondents' agents having undertaken to do his work, the burden was on respondents to show that the quantity accepted by the agents was less than should have been delivered to them, through some fault of the ship.

In Admiralty. On appeal from district court. 33 Fed. Rep. 891.

Libel by Charles F. Eaton to recover freight on a consignment of iron rails. The respondents, Julius Neumark and others, pleaded as an offset shortage in the quantity delivered. There was a decree in the district court in favor of the libellant, and respondents appeal.

L. Edgar Aron and *Geo. E. Sibley*, for appellants.

James K. Hill and *Wing & Shoudy*, for appellees.

WALLACE, J. As the master gave separate bills of lading for the two consignments of old iron which he undertook to transport, it became his duty to make delivery to each of the two consignees of their respective parts of the cargo, and to keep the two consignments separate or distinguishable, so far as necessary in this behalf. The circumstance that the whole cargo was received from one shipper did not affect his responsibility in this regard. The clause which was written in the bills of lading, "vessel not accountable for the number of pieces or weight," did not absolve him from making delivery of all the iron he received, but only qualified the effect of the recital in the bill of lading of the number of pieces, and the weight of the iron received, as an admission. It was equivalent to a statement by the master that he had not so verified the truth of the admission as to be willing to adopt it as correct. According to their bill of lading, the appellants, who were the consignees

of one of the shipments of iron, were entitled to receive 88½ tons. The consignees of the other shipment, Waulbaum & Co., according to their bill of lading, were entitled to receive 180½ tons. Thus the aggregate of both shipments, according to the recitals in the bills of lading, was 269½ tons. When the iron was discharged it was weighed by an officer of customs, and both lots together were found to weigh 20 tons less than the weight called for by the two bills of lading. I agree with the district judge, that the evidence shows that the ship discharged in the cars of the railway company all the iron actually received at Danzig, and that the amount actually received was 20 tons in weight less than the bills of lading called for. But the appellants received 60½ tons, instead of 88½ tons, while Waulbaum & Co. received 8 tons more than their bill of lading called for. The question in the case is not whether the master delivered all the iron received by the ship, but whether he delivered to the appellants that part of it which belonged to them under their bill of lading. When the ship arrived at Philadelphia the consignees of both shipments directed the iron to be delivered at the wharf of the Reading Railway Company, where it had to be put on board the cars of that company. As the iron was discharged an employe of the railway company designated which cars were the ones for each of the consignees. Besides selecting the railway company to receive the iron from them, and requesting the officer of customs to see that they got what belonged to them, and giving necessary information to the latter of the quantity which their bill of lading called for, the appellants gave no attention to the matter. After the cars were loaded they were weighed, and dispatched to the respective consignees, under the supervision of the customs officer and the employe of the railway company. The master's duty ended when he delivered into the cars designated for the respective consignees the iron belonging to each. If any mistake was made by the employe of the railway company, or the customs officer, or either of them, in designating the cars or dispatching them to the proper consignees, the master was not responsible for it, and the appellants cannot complain. What was delivered to the railway company pursuant to the directions given the master by the employe of the railway company or the customs officer was delivered to the appellants, because they had made these persons their agents for the purpose. As their agents assisted in selecting what was delivered, accepted it as what they were entitled to by their bill of lading, and caused it to be sent away by the cars, it is incumbent upon the appellants to show satisfactorily that what was thus accepted was less than should have been delivered, and that their failure to receive all they should have received is attributable to some default on the part of the ship. The evidence fails to show this, and is as consistent with the theory that the ship delivered to the designated cars all the iron that belonged to the appellants, and that one of the cars in which the iron was sent away was misdirected, as with any other theory of the facts. Although eight tons more of iron were sent to Waulbaum & Co. than their bill of lading called for, there is nothing in the evidence to fix the master with the responsibility for the mistake. The master seems to have assumed that

he owed no duty to the consignees of the two shipments to make separate delivery, but that, having stipulated in the bills of lading not to be accountable for weight or number, all he was required to do was to put out all the old tramway rails he had on board, and let each consignee select his own; and I cannot doubt that his indifference in this regard imposed additional responsibility upon the agents for the appellants, and to some extent embarrassed them in discharging their duties. Nevertheless, if they saw fit to undertake to do what it was primarily the master's duty to do, no legal responsibility for any subsequent loss can be imputed to the master. As stated before, the only question is whether the iron belonging to the appellants was delivered into their cars. They must show that some part of it was not thus delivered; and this they have not done. The decree of the district court would be more satisfactory if costs had not been allowed to the libellant. In all other respects it is affirmed. Neither party is awarded costs in this court.

MELLOY v. LEHIGH & W. COAL CO.

(District Court, S. D. New York. December 26, 1888.)

1. DEMURRAGE—LIABILITY OF FREIGHTER—ACCEPTANCE OF COAL ORDER.

The defendants accepted their vendee's order to load coal upon the libellant's canal-boat "in turn," but "under the customs of the shipping point," and "without liability for delay or failure to load." The accepted order was given to the libellant's master, who proceeded with his boat to the shipping point, and waited three weeks for loading. On suit for demurrage, *held* (a) that, aside from the express contract, a freighter who undertakes to load a vessel is bound to reasonable diligence in loading, and the defense of want of privity of contract was overruled.

2. SAME—PRIVITY OF CONTRACT.

(b) That the respondents' delivery of the order to the master, with the intent that it should be acted on, and his action accordingly, imported an implied contract with him to load according to the terms of the accepted order.

3. SAME—WILLFUL DELAY.

(c) That the exemption from liability for delay or failure to load did not cover any delay or failure by the respondent's willful neglect or fault.

4. SAME—CUSTOM OF PORT.

(d) That the custom of the shipping point authorized delay by the freighter until all the kinds of coal required could be loaded together.

In Admiralty. Libel for damages in the nature of demurrage.

T. C. Campbell, for libellant.

Biddle & Ward, for respondents.

BROWN, J. The libellant sues to recover damages in the nature of demurrage for the alleged detention of the canal-boats *H. C. Rew* and *Maggie Hager* at Port Johnson, by not loading them in turn. On the 20th of June, 1888, *Kurtz, Crook & Co.*, having purchased coal of the respondents, deliverable at Port Johnson, drew an order upon their sup-

erintendent at the New York office, directing them to load the canal-boat H. C. Rew with "Wilkesbarre coal, 100 tons broken, and 125 tons egg, deliverable to Buchanan Bros., 25th St. New York, North river." On the back of the order was a printed statement that the order was given upon the following conditions:

"*First.* The vessel named on this order shall take her regular turn at the shipping wharf, and shall be governed in all respects by the customs of the shipping point to which she is sent.

"*Second.* No liability for demurrage or other cause is to be incurred by J. D. Kurtz, Crook & Co., or by the cargo, or the consignees thereof, for delay in loading; such delay to be borne by the vessel."

The order, being presented at the defendant's office at New York, was stamped as usual:

"Accepted subject to the following conditions: The vessel receiving this order is to conform to the directions of the company's shipping agent at the point to which she is sent. No liability is to be incurred for delay, or failure in furnishing a load to the vessel."

The order was delivered by the respondents' agent to the captain of the Rew, who proceeded to Port Johnson, and filed the order with Mr. Martin, the respondents' shipping agent there, as customary, on the 21st day of June. He was not loaded until the 11th or 12th of July, and claims that three other boats arriving after him were loaded first, and that he was not loaded "in turn," as provided by the order, and by the custom of that shipping point. Substantially the same facts are alleged as regards the Maggie Hager, which reported later.

It is contended on behalf of the respondents that on such orders no direct action will lie by the master of the vessel detained, for lack of privity of contract; because the respondents' contracts in such cases, it is said, are solely with the drawers of the orders, i. e., the vendees of the coal. The right of a vessel to damages for detention, however, need not rest on express contract. The maritime law makes it the duty of the freighter, or of the owner or consignee of goods, who undertakes to load or to discharge the ship, to do so with reasonable promptness, and it imposes on him a liability for the damages from detention arising from his negligence or unjustifiable delay. At common law, an action of trespass on the case would lie for this breach of duty. *Sprague v. West*, Abb. Adm. 548, 553; *Bacon v. Transportation Co.*, 3 Fed. Rep. 344; *Hawgood v. Tons of Coal*, 21 Fed. Rep. 681.

The present case is stronger. The defendants undertook and expressly agreed with Kurtz, Crook & Co. to load this vessel subject to the terms of the written contract. The contract, as accepted by the respondents, was delivered by them to the master, with the intent that he should act on it, and go to Port Johnson, and wait his turn for this coal. The master did so, relying upon this accepted order. The order was duly filed by the master at Port Johnson; and thus, by the contract with the drawer, the respondents became bound to load the vessel in turn, subject to the other conditions as to custom. While that order was outstanding, and the vessel was in waiting under it, Kurtz, Crook & Co. could not re-

quire the respondents to accept any other order for the same coal, or sue them for non-delivery, under their original contract of purchase, so long as the conditions of the accepted order were fulfilled. The delivery of the accepted order to the master, under such circumstances, and with such intent, imported an implied contract with the master that if he would go to Port Johnson and wait his turn, subject to the other conditions also, he should be loaded with the libelant's coal. The exception, "no liability for delay or failure to load," does not include a willful, nor, in my opinion, a negligent, disregard of the contract; but only a delay or failure without the respondents' fault, or through the operation of some of the other conditions of the contract. The respondents, therefore, were not only bound under their ordinary maritime duty as freighters, to load the vessel without unreasonable delay,—that is, in this case, according to the express contract with the drawer,—but the implied contract created the same obligation. Upon either ground the vessel has a direct remedy against the freighter; just as she has a direct remedy against any owner of cargo that is bound to unload her, and who has induced her to submit to his direction. *Sprague v. West, supra*; *Railroad Co. v. Northam*, 2 Ben. 1; *Crawford v. Mellor*, 1 Fed. Rep. 638; *Houge v. Woodruff*, 19 Fed. Rep. 136, 137, and cases there cited.

The obligation to load in turn "under the custom of the shipping point," is shown not to require the shippers to load a part of the coal until they have got the other part of the cargo that the order requires. The *Rew* was to be loaded partly with broken coal, and partly with egg; both Wilkesbarre coal. She was not entitled, under the custom, to take her place "in turn," until the respondents had both kinds of coal with which to load her at once; and the proof does not show that the *Rew* could have been loaded at any time with both kinds of coal before the other three boats complained of were loaded. As to the *George Albertson*, claimed to have been loaded ahead, the proof is that her order was filed at the shipping point on the 30th of June, prior to the report of the *Hager*, and therefore entitled, apparently, to prior loading. One witness for the libelant says she did not arrive until after the *Hager*. Either the witness is mistaken, or there was some sharp practice by the other boat in falsely reporting her arrival, and in filing her order on the 30th of June, about which there can be no mistake, before she reached Port Johnson. The shipping agent testified that he had to rely upon the orders filed with him, and the reports of arrival. I think he was entitled to do so, as between different vessels, until notice of irregularity was given him in filing the order before the vessel's arrival, if such was the fact. Without such notice it was not to be expected that he should undertake to verify the reports of arrival made by the captains of the canal-boats when they file their orders, or ascertain that the boats are actually present. The boats are reported in considerable numbers, and lie at anchor at a distance, until their turn comes. If the boat previously reported did not actually arrive at that time, no notice of the fact appears to have been given to the shipping agent, or any complaint made of her lack of a prior right to load.

The libel must be dismissed; but in consideration of the long detention of the vessel, and her apparent right, the dismissal must be without costs.

McCORMICK v. JARRETT.

(District Court, E. D. Missouri, E. D. January 15, 1889.)

1. TOWAGE—NEGLIGENCE—UNSEAWORTHY TOW.

The respondent agreed to tow an unseaworthy barge loaded with ice from Quincy, Ill., to St. Louis, Mo., for \$200, on condition that the owner would assume all risks incident to unseaworthiness. The barge having sprung a leak on the voyage, owing to unseaworthiness, and being about to sink, held (1) that in such emergency respondent was bound to take such steps to protect the owner of the barge from loss as ordinary and reasonable prudence would suggest; (2) that for violation of such duty respondent was liable for whatever loss was sustained over and above what would have been sustained, if such reasonable and proper efforts had been made, and that it was libelant's duty to show such difference in the amount of the loss.

2. SAME.

Under the contract aforesaid, although respondent was not negligent, he cannot recover the full contract price for towage, but only the reasonable value of towage to the place where the sinking occurred.

(Syllabus by the Court.)

In Admiralty. Libel for damages.

This was a libel *in personam*, filed to recover the value of a barge and cargo of ice, which was sunk in the Mississippi river, near Clarksville, Mo., while on a voyage from Quincy, Ill., to St. Louis, Mo. Libelant charged that the barge in question was carelessly run against an obstruction while being landed at Clarksville, Mo., and in consequence thereof sprung a leak and sunk. Also that after the barge was partially sunk in shoal water at Clarksville, it was hauled out into the stream, and landed below the town, where the water was deep, and there abandoned, and in consequence thereof became a total loss.

R. H. Kern, for libelant.

Mills & Flitcraft, for respondent.

THAYER, J. In this case I announce the following conclusions of law and fact, namely: The barge East, at the time it was taken in tow by the steamer Jarrett, to be towed from Quincy, Ill., to St. Louis, Mo., was not in a fit and proper condition to stand the voyage with a load of 420 tons of ice stored wholly on deck. In other words, the barge, so laden, was unseaworthy. One end of the barge was unquestionably in a bad condition. The stem-post was either weather-checked or rotten, and the planking about the stem had burst its fastenings. An attempt had been made at Quincy to repair the defect by nailing pine plank to the stem-post, so as to strengthen the bow, but the work had been imperfectly done. When the barge reached Clarksville, Mo., and was tied up temporarily, the injured stem pointed up stream, and most likely

rested on the bottom. Lying in that condition, the weight of ice on deck either split the injured stem-post, or burst the planking from the stem-post below the water line. The evidence in the case convinces me that the barge was properly landed at Clarksville, and was made fast to the shore by sufficient lines. The sinking of the barge at that point was not due, in my judgment, to the careless manner in which the barge was landed or made fast, but was due to the inherent weakness of the barge, as above explained, and its inability to withstand the ordinary incidents of a voyage with a load of 420 tons of ice stored on deck. I further conclude that the respondent at first refused to tow the barge on account of its unseaworthy condition, but eventually agreed to transport it to St. Louis for \$200, on condition that libelant would assume all risks incident to unseaworthiness. Under that agreement the voyage was undertaken. The result is that respondent incurred no liability on account of what happened to the barge up to the time that he attempted to tow the barge away from the landing at Clarksville, Mo., after it became water-logged.

It may be conceded that, although the libelant had agreed to assume all risks incident to unseaworthiness, yet that it was respondent's duty, after the barge had sprung a leak, to make all reasonable and proper efforts to save the barge and cargo, or as much thereof as possible. Any violation of such duty would render the respondent liable, not for the entire value of the barge and cargo, necessarily, but for whatever loss was sustained by the libelant over and above what would have been sustained if reasonable and proper steps had been taken to save the barge and cargo. After a careful consideration of all the evidence, my conclusion is that the testimony in the case does not show with any degree of certainty that the libelant sustained any greater loss by reason of the fact that the barge was towed from the landing at Clarksville, after it was partially sunk, and was tied up some distance below the town, than he would have sustained if the barge had been left at the landing. I consider it most probable that in any event the cargo (consisting, as it did, of ice loaded on deck) would have been, as it was, wholly lost. As the barge careened at the landing, in the act of sinking, it would most likely have precipitated the entire cargo into the river. This, I think, would have been the necessary result before the ice could have been unloaded, if the necessary appliances had been at hand (which they were not) for unloading with economy and dispatch. Even if the cargo had not been lost in the manner last indicated, I think it very doubtful, considering the value of the cargo, and the expense of obtaining the necessary appliances for unloading, and of unloading it, whether a prudent owner, if the barge had been left at the landing at Clarksville, would have made any effort to unload, and thus save, the cargo.

In opposition to these views it may be urged that the barge itself could have been raised more easily, and at less expense, if allowed to sink at the landing, than at the point below the town where it was subsequently moored and sunk. This may be true, but the evidence fails to show how much more it would have cost to raise the barge in the latter place

than in the former. The court is accordingly without the means of assessing the damage, even if it be conceded that it would have been more prudent to have left the barge at the landing. From what has been said, however, I would not have it inferred that the court finds that the respondent was in fact guilty of negligence in towing the barge from the Clarksville landing while in a sinking condition. Such conclusion, in my opinion, is not justified by the evidence. After the barge was partially submerged, and badly listed, the respondent was forced, by the necessities of the case, either to allow the barge to sink where it lay, or to pull it out into the stream, and attempt to land it at some other place, where it would rest on an even keel. The latter course promised some advantages in the way of preventing the cargo from sliding into the river, besides removing what would have been a formidable obstruction at the landing, if the barge had there sunk. It appears to me that the respondent was compelled to choose between the alternatives last named, in consequence of the unseaworthiness of the barge, for which the libelant was responsible; and although I am not able to say that he pursued the wisest course, yet I am equally unable to say, that he was culpably negligent. The respondent, under his contract, did not insure the safety of the barge. He was simply under obligation to do what was prudent, and seemed to promise the best results for the owner in case a loss became imminent through unseaworthiness. The evidence, as before stated, does not satisfy me that he was guilty of any culpable neglect in the performance of such duty. The libel will be dismissed in accordance with the foregoing views.

The cross-demands mentioned in the third and ninth articles of respondent's answer must be dismissed for the reasons following: Respondent is not entitled to recover the full contract price for towing the barge from Quincy to St. Louis, as the voyage was broken up at Clarksville. At most he can only recover reasonable compensation for towing the craft to Clarksville, Mo., and there is no evidence of the reasonable value of such service. The sum of \$25, claimed for towage from Cottonwood island to Quincy bay, is not recoverable in this action, as there is no legal evidence of a promise on libelant's part to pay that sum, and no evidence of the reasonable value of such service. Both cross-demands are therefore rejected, and a decree will be entered accordingly.

CALL v. THE ADDIE SCHLAEFER.

(*District Court, D. New Jersey. January 7, 1889.*)

COLLISION—BETWEEN VESSELS AT WHARF.

The schooner S. was towed to a wharf, and berthed on the outside and within two or three feet of the canal-boat C., which was unloading at the wharf. The S. was warned by the C. to keep off, or both would go aground at low water, and the C. be injured; but the S. remained where she was, although she could easily have gotten away by employing a tug, if not by her own efforts. When the tide fell, the C. grounded, and collided with the S., receiving some injury,

but finally getting away. On returning to her position, it was found that the S. had got several feet closer to the wharf, in consequence of which, at the next low tide, the vessels again collided, the C. receiving further injury. The S. could easily have moved off at high tide before the second collision. *Held*, that she was liable for the damages caused by both collisions.

In Admiralty. Libel for collision.

Carpenter & Mosher, for libellant.

Bedle, Muirheid & McGee, for claimants.

WALES, J. This is a suit brought to recover damages sustained by the canal-boat *Ellen Call* in colliding with the schooner *Addie Schlaefer*, while both vessels were lying in the Morris canal-basin, Jersey City, on the nights of the 8th and 10th of November, 1884. The canal-boat had been moored to a wharf on the south side of the basin for several days prior to the collision, discharging gas-pipe. About midday on Saturday, the 8th, the schooner, loaded with pine wood, was towed in by a tug, and berthed on the outside and within two or three feet of the *Call*, so that persons could easily step from one vessel to the other. Both vessels laid side by side, with their bows to the westward. The tug had no sooner cast loose, than those on board the *Schlaefer* were warned by the men on the *Call* to keep off; because, if she remained where she was, both vessels would go aground at low water, and the canal-boat would be injured by the schooner; but the mate, who was in charge of the schooner, paid no attention to the warning. The tide was then at flood. Shortly after this, one of the hands on the *Call* went on board the *Schlaefer*, and requested the latter to breast off, so that the *Call* could have room to shift and continue her unloading; but this request was also unheeded. These occurrences took place during the absence of the captains of the respective boats. When the tide fell, the *Call* grounded, and the bottom of the basin being composed of soft mud, and sloping from the wharf, she slid down against the schooner, her rail being caught under the ends of the pine wood which projected over the side of the latter. There is some dispute as to whether the *Call* listed against the *Schlaefer*, or the *Schlaefer* listed against the *Call*; but this matters little, since it is certain that the vessels were jammed together, and that on the rise of the tide, the bow of the *Call* was kept down by the projecting deck-load of the schooner, while her stern was afloat, thus straining and twisting the *Call*, and doing other damage. By cutting off the ends of the wood, the *Call* was released, and hauled out and lower down the basin, and was not brought back to the wharf until Monday, the 10th. In the mean time she had been turned end for end, so that her after-hatch could be unloaded by the derrick, and it was then discovered that she could not take exactly her former position between the wharf and the schooner, owing to the closer proximity of the latter. The work of unloading was continued on Monday, and, at the fall of the tide again on that day, the vessels once more came together, and the schooner's anchor ripped or stove in some planks of the *Call*'s cabin. The schooner floated at high tide on Monday, and could easily have moved off, but persisted in hold-

ing on whereshe was. The claimants allege that the tug had left the schooner aground, and that those on board were ignorant of the nature of the bottom of the basin, which was uneven next to the wharf, and sloped rapidly away; that the schooner was unable to move, and, being consigned to the same wharf, had a right to stay where she was left by the tug, in order to secure the place of the Call when the latter had finished unloading; that, on the other hand, the canal-boat could readily have hauled out from the wharf before low water, and should have done so both on Saturday and Monday nights, and so escaped the damages, which were the result of her own negligence.

The testimony shows that the Schlaefer was in fault from the beginning. The Call was entitled by precedence to maintain her position at the wharf until she had finished discharging her cargo. She had been unloading for several days before the schooner came in, and had grounded at low water without suffering any injury. The Schlaefer had received timely warning to keep off, and it was her duty to have done so; but she obstinately refused to move. The excuse that she was aground, and could not change her position, is refuted by the fact that she did move a few feet on Monday, and could have gone further away had her captain been so disposed. At all events, a small outlay for the services of a tug would have put her in a place where she could do no harm to the Call. Under the customary rule of "First come, first served," the Call had possession of the wharf, and was entitled to reasonable room to work in without interference by the Schlaefer, which had timely notice to keep out of the way when the tide fell. The mud at the bottom of the basin was very soft, and would not have opposed much resistance to the moving of the schooner to a point lower down, or nearer the north side of the basin, and thus have left sufficient room for the Call. The testimony of the mate of the Schlaefer, that he received no notice to move off before it was too late for him to do so, is in direct contradiction of the libelant's witnesses. His examination was not taken until more than two years after the collision, and the lapse of time may have more or less impaired his recollection of the facts. The libelant's witnesses spoke of what was fresh in their memories, and had no motive for misrepresentation. It was the duty of the Schlaefer to take every precaution to avoid interference with, or doing injury to, the Call, especially after receiving the cautionary notices of danger. On these facts there can be no doubt of the law of the case, or that the collisions were caused by the fault of those having charge of the schooner. *The Lake*, 2 Wall. Jr. 52. There will be a decree for the libelant, with an order of reference to ascertain the damages.

YOUNG v. FOX *et al.*FOX *et al.* v. YOUNG.

(Circuit Court, E. D. Tennessee S. D. November 23, 1883.)

1. TRUSTS—RIGHTS AND DUTIES OF TRUSTEE—CORPORATIONS—MANAGER.

P. owned thirty shares of stock in a corporation of which he was general manager and director, which he sold to Y. for \$7,000, \$5,000 of which was paid. Y. then took his place in the company as manager, etc. While he was acting as such, an officer called on him with an attachment against P., and asked him if P. owned any stock in the company. He replied that he did, and pointed out the 30 shares, and gave assistance in levying on them. He gave P. no notice of the suit, but attended the attachment sale, and bought the stock for \$496. Y. having failed to pay the \$2,000 when due, F., another stockholder, who had guarantied its payment, paid it. In a suit between them as to the ownership of the stock, Y. relied entirely upon his purchase at the attachment sale, repudiating his purchase from P. *Held*, that he must be treated as holding the stock in trust for P. and F., and that, in view of his conduct, he was not entitled to have refunded the \$496 which he had paid.

2. JUDGMENT—RES ADJUDICATA.

In a former suit between Y. and F. it was adjudged that Y.'s title to the stock was superior to F.'s under his payment of \$2,000 to P., but the question of trust was not raised. *Held*, that that adjudication did not preclude F. and P. from asserting that Y. held as trustee.

In Equity. Cross-bill to declare and enforce a trust. On final hearing.

De Witt & Thomas, W. L. Eakin, and Pettibone, Warder & Evans, for complainant.

Richmond & Clark, for defendants.

KEY, J. March 5, 1883, H. G. Young filed his bill in the chancery court of the state of Tennessee, against the South Tredegar Company, alleging his purchase of 30 shares of stock in said company, attached as the property of W. H. Powell in a suit in said court by the Benwood Iron & Nail Company against said Powell. The relief sought was to have said stock transferred to Young upon the books of the company, and to prevent the payment to any one of the dividends and profits which had accrued or might accrue on said stock, and for a decree of the same to Young. On the 5th of April, 1883, H. L. Fox filed his bill in said chancery court against H. G. Young and others, alleging that Fox was the owner of said 30 shares of stock, and that Young had no title thereto, and he asked to have a decree declaring him the owner of said stock. The causes were consolidated, and found their way to the supreme court of Tennessee, in which it was determined that Young was the lawful owner of the 30 shares of stock, and entitled to have them placed to his credit on the books of the company, and to have a certificate issued therefor, and was entitled to all dividends of said shares of stock since his purchase thereof; and the cause was remanded to the chancery court, so that an account might be taken of the matured dividends declared upon the stock since Young's purchase. 2 S. W. Rep. 202. Not content
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with this decree of the supreme court, Young filed his bill in the chancery court to which the cause was remanded, alleging that Fox and one Duncan had appropriated large sums to which they were not entitled as salaries; that they had fraudulently appropriated the assets of the company; that they had fraudulently appropriated the dividends to which Young was entitled; that Fox sold the products of the company, and had charged and retained enormous commissions in bad faith and illegally, for which he should account; that these things had occurred since Young had filed his original bill, and Fox's interests in the company were attached to meet such decree as Young might obtain for dividend or other things, and for such dividends and profits as had accrued since his original bill had been filed. Said bill was answered, and Fox and Powell filed a cross-bill, in which it is alleged, among other things, that Young at the time he purchased said stock was the general agent and manager of the company, and as such had notice of the suit against Powell by the Benwood Iron & Nail Company, and concealed the fact of the suit from Powell, and Fox and Powell's attorney; that under the circumstances of the case Young must be regarded as trustee for the company, and for Powell as a stockholder therein, and holds title to the stock as such trustee. The cause was removed to the circuit court of the United States, where Young filed a plea to the jurisdiction of this court, but the court held the plea insufficient, as the removal of the cause did not bring with it the cause determined in the supreme court, but only the bill and the proceedings thereunder, filed after the case in the supreme court had been decided. Thereupon Young asked for leave to dismiss his bill, and was allowed to do so, but the court held that this step did not carry the cross-bill, but that it remained as though it were an original bill. Then Young pleaded the decree of the supreme court as a bar to the cross-bill, but this plea was held insufficient, and then Young answered the cross-bill, and the cause has been heard upon the pleadings and proof.

The record is voluminous, and the very able and interesting arguments of counsel have taken a wide range, but I shall not undertake to review these; I shall do little more than give the conclusions to which I have arrived. It may be as well to state here that after most of the proof was taken complainant Fox moved for leave to amend his bill so as to allege more minutely and specifically the circumstances and facts attending Young's relations as trustee towards the stock purchased by him, as shown by the proof under complainant's theory of the case, but the court held that under the general allegations of the trust relations in the bill this proof is competent, and therefore the amendment was unnecessary, and would result in expense and delay for no sufficient reason. It is doubtful probably whether Young should have been permitted to dismiss his bill after the cause had been removed, after defendants had answered it, and after Fox and Powell had filed their cross-bill. An earnest desire to avoid all conflict with the state court, and to escape a trial of the matters passed under the consideration of the state court, had a controlling influence in coming to the conclusion reached. When the complainant, Young, sought more than the decree of the supreme court

gave him; and the defendants took issue with him without relying on that decree, in bar or otherwise, it may be questioned whether complainant could retreat from his position so as to intrench himself behind this decree; still he was permitted to do so.

The controversy between Young and Fox in the state court was as to which had the legal title to the 30 shares of stock in dispute between them. Fox claimed that he had the title by virtue of a purchase from Powell. Young claimed title under the sale in the suit of the Benwood Iron & Nail Company against Powell. The court decided that Young had the title; that is, that the title which he had by virtue of the sale in the Benwood Iron & Nail Company case is superior to that claimed by Fox under the Powell purchase. This question is *res judicata*, and binds this court as well as the parties to the suit. In my opinion, however, this does not preclude Fox and Powell from asserting in the case pending here, that Young held the legal title to the stock as trustee, either under express or implied contract, or by reason of fraudulent conduct or concealment. The question of trust was not raised, and was not required to be raised in the case decided by the state court; and the matter of this trust is all we have to deal with in this suit, as I conceive. Fox, Duncan, and Powell had owned the entire stock of the South Tredegar Company. The stock amounted to \$30,000, face value. Powell owned \$8,000 of this stock. It was agreed on all hands that Powell should sell out to Young, and that Young should take Powell's place in the company. On the 6th of February, 1882, Young agreed to pay Powell for his stock \$2,000 cash, and gave his note for \$3,000, which was afterwards paid, and he was to pay \$2,000 more by order or draft on Fox. The cash and note, \$5,000 in all, were paid, and 50 shares of the stock were transferred to Young. The other 30 shares were held by Powell until Young should pay the remaining \$2,000. Powell, who had been general manager and director of the company, retired, and Young took his place, and was to receive not only such dividends as might be declared upon his stock, but a salary as well. His position required of him good faith and fair dealing with the interests of those whose capital had been placed in his charge for profitable management. In addition to this, his contract with Powell bound him to pay the \$2,000 he had promised. Thus situated, what does Young do? June 1, 1882, the sheriff waited upon Young with an attachment in favor of the Benwood Iron & Nail Company, and inquired whether Powell had any stock in the South Tredegar Company. Young did not tell him that he had bargained for the stock, and owed \$2,000 therefor, which might be attached, but, on the contrary, informed the officer that Powell owned the stock, gave such cheerful aid as he could in having it levied upon and hurried to a sale at the succeeding term of the court,—the term to which the suit was returnable,—without giving Powell or his attorneys any notice of the suit, as I believe, under the proof. Indeed, it appears that Young signed his name as manager, and affixed the seal of the corporation to its answer to the bill of the Benwood Iron & Nail Company, some days after his connection with the company had ceased, and when

he had no authority to act as its agent or representative, which action may harmonize with a scheme to keep the suit and the proceedings under it from going into the hands and under the supervision of any officer or agent of the company. The result of the whole matter was that Young was able to purchase property for less than \$500 for which he contracted to pay \$2,000,—property, the stock of which has, according to his own showing in his bill, which he has dismissed, grown wonderfully in value since his connection with the company ceased. The general facts in reference to the transactions indicated do not improve Young's position, but, on the contrary, aggravate it. Can a court of equity permit a party holding a trust relation, with the obligation of a personal contract resting upon him in addition, to disregard the duties of his trust, and the terms of his contract, to his advantage, and to the injury of his employer and obligee? Certainly not.

Coming to this conclusion, it is next to be determined what relief is to be given. The proof establishes the fact that when Powell sold his stock to Young, Fox undertook to see to it that Powell should be paid according to the terms of his contract with Young, and that he did pay Powell for the 30 shares of stock after Young's failure to do so. To decide that complainants should have a lien on the stock for the unpaid \$2,000 and its interest would allow Young to reap a great advantage from his fraudulent conduct, according to his estimates of the increased value of the property, and the profits of its operations. But his legal attitude here and in the state court is in antagonism to and disaffirmance, it may be said repudiation, of his contract. His effort is to hold stock for which he was to pay \$2,000 for \$496. Under these circumstances a court cannot grant him relief in defiance of his position, and in the very teeth of his legal and equitable environment. His hands are not clean. To refund to him the \$496 he paid for the stock would be to his advantage as against Fox, who paid Powell for the stock, as he had promised when the sale was made to Young. The money would be taken out of Fox's pocket to go into Young's, when Fox has kept his contract, and Young has repudiated his. Young's fraud is not constructive, or in any sense innocent. It is positive, actual, intentional, and he is entitled to nothing. I have not deemed it necessary to pass upon many of the positions argued by counsel. The view I take of the case makes it unnecessary to do so. A decree will be entered declaring that Young holds title to the 30 shares of stock in trust, but, as Powell has sold and transferred his interest therein to Fox, the title to the stock and its dividends, accretions, and profits will be divested out of Young and vested in Fox, and the books of the company will be made to conform to this decree. Young will pay the costs.

McKEY v. VILLAGE OF HYDE PARK.

(Circuit Court, N. D. Illinois. December 17, 1888.)

1. BOUNDARIES—BY AGREEMENT—FENCES—ERECTION BY TRESPASSER.

The fact that a trespasser built a fence between two tracts of land will not support an implied agreement between the owners to recognize such fence as a boundary line, where the lands are seldom used by such owners.

2. DEDICATION—BY IMPLICATION.

Where plaintiff knows, on attaining his majority, that a street has been opened and improved across his land, and such street is thereafter maintained and used by the public with his knowledge, and without objection, for seven years or more, a dedication of the land embraced in the street may be inferred by the jury.¹

3. SAME—PROVINCE OF JURY.

Where plaintiff resides in another state during the seven years, but his co-tenant resides near the land, and pays the taxes thereon for all the owners, including plaintiff, without objection to the improvement and use of the street, and the street enhances the value of the remaining lands, it is for the jury to say whether plaintiff had knowledge of the street.

4. SAME—PARTITION—APPROVAL BY VILLAGE TRUSTEES—EFFECT.

Approval by village trustees of the report of commissioners in partition proceedings to which the village was not a party, the report partitioning the land occupied by the street, will not restore to plaintiff land previously dedicated by him to the public.

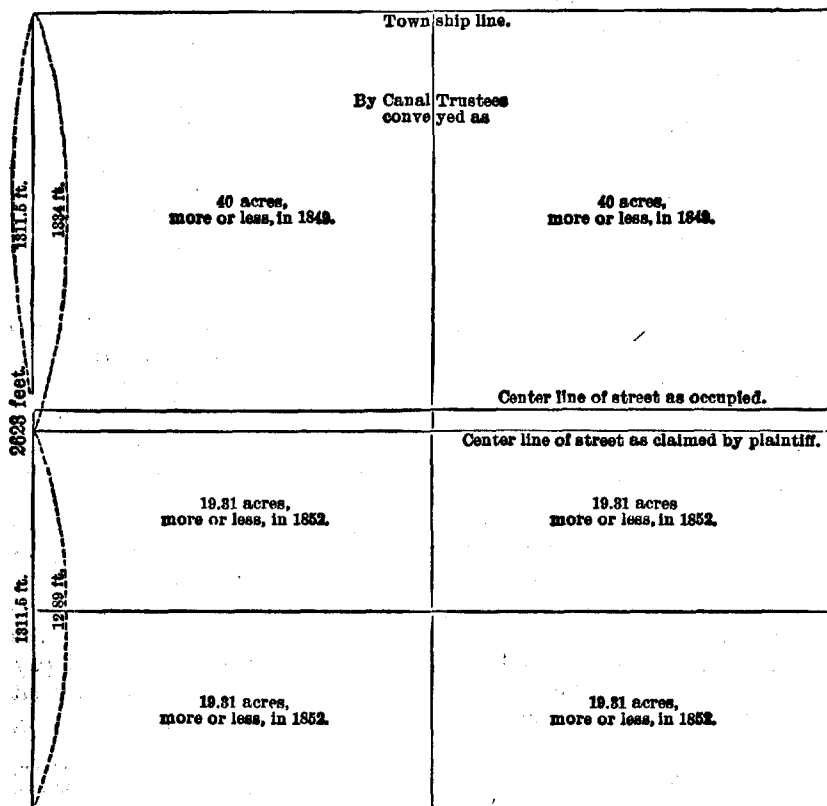
At Law.

This was an ejectment suit which involved the location of Forty-First street in the village of Hyde Park; the plaintiff claiming that the street, as laid out and occupied by the village, was placed 23 feet too far north; and the case really involved the location of the southern line of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 3, township 38 N., range 14 E., and the construction of the United States survey and government descriptions, and conveyances by the canal trustees. The defendant claimed that such southern boundary line was the center line of Forty-First street, as occupied; and the plaintiff claimed that such southern boundary line was 23 feet south of the center line of the street as occupied. Section 3 is in the north tier of the township, and when the government survey was made the shortage was put, as required by law, in the N. $\frac{1}{4}$ of the section, and the N. E. $\frac{1}{4}$ was surveyed as containing only 157 acres. The whole section was conveyed through the state of Illinois to the canal trustees. In 1849, the canal trustees sold the N. W. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of the quarter section at the rate of \$15 per acre, and issued deeds of conveyance, each in consideration of \$600, and describing the property as the quarter of the quarter, containing 40 acres, more or less. In 1852, the canal trustees sold and conveyed the south and north halves, respectively, of the south-east and south-west quarters of the quarter section, as containing 19 and a fraction acres each, more or less, and received pay in each case for that number of acres. The plaintiff here claimed that by these conveyances it was shown that the canal trustees, in conveying

¹As to what will raise a presumption of dedication of land as a street, see *Rube v. Sullivan*. (Neb.) 37 N. W. Rep. 666, and note. See, also, *City of Eureka v. Croghan*, (Cal.) 19 Pac. Rep. 485, and note.

the "north-west quarter of the north-east quarter" of the section, "containing forty (40) acres, more or less," intended to and did convey 80-157 of the W. $\frac{1}{2}$ of the quarter section; that is, the west line of the quarter section being about 2,623 feet long, the N. W. $\frac{1}{4}$ of the quarter section would extend 80-157 of that distance, or about 1,334 feet, which is 14 feet longer than a full quarter section. The defendant, on the other hand, insisted that the N. W. $\frac{1}{4}$ of the quarter meant the equal half of the W. $\frac{1}{2}$ of the quarter, and that the west line thereof would be just one-half of the west line of the quarter section itself, or one-half of 2,623 feet, which was the basis taken for establishing the center line of Forty-First street at the time it was laid out. Plaintiff also claimed that the line as claimed by him had been recognized and established by former owners by the erection of a fence. Defendant opened the street in 1873, and claimed a common-law dedication of the premises in dispute. Plaintiff admitted a dedication of the south 33 feet of the strip, according to his survey, but claimed defendant had taken 23 feet more. The plat given shows more fully the situation of the quarter section.

N. E. $\frac{1}{4}$ of Sec. 3, 38, 14,—157.24 acres.



Judge Doolittle and Henry McKey, for plaintiff.
James R. Mann and Henry V. Freeman, for defendant.

GRESHAM, J., (*charging the jury.*) The canal trustees owned the N. E. $\frac{1}{4}$ of section 3, township 38 N., range 14 E. They conveyed the N. W. $\frac{1}{4}$ of this N. E. $\frac{1}{4}$ to P. F. W. Peck, describing it in the deed as the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the section, containing 40 acres, more or less. It is admitted that on June 1, 1866, Edward C. Cleaver held the legal title to this land, and on that day he and his wife by their deed conveyed to Edward and Michael McKey, who were brothers, the south 10 acres of the tract. In 1873 the village of Hyde Park laid out and opened Forty-First street, 66 feet wide, from Grand Boulevard to Vincennes avenue, the center of which was a line equidistant from the north and south lines of the quarter section, on the theory that this was the true east and west boundary between the four quarters of the quarter section, and the true southern boundary of the McKey tract. The street thus laid out appears to have been used by the public without objection from abutting proprietors, until proceedings were commenced in the state court in 1881 for partition of the McKey tract. The decree of partition required the report of the commissioners as to subdivision to be approved by the trustees of the village of Hyde Park, which was done, as appears by the following entry on the plat: "Approved by the president and board of trustees this 8th day of September, 1882. E. W. HENRICKS, Village Clerk." This plat, thus approved, was made a part of the report of the commissioners, which the state court by its decree confirmed; but the village of Hyde Park was not a party to the suit and was not concluded by it.

Samuel S. Greeley was employed by the commissioners to make the subdivision, and on the plat already referred to certified that it correctly represented the subdivision as he had surveyed and staked it. Instead of taking a line east and west through the center of the quarter section as the true original southern line of the McKey tract, which was indicated by the center of the street, Greeley ran and staked a line 23 feet south of this, thus giving to the McKeys 23 feet of the street; and the partition and subdivision were made on the theory that this survey was correct. The land in dispute is part of this 23 feet, it having been assigned to the plaintiff as part of his share as one of the heirs of Michael McKey, who died in 1868. The plaintiff became of age in 1874, and lived at Janesville, Wis., until a year or two ago, when he removed to Chicago. Greeley gave you his reasons for refusing to recognize the center of the street as the true east and west boundary between the four quarters of the section, and I will not detain you by rehearsing his testimony on that point. You will bear in mind that the McKey 10-acre tract was taken off the south side of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and you are instructed that the canal trustees conveyed to Peck one equal fourth of the quarter section, and that no subsequent conveyances of the trustees had the effect of either enlarging or diminishing that grant; and if you believe from the evidence that the center of the street is the center

east and west line of the quarter section, then you are also instructed that it was and still is the true boundary line, and that the plaintiff is not entitled to the land described in the declaration, on the theory that the Greeley survey was correct.

But it is contended that, even if the center of the street represents the correct original line, the adjoining proprietors, by agreement, established a boundary line still further south, which was represented by an old board fence. You have heard the evidence touching that fence, and it is for you to say whether it is sufficient to establish such an agreement. We are not informed by whose authority the fence was built, when it was built, or who occupied the lands north and south at the time it was erected. You are to determine, however, what the evidence is upon this point. If the fence was built by a squatter or trespasser, when the lands were of little practical use, and were therefore neglected by the owners, that of itself would not support an implied agreement to treat the fence as a boundary line. The law calls for clear proof in support of an agreement between adjoining proprietors for the establishment of a boundary line different from the true one. I do not say that such an agreement may not be inferred from acts and conduct. For example, if two adjoining proprietors erect or maintain a dividing fence, or hold possession and cultivate land on either side of a fence for a long time, or for a considerable time, that, of itself, might warrant an implied agreement between them to make the fence the true boundary line; but in this connection you will bear in mind that Mr. Henry McKey, who is one of the children and heirs of Edward McKey, and as such inherited an interest in the McKey tract, testified that from the time the street was laid out, in 1873, until the Greeley survey, he supposed the true boundary line was the center of the street, and that the old fence did not represent the true line. It was not, he said, until Greeley informed him, in connection with the partition proceeding, the McKey heirs owned 23 feet of the street on the north side, that he thought of the old fence as the original boundary line. How far Henry McKey then and prior to that time represented the plaintiff and the other owners, you will determine from the evidence. He certainly had acted as their agent to some extent. It is admitted that he had paid the taxes on the tract, and that he knew of the laying out and improvement of the street. You will weigh all the evidence, and determine whether or not the McKeys, including the plaintiff, who became of age in 1874, knew of the laying out and improvement of the street and its use by the public, without protest or objection, until informed by Greeley that there was a mistake in the location of the south boundary line, and that they owned 23 feet of the street. Mr. Henry McKey testified that he asserted the right of the McKeys to the 23 feet of the street when street assessments were made, and protested against such assessments; but did he do that before Greeley informed him that the McKeys owned part of the street?

If you believe from the evidence that in 1874, when plaintiff attained his majority, he knew of the action of the village of Hyde Park in laying out, opening, and improving the street, and that thereafter and until the

partition suit was commenced, in 1881 or later, the street was maintained and used with his knowledge, and without objection by him, you are authorized to infer a dedication to that use of so much of the McKey tract as is embraced within the present limits of the street. The owner of land may dedicate it to the public to be used as a street, and, having once done so, he cannot recover the land thus disposed of so long as it is used for that particular purpose; and, while there can be no dedication unless it be the intention of the owner to so dispose of his property, an intention to dedicate may be inferred, if, with his knowledge and without objection, his land is improved and used for a number of years as a street. Was this street maintained, improved, and used from the time the plaintiff became of age until the partition suit was commenced, in 1881 or later, without the knowledge of the plaintiff? During this time he resided in a neighboring state, and one of his co-tenants, Henry McKey, was a practicing attorney at Chicago, made no objection to the improvement and use of the street, and paid the taxes on the McKey tract for all the owners, including the plaintiff. If it is true, as claimed, that the opening and improvement of this street materially enhanced the value of the McKey lands, and thus greatly benefited the owners of the property, is it probable that during all this time the plaintiff did not know there was such a street? Is it, or not, probable that Henry McKey failed to inform his co-tenants of action so material to their interests, if indeed they needed such information.

If you find that the village of Hyde Park acquired, as against the plaintiff, the right to the strip of land in dispute, for use as a public street, was that right lost by the action of the state court in confirming the report of the commissioners in the partition suit, and the action of the village trustees in approving the plat which was made on the basis of the Greeley survey? I have already stated that the village of Hyde Park was not a party to the partition suit, and that it was not therefore concluded by the decree of the state court; and you are now further instructed that if the plaintiff had dedicated his interest in the strip in dispute for use as a street, subsequent action of the trustees of the village, in connection with the subdivision of the McKey tract, did not have the effect of restoring to the plaintiff what he had disposed of.

Verdict for the defendant.

BORLAND v. HAVEN *et al.*

(Circuit Court, N. D. California. December 17, 1888)

1. CORPORATIONS — STOCKHOLDERS — STATUTORY LIABILITY — CONSTITUTIONAL LAW.

Section 822 of the Civil Code of California, fixing the liability of stockholders of corporations, adopted in 1876, is not in conflict with article 12, § 3, of the constitution of California of 1879, and was by it expressly continued in force.

2. SAME—COURTS—NATIONAL JURISDICTION.

New remedies afforded by state statutes will be applied, and new rights given, enforced, in the national courts. *Held*, accordingly, that an action at law, to enforce the individual liability of stockholders, under provisions of the Civil Code of California, may be maintained in the circuit court of the United States.

3. SAME—ENFORCEMENT OF LIABILITY—EVIDENCE.

In suits to enforce the statutory liabilities of a stockholder for his proportionate share of a debt of the corporation, under the Civil Code of California, testimony that would be competent in a suit against the corporation to recover such debt, to establish the demand against the corporation, is competent to establish the same against the stockholder.

4. SAME—EXTENT OF LIABILITY—ASSIGNMENT OF STOCK.

Under the Civil Code of California the liability of an owner of stock of a corporation continues until a transfer of the shares once held by him has been entered upon the records of the corporation, and this whether the stock stood on the books of the corporation in the name of such owner, or in the name of some other person, as trustee, without disclosing the name of the true owner.

5. SAME—DIRECTOR AS CREDITOR.

A stockholder, and even a director, may become a creditor of a corporation where the action is not tainted with fraud or other improper act.

6. SAME—BANKS AND BANKING—LOANS TO DIRECTORS.

Where a bank advances money to a corporation upon a director's becoming security, and the form of the security is a promissory note of the corporation made payable to the order of one of its directors, and indorsed by him to the bank, the transaction is between the corporation and the bank, and not between the corporation and the nominal payee of the note. In such case, when the note goes to protest, and is afterwards paid by the director, who is the nominal payee and the indorser, a liability accrues against the corporation for the amount paid in favor of the party so paying.

7. SAME—REINSTATING RESCINDED CONTRACT.

Where two corporations make a valid agreement, whereby an indebtedness of one corporation is extinguished, or assumed by the other, it is competent for said corporations, by mutual agreement duly made, to rescind such agreement, reinstate the liability of the corporation so discharged, and place the parties *in statu quo*; and the stockholders of the debtor corporation in such case will become personally liable for their respective proportionate shares of the liabilities so created or reinstated.

8. SAME—DIRECTORS.

Where the directors of a corporation, acting in good faith, upon the reports and representations of the duly-authorized agents of the corporation, believing them to be correct, borrow money for the purposes of the corporation, it is not necessary to show that the money so borrowed was all actually appropriated to the legitimate uses of the corporation, in order to establish an indebtedness against it, or a personal liability of its stockholders in favor of the lender of the money, or of the sureties who pay the loan.

9. LIMITATION OF ACTIONS—PLEADING AND PROOF.

The plea of the statute of limitations impliedly admits the existence of the demand, and the burden of proving a bar by the statute is on the party pleading it, as in the case of a plea of payment. *Held*, accordingly, that where a

portion of a demand is claimed to have been barred, the party so claiming must prove the specific amount; mere proof that some portion is barred, not showing the amount, is not sufficient to establish that the bar of the statute applies to any. In the case of a running account, embracing only one entire transaction or liability, the bar only attaches from the date of the last item.

10. PLEADING—TRIAL.

Where a demurrer to a complaint is by the court overruled, its sufficiency will not ordinarily be reconsidered at the trial.

(*Syllabus by the Court.*)

At Law.

This is a suit brought by plaintiff against defendants, to recover the shares, for which the defendants are respectively alleged to be personally liable, as stockholders of the Wyoming & Dakota Water Company, for moneys advanced by plaintiff to, and for the benefit of, said corporation. The answer admits that the defendant, Nichols, separately but not jointly with Haven, held 2,500 shares of the stock of said company on May 27, 1879, and from that time till the ——— day of June, 1880, without specifying the day in June, and that defendant Haven, in severalty and not jointly with Nichols, owned 2,500 shares of said stock from May 27, 1879, up to November, 1880. From the evidence, the following additional facts are found:

The Wyoming & Dakota Water Company is a corporation, organized and existing under the laws of the state of California, having its office and principal place of transacting business at San Francisco, in said state, but its field of operations in constructing, purchasing, owning, and maintaining water-ditches for supplying towns and cities with pure water and for mining and for other purposes, is in the territories of Wyoming and Dakota. Its capital stock is \$5,000,000, divided into 100,000 shares of \$50 each. Of these, on May 27, 1879, 5,000 shares were issued and stood upon the books of the corporation in the name of the defendant Haven, trustee, but defendant Nichols owned 2,500 of these shares, and defendant Haven 2,500, each in severalty. Afterwards, on April 6, 1880, this certificate was surrendered and canceled on the books, and the stock reissued in two certificates of 2,500 shares each, in the name of said defendant Haven, trustee, but the shares, so issued, were owned respectively by said defendants, Haven and Nichols, in severalty, each owning 2,500. The said shares were never afterwards transferred on the books of said corporation; but, at the time of the commencement of this suit, the said stock represented by said two certificates of 2,500 shares each, still stood in the name of said Haven, trustee, upon the books of said corporation. In the month of November, 1881, Haven delivered the certificate for 2,500 shares held by himself to one Roberts, with directions to have 100 shares transferred on the books to one Clay, for the purpose of making said Clay, who was an expert in matters of book-keeping, a stockholder, and giving him a right as such to examine the books and affairs of said company. Roberts, for his services in the matter, was to have an interest, but no definite amount was specified. Said Roberts presented said certificate to the secretary of said corporation to thus divide said certificate, and the sec-

retary having been recently appointed, and not being familiar with his duties, made an entry in the books with the view of transferring 100 shares to Clay, and leaving the other 2,400 shares still on the books in the name of said Haven, and of issuing two certificates in accordance therewith; but there was an unpaid assessment of one dollar per share upon the stock, and under the statute and by-laws of the corporation, no transfer could be made on the books of the company while there was an unpaid assessment upon it; and the president called the secretary's attention to the assessment and by-laws, and on that ground declined to sign the transfer or issue the new certificates to Clay and Haven. The incomplete attempted entry and transfer on the books was thereupon canceled, and the certificate for 2,500 shares returned to the party presenting it for division and transfer as aforesaid, thus leaving the stock standing in the name of Haven upon the books, as when first issued. What became of the certificate afterwards is not shown by the evidence. There never was any other transfer on the books of the company, and no other was ever attempted or demanded. Nichols, some time in 1880, delivered his certificate for 2,500 shares to a Mr. Honore in New York with certificates of stock in three other companies, the whole to be sold for \$20 per four shares; that is to say, \$20 for four shares, embracing one in each company. That is the last known of those shares, so far as the evidence shows. They were never transferred on the books of the corporation, or presented for transfer; and the fact of the delivery to Honore, as stated, and sale, if sale there was, was not brought in any way to the knowledge of the corporation.

The plaintiff was a large stockholder, originally having 20,000 shares of the stock, and a director in the corporation from its organization until August 12, 1880, and on August 12, 1880, he was president of the board of directors. On said August 12, 1880, he resigned his position, both as president and director, and Jules P. Cavallier was elected director in his place, and Thomas Barr as president of the board. Plaintiff was never afterwards a director or officer of said corporation. On said August 12, 1880, several directors resigned and others were elected in their place. Those elected were elected in plaintiff Borland's interest and through his influence, he having furnished them with the stock necessary to qualify them to be directors. Prior to the creation of the second and subsequent indebtedness hereinafter set out, to-wit, on June 30, 1880, 15,552 shares of the stock of said corporation were duly sold for unpaid assessments, and purchased in at said sale by the corporation, so that there thereafter remained of the stock of said corporation outstanding in the hands of the shareholders, but 84,448 shares upon which to distribute the liability for any indebtedness thereafter accruing. The said corporation had no funds for carrying on its operations other than money raised from assessments on its capital stock. On June 10, 1880, the duly-authorized superintendent of the Wyoming & Dakota Water Company, at Golden Gate, D. T., drew a draft at three days' sight on the president of said corporation at San Francisco, in favor of the Merchants' National Bank at Deadwood, for \$25,000, being for alleged in-

debtedness incurred in the business of the corporation in the construction of its works, and for the other purposes of the corporation, etc., in Dakota territory, which draft was sent by the payee to the Bank of California at San Francisco, for collection, and was duly presented to the drawee for acceptance, and accepted on June 18, and payable on June 21, 1880. A draft similar in all respects was drawn by said superintendent at the same place, payable at the same time in favor of the First National Bank of Dakota, for \$20,000, which was sent to Wells, Fargo & Co., in San Francisco, for collection, and which was in like manner on the same day presented for acceptance, and accepted payable on June 21, 1880. The corporation was without funds to meet these drafts, and was compelled to borrow. Upon application made, the Bank of California agreed to advance the money, if plaintiff, Borland, would indorse the note, or guaranty its payment, but not otherwise. Thereupon plaintiff promised to guaranty the payment upon being paid 10 per cent. per annum interest upon the money he should be required to pay upon his guaranty. A meeting of the board of directors was called to act upon the matter, and met on June 21, 1880. At this meeting a resolution was adopted in pursuance of the previous understanding between the plaintiff and the directors individually, authorizing the president and secretary to execute a note for \$45,000, the amount of the two drafts, payable to the order of A. Borland, A. Hemme, and R. N. Graves, at the Bank of California; the resolution reciting that it was "in order to settle the indebtedness of the company to the Bank of California." The note was accordingly executed and the money obtained with which the drafts were paid. This note went to protest, and was afterwards paid, with interest, by plaintiff, Borland, on August 31, 1880, the amount of interest being \$887.50. Notarial fees for protest, \$5. At the time of this payment, plaintiff, Borland, had ceased to be a director in the corporation. On or about September 26, 1880, plaintiff, Borland, paid and took up in like manner on behalf of said corporation a draft of the superintendent of the Wyoming & Dakota Water Company, dated Golden Gate, Dak., September 10, 1880, in favor of the First National Bank of Deadwood, on the president of said company at San Francisco for \$6,000; and on or about November 1, 1880, another similar draft drawn at the same place, in favor of the same party, dated October 1, 1880, for \$3,500. These drafts were drawn for moneys represented by the superintendent and believed to be used in the business and for the purposes of the corporation, and they were afterwards recognized by the board of directors as properly drawn and paid. Plaintiff, Borland, also paid, on behalf of the said corporation to Messrs. Garber & Thornton, for legal services rendered to said corporation, Wyoming & Dakota Water Company, in the latter part of 1879, and fore part of 1880, in litigating the right and title of said corporation to the waters of certain streams appropriated to their use as hereinafter stated, and for other legal services relating to the business of the corporation, the sum of \$6,854.15. The moneys so advanced by plaintiff and paid on behalf of said corporation to Messrs. Garber & Thornton, were paid at different times as their services were

rendered from August or September, 1879, to August, 1880. The Father de Smet Consolidated Gold Mining Company was a corporation organized and existing under the laws of the state of California, having its principal business office in San Francisco, in the state of California. Its object and its business was to carry on gold mining operations in the said territories of Dakota and Wyoming. It was the first organized of the two corporations herein mentioned, and was a successful and dividend-paying corporation. The plaintiff, Borland, owned 48,000 of the 100,000 shares of the stock of the Father de Smet Company, purchased mostly from the defendants, Haven and Nichols. From the organization of the Wyoming & Dakota Company, the stockholders were identical or nearly so with those in the Father de Smet Company, until the stock in the latter became somewhat scattered. The offices of the two corporations were in the same place in San Francisco, and the same party, Theodore Widman, was secretary for both corporations from the beginning until after the occurrence of the transactions which constitute the subject matter of this suit. Plaintiff, Borland, was a director in the Wyoming & Dakota Company until he resigned on August 12, 1880, as hereinbefore stated. At the same time he was also a director in the Father de Smet Company till August 12, 1880, when he resigned his position as a director in that company, and another in his interest was elected in his place. On the same day one other director resigned and another was elected in his place, through Borland's influence and in his interest, Borland having furnished the stock necessary to qualify both parties so elected to be directors.

Before and on August 20, 1880, defendant George D. Haven was a director in the Wyoming & Dakota Water Company, and he so continued a director in said company till he resigned said position at a meeting of said board of directors, held on November 12, 1880, at which meeting he resigned his position as director, and Charles H. Cook was duly elected in his stead. Said defendant Haven was also, during the same period, and longer, a director in the Father de Smet Consolidated Gold Mining Company. The two companies, having common stockholders, and in part, at least, common directors and officers, worked in harmony. The Wyoming & Dakota Water Company was without funds or resources to construct its canals or carry on its business except such as were derived from assessments upon its stock, and the Father de Smet Company advanced large sums of money from time to time to said company, which were expended in constructing the water-ditches or canals and other works of said Wyoming & Dakota Water Company; and when the first two assessments of the stock of the latter company were paid, the moneys so paid on assessments were paid over to the Father de Smet Company upon the advances made as aforesaid, but the assessments collected were insufficient to pay all the advances so made from time to time. Early in the month of August, 1880, or before, the Father de Smet Company refused to advance any more money, and demanded a repayment of the balance due on prior advances, which then amounted to about \$90,000. A plan of settlement was suggested, and in pur-

suance thereof, at a meeting of the directors of the Wyoming & Dakota Water Company, held on August 12, 1880, after the resignation of plaintiff as director, as aforesaid, a resolution was unanimously adopted providing for conveying to the Father de Smet Company all the property of said Dakota Water Company upon the terms that, upon the execution of such conveyance, the Father de Smet Company should assume and agree to discharge all the liabilities of the said Wyoming & Dakota Water Company, amounting to \$150,000, whether the same should be more or less, and make and deliver to said latter company the negotiable promissory notes of said Father de Smet Company,—one payable in 90 days after August 13, 1880, for \$100,000 gold coin, and the other, for a like amount, payable 6 months after August 13, 1880; and should further discharge said water company from all claims, demands, and liabilities by reason of any indebtedness arising from advances and payments already made by the Father de Smet Company to or on account of said water company, and authorizing the president and secretary to execute and deliver such conveyance on the performance by the Father de Smet Company of the conditions indicated. On the same day, August 12, 1880, the directors of the Father de Smet Company met, and after the resignation of plaintiff, Borland, as director, and the election of his successor, as hereinbefore stated, said board passed unanimously a resolution, the counterpart of that hereinbefore cited, authorizing the purchase and acceptance of the conveyance of the entire property of the Wyoming & Dakota Water Company, and the execution of the notes and discharge of the latter of all of its prior liabilities, and directing its president and secretary to receive the conveyance and execute and deliver the proper notes and other acquittances and papers. In pursuance of these resolutions the corporations, respectively, by their presidents and secretaries, executed and duly delivered and exchanged the conveyances, notes, releases, acquittances, and papers provided for. Eight days thereafter, on August 20, 1880, the board of directors of the Wyoming & Dakota Water Company held another meeting at which the defendant George D. Haven, being a director, was present and acted as a director, at which meeting a resolution was, on motion of said defendant Haven, unanimously adopted, which, after reciting that the said purchase and conveyance of the property of the Wyoming & Dakota Water Company, and assumption of the debts and discharge of the liabilities for advances to said company by the Father De Smet Company, and the execution of the several notes and discharges by the latter corporation to the former, as provided by the said resolutions of said corporations, respectively, passed August 12, 1880, were not satisfactory to the stockholders of the Father de Smet Company, rescinded and annulled the said several resolutions of August 12th and the transactions had in pursuance thereof, and placed the said parties *in statu quo*. It authorized the president and secretary to receive a reconveyance of the property before conveyed as aforesaid, and upon such receipt to deliver up the notes and other papers received under the arrangement provided for in said prior resolutions. On the same day, August 20, 1880, the board of directors of the Father de Smet Company met, the defendant George

D. Haven being a director, and present and acting as one of the directors, and at said meeting, on motion of John McGillivray, seconded by said defendant George D. Haven, a corresponding resolution was passed rescinding and annulling the said resolutions of August 12th and all action had under them; and, on motion of said defendant Haven, a further resolution was unanimously adopted to the effect that the reconveyances, exchange of documents, rescinding said action, and canceling the said notes be conducted in accordance with the advice of John Garber, attorney at law. In accordance with these resolutions the Father de Smet Company, on the same day, said August 20, 1880, reconveyed to the Wyoming & Dakota Water Company all the said property before conveyed by the latter to the former, and the Wyoming & Dakota Water Company, in consideration thereof, and of its promise, surrendered to the Father de Smet Company all the notes, releases, acquittances, and papers received from it, and all were canceled, and the whole transactions were thereby rescinded and annulled, and the parties by mutual agreement, placed *in statu quo*. Afterwards, on November 12, 1880, there was held another meeting of the board of directors of the Wyoming & Dakota Water Company. At said meeting, after receiving and accepting the resignation of defendant George D. Haven, and the election of his successor, the said board passed unanimously a resolution that said company execute and deliver to the Father de Smet Mining Company, a negotiable promissory note, for the sum of \$90,787.03, said resolution containing the recitation, "said sum being the amount of the existing indebtedness due from the company to the Father de Smet Consolidated Gold Mining Company," said note to be made payable to said company, or order, 24 days after date, without grace. The president and secretary were thereby duly authorized to execute said note in the name of the corporation, affix the corporation seal thereto, and deliver it to said Father de Smet Company. This note was for advances made to the said corporation before the said transactions under the said resolutions of August 12, 1880. In pursuance of this resolution a note was afterwards duly executed in the name of the Wyoming & Dakota Water Company and delivered to the Father de Smet Consolidated Gold Mining Company, which note is in the words and figures following:

"\$90,787 $\frac{3}{100}$

SAN FRANCISCO, Nov. 12th, 1880.

"For value received, twenty-four days after date, without grace, the Wyoming and Dakota Water Company promises to pay to the Father de Smet Consolidated Gold Mining Company or order, the sum of ninety thousand seven hundred and eighty-seven and $\frac{3}{100}$ dollars.

[Signed]

{ Seal of
{ Company. }

"WYOMING AND DAKOTA WATER COMPANY,

"By THOMAS BARR, President,

"THEODORE WIDMAN, Secretary."

At a meeting of the board of directors of the Father de Smet Gold Mining Company, also held on the 12th day of November, 1880, a resolution was unanimously passed authorizing the sale, indorsement and transfer of said note and any and all right of action arising thereon in favor of the said payee, to said Borland, in consideration of the payment of the amount named in the note by plaintiff Borland, and in pursuance

of said resolution, the said Borland having paid the said sum named therein to the said Father de Smet Company, the said note was duly indorsed, assigned and delivered to said Borland in pursuance of the provisions of said resolutions. Said Borland paid this money and took the assignment of the note November 15, 1880. Said payment was made by said Borland on behalf of said Wyoming & Dakota Water Company, in pursuance of an understanding before that time had with the trustees of said company, that he should advance the money for the purpose, and receive 10 per cent. interest for the money so advanced. Before the payment of said money so advanced, but after the indebtedness had accrued said Borland had sold to Mr. J. B. Haggin all his interest in both the said Wyoming & Dakota Water Company, and the Father de Smet Consolidated Gold Mining Company. The right to the water of certain streams taken up and appropriated by the Wyoming & Dakota Water Company for the purposes of the corporation and for the conveyance of which to the place of sale and use, it constructed ditches at large expense, was disputed by other parties, and in a suit vigorously litigated to determine the right and title to those waters, a judgment was rendered against the said corporation some time in August, 1880, which greatly reduced the value of its property, and rendered the stock nearly or quite worthless. Had the corporation been successful in this suit, and sustained its title to the water, it would have possessed one of the most valuable properties in that region of country. After this judgment no further assessments were paid, and no further advances of money made by the Father de Smet Company. At a meeting of the board of directors of the Wyoming & Dakota Water Company held at the office of the company on February 1, 1881, a resolution was unanimously and duly passed in the words and figures following, to-wit:

"Whereas, the Wyoming and Dakota Water Company is indebted to A. Borland as follows, to-wit: *First*, upon a note made by said company to the Father de Smet Consolidated Gold Mining Company, dated November 12, A. D. 1880, payable 24 days after date, for the sum of \$90,787. $\frac{93}{100}$ (ninety thousand seven hundred and eighty-seven $\frac{93}{100}$ dollars,) indorsed by said Father de Smet Mining Company without recourse, upon which there is this day due principal and interest \$92,365.77. *Second*, for moneys heretofore paid by said A. Borland for legal services rendered said company, the further sum of \$6,854.16. *Third*, for the overdrafts of said company upon the Bank of California for the sum of \$9,829.83, which said Borland has agreed to pay and this day pays. Said three several sums amounting this day to \$109,049.76. Now therefore, resolved, that this day the said Wyoming and Dakota Water Company execute and deliver to said Borland, its promissory note, due and payable ten days after date for the sum of \$109,049.76, with interest thereon from date until paid at the rate of ten (10%) per cent. per annum and the president and secretary of this company are hereby authorized and directed to execute said note in the name of, and for and on behalf of this company, and the secretary to affix the official seal of the company thereto."

The said sum of \$109,049.76, indebtedness of said corporation to said Borland mentioned in said resolution is made up of the several sums paid and advanced on the drafts for \$6,000, the draft of \$3,500, the sum of \$6,854.16 attorney's fees paid to Messrs. Garber & Thornton, hereinbe-

fore mentioned, and the note from the Wyoming & Dakota Water Company to the Father de Smet Consolidated Gold Mining Company for \$90,787.03, paid by plaintiff Borland as hereinbefore in the finding of facts stated, and the interest due on said several sums so paid. In pursuance of the authority conferred by the foregoing resolution, a negotiable note for the amount specified as being due was duly executed and delivered to plaintiff, Borland, on said 1st day of February, 1881. The indebtedness from the Wyoming & Dakota Water Company to the Father de Smet Company for moneys advanced as hereinbefore stated, the balance of which is included in this note, arose and accrued while said Borland was a stockholder in said Wyoming & Dakota Water Company. Prior to said February 1, 1881, and to the passing of said resolution and making of said note, said plaintiff Borland had disposed of all his interest in both corporations to J. B. Haggin. On May 17, 1881, the sum of \$11,219.13 was paid and credited on said sum of \$109,049.76 due as aforesaid on February 1, 1881, and on August 18, 1881, the further sum of \$27,455.90 was paid and credited on said sum and duly applied in part payment thereof. No other or further sums have been paid upon the indebtedness hereinbefore set out, and the balance thereof is now due, together with interest on said sum of \$45,000 at the rate of five-sixths of 1 per cent. per month and interest on the balance of said second sum of \$109,049.76 at the rate of 10 per cent per annum, said sums now due to said plaintiff from the Wyoming & Dakota Water Company, aggregating the sum of \$214,855.46 in United States gold coin, on this 31st day of December, 1888. Said plaintiff Borland, before the maturity thereof, indorsed, transferred and delivered said note for \$109,049.76 to one Samuel McMasters, and the said McMasters as such indorsee and assignee on the 17th day of March, 1881, commenced a suit thereon in the district court of Lawrence county, territory of Dakota, against the said Wyoming & Dakota Water Company, the maker thereof, to recover the amount due on said note, in which suit a judgment was duly entered on April 23, 1881, for the sum of \$111,506.71. Executions were subsequently issued upon said judgment, and the property of said defendant sold and the net proceeds thereof at said sale applied on said judgment in part satisfaction thereof, the said two several payments of \$11,219.13 and \$27,455.90 hereinbefore mentioned as credited as payments on said note, being the said net proceeds of the sales of the property of said company hereinbefore set forth. The said note was held by said McMasters and said suit brought in his name for the use and benefit of said plaintiff, Borland, as the real owner thereof, and after said judgment and executions, the said judgment and the balance remaining due thereon were duly assigned to said Borland by said McMasters and at the commencement of this suit, said Borland was the real and *bona fide* holder thereof, and entitled to the moneys due thereon. During all the time while the transactions here in question were occurring, the said Wyoming & Dakota Water Company had superintendents in charge of its works and operations in the said territories of Wyoming and Dakota, who were severally duly authorized by resolutions of the board of trustees duly passed, to act as its agent in the construction of its works, and the

management of its affairs in said territories, and said agents in accordance with their prescribed duties, reported monthly to the board of trustees of said corporation at San Francisco the work performed, the character and amount of expenditures on behalf of the corporation, the liabilities incurred, etc., and as authorized, drew their drafts from time to time on the president of the corporation at San Francisco for moneys to meet the expenses thus incurred, in the manner hereinbefore indicated with respect to the several drafts in question, and these reports were accepted as correct and acted upon by the board of directors, and formed the basis of the entries in the books of the corporation upon this subject, the said directors having made no actual personal inspection and having no actual personal knowledge of the operations of their superintendents, except that upon one occasion plaintiff, Borland, visited the region of the operations of the corporation, and made a general, extensive inspection of the works, passing over and examining 10 or 12 miles on each end of the ditch or canal of the corporation; and the transactions now in question and all other transactions by the board of directors of said corporation respecting the affairs of the corporation in said territories were based upon the said reports and other information received from their said superintendents and agents and such information as said Borland obtained in his said tour of inspection.

There was due and owing to plaintiff, Borland, from said corporation the Wyoming & Dakota Water Company upon the indebtedness alleged in the cause of action in the complaint herein first stated, on the 31st day of December, 1888, principal and interest, the sum of \$132,351.36 in United States gold coin, and there was due and owing to plaintiff, Borland, from said corporation on said 31st day of December, 1888, upon the indebtedness alleged in the cause of action second in the complaint herein stated, principal and interest, the sum of \$82,504.10 in United States gold coin, and the total indebtedness of said corporation to plaintiff on said 31st day of December, 1888, was, and is, the sum of \$214,855.46 in United States gold coin. At the time when the indebtedness first in said complaint stated was incurred by said corporation the Wyoming & Dakota Water Company, the total number of shares of the capital stock of said corporation issued to and held by stockholders of said corporation liable to contribute for and on account of the debts of said corporation and for said indebtedness was 84,448, and at the time the indebtedness second in said complaint stated was incurred by said corporation the Wyoming & Dakota Water Company, the total number of shares of the capital stock of said corporation issued to and held by stockholders liable to contribute for and on account of the debts of said corporation and for said last-mentioned indebtedness was 100,000 shares.

Geo. W. Towle and John Garber, for plaintiff.

McAllister & Bergin, for defendant.

Before SAWYER, Circuit Judge.

SAWYER, J., (*after stating the facts as above.*) The principal question presented on the facts as found in this case, is, whether the defendants Haven and Nichols are personally liable to plaintiff, respectively, for a

share of the indebtedness of the Wyoming & Dakota Water Company paid by said plaintiff in the manner stated, proportionate to the amount of stock held by them in severalty, as compared with the whole amount of stock liable to contribute. Section 322 of the Civil Code of California, as amended in 1876, provides that—

“Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities, as the amount of his stock, or shares owned by him, bears to the whole of the subscribed capital stock, or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. * * * If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt, and if an action has been brought against him upon such debt, it shall be dismissed, as to him, upon his paying the costs, or such portion thereof as may be properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred, and such liability is not released by any subsequent transfer of stock.”

Thus, taking the several provisions together, a stockholder is personally liable for his proportionate share of each debt of the corporation and of each debt, only, contracted while he is a stockholder. This section was in force at the time of the adoption of the amended constitution in 1879, and it has never since been changed. Article 12, § 2, of the constitution of 1879 is as follows: “Dues from corporations shall be secured by such individual liability of the corporators, and other means as may be prescribed by law.” And section 3 of the same article, provides, that “each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him, bears to the whole of the subscribed capital stock or shares of the corporation.” Thus the section of the Civil Code, taking its provisions together, is precisely like this provision of the constitution, except by express provision, no one creditor can collect more than the share of his own particular debt of the stockholder, whether he has paid his share of the debts to other creditors, or not; but the liability in the aggregate of the stockholders is precisely the same under each, since the aggregate of the stockholder's share of liabilities to each creditor is equal to his share of the liabilities upon the whole debt or liabilities of the corporation. It is urged that the constitution on this subject is not self-executing, but that it requires legislation to give it effect; that section 322 of the Civil Code, is inconsistent with section 3 of article 12 of the constitution of 1879, and is, therefore, under section 1, art. 22, repealed by it; and, since there has been no other legislation on the subject, since the adoption of the new constitution, to give the constitutional provision effect, that this right of creditors to enforce the personal liability of stockholders has lapsed. Section 1, art. 22, referred to provides “that all laws in force at the adoption of this constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the legislature.” If, therefore, the provisions of section 322 quoted are not inconsistent with the provis-

ions of article 12, § 3, they are, in express terms, continued in force. As we have already seen, they are clearly not inconsistent, but in all respects in harmony. Under both, the stockholder is liable in the aggregate for his proportion of all debts and liabilities of the corporation contracted while he was a stockholder, and no more. The constitution does not provide how the liability shall be enforced, whether against each stockholder separately, or all jointly, while the statute goes further, and does so provide for its enforcement, and that provision is not inconsistent with the provision of the constitution, but in the end it reaches the same result. *Larrabee v. Baldwin*, 35 Cal. 156, and other cases affirming it, establish this point. Were section 322 to be formally re-enacted now by the legislature, would anybody pretend that it would be inconsistent with the constitutional provision now in question in such sense as to render it unconstitutional and void? I apprehend not. If it would not be inconsistent, and, therefore, unconstitutional, and void, if formally re-enacted, it cannot be inconsistent, and, therefore, repealed now. If it could stand with the constitution upon re-enactment, it can stand with it now. Not being inconsistent, as we have seen, it is in express terms continued in force. Section 36 of the old constitution provided, that "each stockholder of a corporation shall * * * be individually and personally liable for his proportion of all its debts and liabilities." This, as construed in *Larrabee v. Baldwin*, *supra*, and other cases affirming it, although couched in somewhat different language from that of section 3, art. 12, of the new constitution, is in effect identical with the old, except that the new, in terms limits the liability of the stockholders to those debts contracted while he is a stockholder, and the old does not. Yet in the case cited and in other cases the courts so construed the old, although there were no such express terms of limitation. Section 322 of the Civil Code, was, certainly, not in conflict with section 36 of the old constitution. If its provisions are not in conflict with the old constitution on this point, they, certainly, are not inconsistent with those of the new. They simply provide for carrying the constitutional provisions into effect—for executing them. The defendants are, therefore, liable, personally for their respective shares of the indebtedness unless exonerated or discharged therefrom, on some other ground.

It is insisted, that the only remedy in this case is, necessarily, in equity, as all the stockholders are interested and personally liable for their respective shares, and are necessary parties, and numerous authorities are cited on the point. But the cases cited arose where there was no statute expressly giving a remedy at law. Section 322 of the Civil Code of California, still in force, as we have seen, provides, "that any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim, payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be entered against each in conformity therewith." This is mere procedure, in an action at law, especially given by the statute. It is not an equity or an admiralty case, and is general in its application so section 914, Rev. St. U. S., applies; or if it confers a new right and affords a new remedy.

to enforce it, a right and remedy so afforded will be enforced, in a proper case in the national courts. *Ellis v. Davis*, 109 U. S. 500-503, 3 Sup. Ct. Rep. 327; *Bank v. Francklyn*, 120 U. S. 747, 756-758, 7 Sup. Ct. Rep. 757. The question as to the sufficiency of the amended complaint was disposed of, whether, properly or not, on demurrer, and the ruling is adhered to.

I have no doubt that the payment of the several sums of money by plaintiff Borland, for the benefit of the Wyoming & Dakota Water Company under the circumstances detailed in the statement of facts, constitute debts, or liabilities of the corporation within the true intent and meaning of the constitution, and statutes for which stockholders of corporations are rendered personally liable, to the extent of their due proportion. That a stockholder, and even a director, may, in a proper manner, become a creditor of a corporation is settled. *Oil Co. v. Marbury*, 91 U. S. 587; *Hotel Co. v. Wade*, 97 U. S. 13; *Railroad Co. v. Spreckles*, 65 Cal. 193, 3 Pac. Rep. 661, 802; *Hallam v. Hotel Co.*, 56 Iowa, 178, 9 N. W. Rep. 111. See, also, *Harts v. Brown*, 77 Ill. 226; *Sanborn v. Lefferts*, 58 N. Y. 179; *Brinham v. Coal Co.*, 47 Pa. St. 43-49; *Hope v. Valley Co.*, 25 W. Va. 789; *Cook, Stocks*, §§ 660, 663; *Duncomb v. Railroad Co.*, 84 N. Y. 190, 88 N. Y. 1; *Harpending v. Munson*, 91 N. Y. 650. The note for \$45,000 does not, in my judgment, come within the principle of the decision in *Wilbur v. Lynde*, 49 Cal. 290, and other cases cited by the defendant, conceding, for the purposes of the argument, that they were correctly decided. The transaction was, in fact, between the Wyoming & Dakota Water Company and the Bank of California, not between the corporation and Borland. The bank declined to advance the money to take up the two drafts on the corporation, one for \$25,000, and the other for \$20,000, unless Borland would guaranty the payment of the loan, but agreed to advance it upon his guaranty. Now the form of the note was simply the mode adopted to effect this guaranty. The note was made payable, in form, to Borland Hemme and Graves and indorsed by them, and delivered to the Bank of California, this simply being the ordinary form of such transactions with banks. The transaction was between the Bank of California and the corporation, and not between the corporation and the nominal payees of the note. The consideration of the note was advanced by the bank to the corporation, on the note and indorsement, and not by, or to, Borland, or on the unindorsed note. The transaction is substantially, so far as the corporation and Borland are concerned, the same as if the note had been jointly made to the bank, as payee, by the corporation and Borland, as joint makers, instead of its being made payable, in form, to Borland, and indorsed by him to the bank. The money was not advanced on the note, but on the indorsed note. The note went to protest, and Borland afterwards, paid it, with the interest, on his guaranty, after he ceased to be a director, and the liability of the corporation to him arose from this payment, as guarantor, and not upon any advances made to him, or by him on the note as payee of the note. I have no doubt, that this note, taken in connection with the explanatory oral testimony, and the drafts taken up with the proceeds, are en-

tirely competent to show exactly what the transaction in its entirety was. What the effect of the transaction, in its entirety, upon the rights of the parties, was, is another question. The facts constituting this entire transaction could only be proved by the kind of testimony introduced, oral testimony in connection with the notes and the record evidence, of the action of the directors, and the facts as set forth in the statement, are, clearly, established by the evidence.

Defendants insist that they were not stockholders at the time the indebtedness in question was incurred, and for that reason, that they were not personally liable. Section 324 of the Civil Code of California provides, that "shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor or his attorney, or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the numbers or designation of the shares, and the date of the transfer." And the rules and regulations of the company forbade the transfer of the stock on the books of the company, while there were any unpaid assessments existing upon it. Under the provision of the statute cited, so long as a transfer of stock, however absolute in terms, properly remains unrecorded on the books of the corporation, the party in whose name the stock stands, as between himself and the corporation, or its creditors, must for all purposes be deemed the owner of the stock. *People v. Robinson*, 64 Cal. 373, 1 Pac. Rep. 156; *Irons v. Bank*, 27 Fed. Rep. 595; *Price v. Whitney*, 28 Fed. Rep. 297; *Evans v. Bailey*, 66 Cal. 112, 4 Pac. Rep. 1089. See, also, *Cook, Stocks*, § 262; 2 Mor. Priv. Corp. § 856; *Tayl. Corp.* 748; *State v. Ferris*, 42 Conn. 560. *Fowler v. Ludwig*, 34 Me. 455; *Bank v. Cutler*, 49 Me. 315; *Dane v. Young*, 61 Me. 160; *Shellington v. Howland*, 53 N. Y. 371. But, in this case a transfer could not be lawfully made upon the books for the reason, that there was an unpaid assessment upon the stock of one dollar a share, at the time of the alleged assignment of the certificates of stock; and for that reason, the then president of the company, Thomas Barr, refused to sign the transfer of the shares held in his own right by Haven or to permit the entry inadvertently partly made by the secretary to remain on the books, and the incomplete entry was canceled thereon. But this transfer, such as it was, for the purpose of putting 100 shares in the name of Clay, was not made till November, 1881. The inchoate transfer on the books is dated November 29, 1881, and Roberts testifies that the certificate was handed to him but a few days before this effort to have a transfer made on the books and the secretary testifies that it was made very soon after receipt of the certificate. Although Haven has an indefinite idea, that he delivered the certificates to Roberts in December, 1880, it is, entirely clear, from the evidence, that this was not done till some time in November, 1881, and the indebtedness in question all accrued before February 1, 1881, long before the pretended disposition of the stock, and the liability of Haven would not have been affected had the transfer attempted on November 29, 1881, been completed and been valid. There never was any attempt to transfer Nichols'

stock upon the books of the corporation, nor was the fact that he had actually assigned his certificate, if he ever did assign it, as to which I have grave doubts, ever been brought to the attention of the corporation or its officers. Both Haven and Nichols, therefore, were stockholders in the corporation, when the indebtedness accrued, in such sense, as to render them personally liable, under the constitution and statutes, for their due proportion thereof.

It is next contended that the conveyance of the property of the Wyoming & Dakota Water Company to the Father de Smet Company, and the release of the former from all indebtedness to the Father de Smet Company by the latter, as set forth in the statement of facts, extinguished all indebtedness for the advances before that time made by the Father de Smet Company, and that the liability could not thereafter be reinstated, as against a stockholder without his consent, whatever might be the case with reference to the corporation. If it was competent for the Wyoming & Dakota Water Company to convey all its property to the Father de Smet Company, and for the latter, in consideration thereof, to release all prior indebtedness for all advances made, and to execute in addition thereto in favor of the former company two valid promissory notes for \$100,000 each, it is not apparent to me, why the transaction, by mutual agreement, might not be reversed, and the property reconveyed, upon a restoration of the consideration received, the liability revived, or new liability created, and the parties placed *in statu quo*. The transactions are of precisely the same character, and if it was competent for the two corporations to make the first transaction, it is not apparent to my mind why they did not have the power to make the second. The property conveyed by the Wyoming & Dakota Water Company was the kind of property, which it was organized to obtain, manage and enjoy; and, having conveyed it away, leaving nothing of the kind with which to carry on the business for which it was organized, it was, certainly, authorized to purchase other property of the kind, with the same consideration which it received for the property sold, and if it could legally purchase other property of the kind, why not repurchase, for the same consideration, that before held, sold and conveyed? There can be no doubt, I think, that it was entirely competent for the Wyoming & Dakota Water Company to repurchase this property from the Father de Smet Company, and create a liability for moneys as a part of the consideration, and give its note therefor so as to be binding upon the corporation. If so, then the liability thus created against the corporation being valid as against the corporation, it must, necessarily, be valid against the stockholders of the corporation; for the constitution and statutes expressly make the stockholder personally liable for his "proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder." There can be no such thing as a valid debt, or liability against a corporation, contracted while a party is a stockholder, without that stockholder being at the same time personally liable for his proportionate share. If therefore, it was competent for the corporation to rescind their agreement by a contract, valid as to the corporators, and place the corporation *in statu quo*, or to create a new but similar liability, that would

be binding upon the corporation, that act must, necessarily be equally binding upon a party who at the time was a stockholder in the corporation. At the time of these two transactions, both defendants were stockholders. The transactions, I have no doubt, were valid and binding upon the two corporations, and created corresponding corporate liabilities; and being so, the stockholders were also liable for their appropriate share. But more than this, these transactions were not without the assent of these defendants. The stock stood in the name of Haven as trustee, but he held the equitable, as well as the legal, title to 2,500 shares, and the other 2,500 shares he held as trustee for Nichols. He was not only a stockholder, but he was at the time of these transactions, a director in both companies. He attended the directors' meeting in person, of the Wyoming & Dakota Water Company, as director, and acted as such, and it was on his motion that the resolution rescinding the contract between the two corporations, whereby one conveyed its entire property to the other, and in consideration whereof all indebtedness of the party so conveying before executing was released. And this was not all. He, also, on the same day, attended the meeting of the Father de Smet Company as director, and acted as such, and it was on the motion of another director, seconded by himself, that the corresponding resolution was, unanimously, passed by that corporation, rescinding the former transaction. So that, he directly assented, as a director, and stockholder also, in both companies to the contract rescinding the former transaction, reviving the liability of the Wyoming & Dakota Water Company to the Father de Smet Company and placing the parties *in statu quo*. Indeed since the stockholders of the Father de Smet Company were the dissatisfied ones, as shown by the recitals in the resolution, it is not improbable that he was himself one of the parties anxious to rescind. However this may be, it does not now lie in his mouth to say that this liability could not be reinstated in such sense as to bind a stockholder, without his assent. He is estopped from setting up such a pretense. I have no doubt, therefore, as to the validity of this proceeding, and that the defendant's personal liability continues.

With reference to the books of the corporation, none were introduced of the character, or for the purpose shown in the case of *Neilson v. Crawford*, 52 Cal. 248, cited by defendants. The ledger and day-book kept by a clerk were not introduced to show charges against the corporation, nor were they introduced at all. The only books introduced were the record of the stock transfers to show that defendant's stock had not been transferred on the books, and the records of the proceedings of the board of directors at their various official meetings, to show what the official action of the directors and board was at those meetings. Those records were, certainly, competent to show what the official action of the board of directors was. Indeed it was the only competent evidence for that purpose. What effect that official action had upon the rights of the parties, is quite another question. The directors, are, certainly, the agents of the stockholders, elected by them, and acting as such under their authority. They are not mere clerks of the corporation, performing ministerial duties only. The records are open to the inspection of the stock-

holders, and if the directors, representing a majority of the interest of the stockholders abuse their trust, the statute affords a remedy to the minority wronged by their action. But no such abuse has been alleged in the answer, or shown by the evidence in this case, and the defendant, Haven, was a director himself, as well as a stockholder.

Nearly, if not all of the evidence introduced in this case by plaintiff was objected to by defendants, and taken under objection and exception to be considered and ruled upon by the court in the light of all the testimony, when the whole case should be before it. One part of the testimony often supplements and throws light upon and illustrates the other. All oral testimony to establish the advance of money by the plaintiff for the benefit of the corporation, was objected to because the matters ought to be of record, and the record would be the best evidence; and, when record evidence was offered, it was objected to because, although it might be competent to establish a liability against the corporation, it is not competent to affect the personal rights of a stockholder of the corporation. Under the principles insisted upon by defendants, I apprehend that it would be very difficult to establish the personal liability of a stockholder to a creditor of the corporation, and that this security or liability provided by the constitution and statutes, would be wholly illusory. In my judgment it is perfectly competent to show by the official record of the action of the board of trustees duly assembled, that for instance A. B. was by resolution unanimously passed, duly appointed and authorized to act as superintendent of the corporation and general manager of its affairs, in Dakota and Wyoming territories, and by parol evidence that the corporation had property in each of those territories, and that A. B. did in fact take the charge and management of its affairs in those regions in pursuance of said appointment; that he in fact made monthly reports of his operations and expenditures in the construction of the ditches and works of the company in those territories, there being no question as to the specific contents of those reports; and that he drew drafts upon the said corporation at San Francisco for moneys required for his operations; that the directors received and acted upon those reports as correct, and in fact paid such drafts, and that it is competent in corroboration of this oral testimony, and to show the dates, amounts, acceptance, etc., to introduce the drafts themselves, upon proper proofs of their genuineness; that it is competent to prove by oral testimony, that the corporation had no money with which to take up the drafts, as they became due, and it was necessary to borrow money for the purpose; that upon negotiation with a bank for a loan of money, it was ascertained that the money could not be got on the note of the corporation alone, but could be had upon the note of the corporation indorsed or guarantied by the plaintiff; and that this condition of things was brought to the notice of the directors, and this being so shown, that it is competent to show by the records of the board, that at a meeting duly held for the purpose, a resolution was passed, authorizing the president to execute a note for the amount of money wanted, to be indorsed by the plaintiff as surety, and fixing the rate of interest to be paid on the loan; and then to show, by parol testimony accompanied

by the note itself, that the note was in fact executed, indorsed, and delivered in pursuance of said resolution, and the money received thereon, and the drafts taken up with it; and to further prove that the note so executed upon which the money was obtained went to protest, and that it was paid and taken up by the indorser and surety. If this kind of testimony is not competent to prove these facts, as against a stockholder, I should like to be informed by counsel, how such facts are to be proved, in such manner as to fix the liability of a stockholder? Testimony of this kind and similar testimony was introduced,—parol testimony where there was no evidence in writing or of record, and record and written evidence, where there was a record, or writing, amply sufficient if admissible for the purpose, to establish all the facts set out in the statement of facts found in this case. The facts undoubtedly exist, as stated, and the real question is, what are the legal rights of the parties arising upon the facts.

But because Mr. Borland and the directors were not present in Dakota and did not know from personal observation and knowledge, all that was done, and there was no proof by parties having personal knowledge, precisely of all the work that was done in Dakota, and whether the money drawn from time to time by the superintendent on the authority of the directors was actually all, in fact expended for the purposes set forth in the monthly reports, it is insisted, that the action of the board of directors in raising the money and paying the drafts upon the representation of the superintendent and reports upon which the board acted, however valid as against the corporation, is not binding upon a stockholder, and can impose no personal liability upon him,—that the directors could not create liabilities upon hearsay evidence. The directors of great corporations having business far away from the central office, and often in distant, and even in foreign countries, must act upon the reports of their authorized agents. No other mode of conducting their business is practicable, or even possible. They cannot possibly have personal knowledge of every act performed in the name of the corporation, and if they cannot render the corporation liable for acts performed beyond the reach of their own observation, they cannot carry on the business of the corporation, at all. The directors of the Wyoming & Dakota Water Company were, certainly, authorized to act upon the information derived from their authorized agents in the regular course of their business, and in so acting, to borrow money for its supposed uses and bind the corporation for its payment; and those who advance it, or become responsible to those who do, and are thereafter compelled to take up the obligations, are not bound to look to the correct application of the money so raised. It was only necessary for plaintiff to show that the directors acted in good faith upon information received from their agents in the usual course of business. It was not necessary to show how all the money was expended, and no effort was made to do so either by hearsay evidence or otherwise. These transactions are certainly valid as against the corporation, whether the moneys were properly applied by the authorized agent of the corporation in Dakota or not; and in a suit against the corporation by the Bank of California, for the

moneys advanced, or by the sureties on the note to the Bank of California, who were compelled to pay the money to the bank, the evidence in this case would have been admissible. If, on the facts disclosed and proved, a valid claim exists against the corporation itself; if the corporation would be liable on the state of facts shown, then of necessity, under the constitution and statutes, every stockholder, at the time the liability accrued, must be liable for his appropriate share, as he is liable for his share of all such debts and liabilities of the corporation. There can be no liability of the corporation, without a corresponding personal liability of its stockholders under the constitution and laws. If the board of directors could by the facts shown create a liability against the corporation, then the same facts must create a personal liability as to the stockholders. And the objection really goes to the effect of the facts, rather than to the kind of proof; and the facts shown are proved by the only kind of testimony by which proof is susceptible. The plaintiff made no effort to prove how, or for what particular purposes the funds realized on the drafts of the superintendent were expended, nor was it necessary to make any such proof. There was then, no hearsay testimony on those points, as there was no testimony at all. The testimony went to the question as to what the directors acted upon, not as to the truth of the reports. It is sufficient that the directors of the corporation acted upon the information received from their superintendent, in the ordinary course of business, whether that information was correct or not, and, that, being satisfied as to the propriety of their action, they created the liability upon the corporation in the manner set out in the statement of facts. These acts were within the scope of their powers, and duties, even if the reports upon which they honestly based their action should turn out to be erroneous or even in some particulars, fraudulent. The question is, what did the directors do upon the information they had from the agents, not whether that information was in all particulars correct or not.

But there is no charge that the moneys raised in the mode stated were not in all respects legitimately expended in the proper business of the company, and there was no occasion for hearsay evidence, or other evidence, on that point. There is no averment in the answer that there was one dollar improperly raised or improperly expended by the directors, their agent, or anybody else. The answer simply denies, that the plaintiff, Borland, advanced, or paid any moneys at all for the benefit of the Wyoming & Dakota Water Company, as alleged in the complaint. And there is not only no averment, in the answer, but not a particle of evidence tending in the slightest degree to show, that one dollar of the money advanced by Borland on the \$45,000 note, or the \$6,000 and \$3,500 drafts, or the \$6,854.15 paid to Garber & Thornton; or of the money advanced by the Father de Smet Company, the balance of which was, afterwards, included in the note set out to the Father de Smet Company, was ever improperly expended, or used for any purpose other than the legitimate objects of the corporation; nor is there a particle of testimony tending to show that every dollar claimed was not advanced and paid by plaintiff, exactly, as is indicated by the testimony on behalf of

the plaintiff. The defendants rest, alone, upon the points, that the evidence introduced, by the plaintiff is incompetent to establish the facts proved, as against the defendants personally, or being proved, that the facts established do not impose a personal liability upon the defendants, and upon their allegation that they were not stockholders at the time the indebtedness accrued. As to the money paid to Garber & Thornton, they rely upon the additional defense, that the action is barred by the statute of limitations. As to the statute of limitations, the first money paid to Garber & Thornton was in August or September, 1879, and the last in August, 1880. The payments were made from time to time as the services of the litigation proceeded. But the transaction and service were continuous, and may be regarded as one transaction, and the payment of items in a running account. The last payments were within the statutory period, so that the bar does not attach to any part. Besides the defense is an affirmative one, set up by the defendants, themselves, and it devolves upon them to show, affirmatively, that the bar has attached, and to what part. Now, it does not appear how much was paid more than three years before the bringing of the suit, and the court has no evidence upon which to apply the statutory bar, if any there be, to any particular part of the sum paid. The defense, therefore, on both grounds must be overruled.

A judgment in favor of McMasters against the Wyoming & Dakota Water Company recovered upon the \$109,049.76 note given by the corporation to the Father de Smet Company for balance of advances made by the latter to the former, and proceedings thereunder, was introduced in evidence by plaintiff, under objection by defendants, that, a judgment against a corporation is not competent evidence in an action by a creditor against a stockholder of the corporation, to enforce a personal liability. There are some authorities, including some New York cases, apparently depending upon peculiar statutes of that state of a highly penal character that seem at first blush to sustain this view. But I think they are inapplicable. However that may be, the weight of authority appears to be very largely to the effect, that a judgment against a corporation for a corporate debt, is, at least, *prima facie*, if not conclusive, evidence against the stockholders therein, when sought to be held liable for such debt; and many of the authorities seem to hold it conclusive except upon proof of fraud, or collusion, or when there is a defect of jurisdiction. 2 Mor. Priv. Corp. (2d Ed.) § 886; Cook, Stocks, § 209; Tayl. Corp. § 737; Freem. Judgm. § 177; *Donworth v. Coolbaugh*, 5 Iowa, 300; *Grund v. Tucker*, 5 Kan. 70; *Cume v. Brigham*, 39 Me. 35, 40; *Milliken v. Whitehouse*, 49 Me. 527; *Thayer v. Lithographic Co.*, 108 Mass. 523, 528; *Hawes v. Petroleum Co.*, 101 Mass. 385; *Bohn v. Brown*, 33 Mich. 257; *Slee v. Bloom*, 20 Johns. 669; *Schaeffer v. Insurance Co.*, 46 Mo. 248; *Hoagland v. Bell*, 36 Barb. 57; *Hastings v. Drew*, 76 N. Y. 9-15; *Stephens v. Fox*, 83 N. Y. 313; *Wilson v. Coal Co.*, 43 Pa. St. 424; *Bank v. Chandler*, 19 Wis. 457; *Glenn v. Springs*, 26 Fed. Rep. 494. This appears to me to be the better view. At all events, it is not a matter of any consequence, in this case, for the liability is fully made out by the oral evidence, various notes, and the record of the action of the boards of direct-

ors of the two corporations, prior to and independent of this judgment. It might just as well have been omitted. Indeed it seems to have been introduced merely to complete the history of the transactions under investigation, and to show the payments made and credited on the liability alleged in the complaint, which payments and credits were denied in the answer. The payments credited, were, in fact, the two sums realized upon the sales of the property upon executions issued upon this judgment, shown by the return of the sheriff upon the executions issued and filed in the case. Indeed this record seems to be favorable to the defendants rather than against them, as it proves payments of a considerable amount. At all events the case was fully made out without it, and it can do no harm, even if erroneously admitted.

I am fully satisfied that the plaintiff is entitled to recover. I cannot go through the long record, and rule, specifically, and, independently, upon every exception taken to the evidence by defendants. I have indicated the character of the important evidence, and the exceptions thereto, and given examples of that upon which I have acted in deciding this case. The other evidence considered is largely of a similar kind, and the exceptions of like character. It is necessary to consider one part of the evidence, in its relation to others in order to decide, intelligently upon its admissibility. Generally, therefore, I overrule the objections taken by defendants.

Should a bill of exceptions be required, it would necessarily, include nearly all if not the whole evidence in the case, as there is very little, that was not taken under objection on some ground on the part of the defendants, and it is necessary to consider one part as illustrated by the others. The facts I have taken pains to set out very fully, and at large, in the findings; and the question, after all is, what is their effect upon the rights of the parties? The case can better be disposed of upon the facts, than upon rulings upon specific isolated items of evidence. If the acts of the parties, as set out, constitute a liability against the corporation, then they must create a personal liability upon each stockholder for his proper share. As before stated, there can be no liability on the part of the corporation without creating a corresponding liability for his share against the stockholder. It may well, be that a fraudulent and collusive transaction between the party in whose favor the liability is sought to be created, and the directors of a corporation intentionally co-operating together could not cast any personal liability upon a stockholder; but, then, such a transaction would be equally void as to the corporation. I cannot now, conceive of a case in which there is a valid debt, or liability, against the corporation where there would not, under the constitution and statutes be a corresponding proportionate personal liability against a party, who was a stockholder, at the time when the debt, or liability was incurred. If this be so, then, the only question as to the liability can be, is there a liability against the corporation? And if that be so, than any evidence, that is competent to establish the liability, as against the corporation, must be competent to establish the liability, of the stockholders, for the liability of the corporation being established, the liability of the stockholder for his share, follows as an

inevitable legal consequence by the express terms of the constitution and statute. But in this case there is no evidence at all of any collusion or fraud—nothing to show that the indebtedness in question was not honestly contracted for the legitimate purposes of the corporation, and honestly paid by the plaintiff, Borland, who was, like the defendants, personally, liable for his proper share. It would seem from a consideration of the whole case, upon the evidence before the court, that the stockholders of the two corporations mentioned in the findings, acted in concert proceeding harmoniously, and satisfactorily, while the Wyoming & Dakota Water Company had a prospect of acquiring, and enjoying a large and valuable property. While the prospects were good, the assessments to meet the expenses of their operations were, cheerfully, paid by the defendants, as well as others. But when the right to the water upon which the value of the investment of the water company wholly depended, was adjudged against them, after a vigorous litigation, their hopes were blighted, and their investment became nearly worthless. Then the stockholders declined to pay the assessments levied to meet the liabilities of the corporation, and the plaintiff, Borland, alone being a large, if not the largest stockholder, assumed the burden, and paid off the existing indebtedness. If, this be so, it is but consistent with justice and common honesty, as well as the requirements of the law, that the defendants should be required to refund to him their just share of the amounts so paid. Let judgment be entered for plaintiff, against each defendant, for his portion of the amount due as stated in the findings, with costs.

MARTIN v. ONE HUNDRED AND EIGHTY-TWO THOUSAND TWO HUNDRED AND FIFTY-NINE FEET OF HEMLOCK LUMBER.

(*District Court, E. D. New York. December 4, 1888.*)

1. SHIPPING—FREIGHT—RECOUPMENT—TOWAGE.

Libelant contracted to transport a cargo of lumber in a canal-boat to pier 4, East river. Through the mistake of the shipper, no consignee appeared, and finally the claimant, at the request of the shipper, agreed to take the cargo for his account, and with his own tug towed the canal-boat to the Erie basin, where his yards were situated. *Held*, that claimant could not recoup against the claim for freight the cost of towage; libelant's contract was complete when the boat arrived at pier 4.

2. SAME—COSTS OF DISCHARGE.

Nor could he recoup for moneys paid extra hands employed in discharging the lumber, the evidence being conflicting as to whether they were employed at the request of the master, and on his account, to aid him in the ordinary discharge of the cargo.

In Admiralty. Libel for freight and demurrage.

Anson B. Stewart, for libelant.

Hobbs & Gifford, for claimant.

BENEDICT, J. This is an action to recover freight and demurrage alleged to be due upon a contract for the transportation of a cargo of lum-

ber in the canal-boat Lizzie Campbell. The lumber was shipped at Albany by Boyd & Co., who gave directions that it be delivered at pier 4, East river, New York city, to one George Adams. A shipping memorandum to that effect was issued. Under that contract the cargo was transported in the canal-boat to pier 4, East river, where it arrived on Thursday, September 1st. Owing to some mistake on the part of the shipper, no consignee appeared, or could be found, to receive the cargo; and finally, by the request of the shipper, the claimant Thomas McCaldin agreed to take the cargo for their account. McCaldin then sent one of his tow-boats to pier 4, East river, where the canal-boat was taken in tow, and carried to the claimant's yard at the Erie basin, and there the lumber was discharged at the bulk-head foot of Walcott street, outside of the basin. The discharge was completed on Wednesday following, and the canal-boat then towed back to pier 4 by one of the claimant's tow-boats. The gross freight amounted to \$164.03. In addition to this freight the libelant claims four days' demurrage. The claimant disputes the right to claim any demurrage, and claims against the freight by way of recoupment, in addition to the sum of \$37, paid to the master, and not in dispute, the sum of \$8 for the towage of the boat from pier 4, East river, to the claimant's yard and back to pier 4, and the further sum of \$36, paid by the claimant to three men employed by him to assist the master in landing and piling the lumber. As to the claim for towage my opinion is that, under the contract made in this case, the master was not required to take the lumber to a different place than that named in the contract, which was pier 4, East river, New York, and therefore that the claimant is not justified in deducting from the freight the expense of towing the boat from pier 4 to his yard and back again. As to the deduction of \$36, sought to be made for money paid by the claimant to three men employed by him to aid in the discharge of the lumber at the Atlantic basin, there is a serious conflict of evidence. It appears that the usual method of discharging the lumber is to pile it in two tiers, but the libelant claims that in this case the lumber was required by the claimant to be piled in three tiers, involving extra labor, which the claimant provided at his own expense, and he produces some five witnesses, I think, to prove that the lumber was piled three tiers deep, and that McCaldin employed three men on his own account, because the lumber was required to be so piled, instead of in the ordinary method. On the part of the claimant there is testimony equally positive that the lumber was not piled three tiers, but only two, as is usual, and that these three men were employed by the claimant at the request of the master, and on his account, to aid him in the ordinary discharge of the cargo. Upon this issue the burden is upon the claimant, and upon testimony so conflicting I am unable to hold it proved that the extra men employed by the claimant were so employed at the request of the master, and for his account. This deduction cannot, therefore, be allowed. As to the libelant's claim for demurrage, it cannot be allowed. He is entitled to a decree for the full amount of freight,—\$164.03,—with the costs of this action.

PRESTON v. UNITED STATES.

(District Court, W. D. Missouri, W. D. October Term, 1888.)

1. COURTS—FEDERAL COURTS—CLAIMS AGAINST UNITED STATES—REJECTION BY COMPTROLLER.

Under act Cong. March 3, 1887, forbidding district courts to entertain claims against the government, "which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same," the court must dismiss a claim rejected by the comptroller of the treasury. Following *Bliss v. U. S.*, 34 Fed. Rep. 781; *Rand v. U. S.*, 36 Fed. Rep. 671.

2. SAME—COURT OFFICERS—MESSENGER AND CRIER.

There is no incompatibility between the offices of crier and messenger of the district and circuit courts; and under the rule in *U. S. v. Saunders*, 120 U. S. 126, 7 Sup. Ct. Rep. 467, the same person may perform the duties and receive the salaries of both.

At Law. Action by James H. Preston for compensation for services rendered.

Quarles & Guffin, for plaintiff.

M. E. Benton, for the United States.

PHILIPS, J. This is an action to recover compensation for plaintiff's services as crier of the district court and circuit court of the United States for the Western district of Missouri. The petition alleges that the plaintiff, under proper appointment, performed services as crier of said courts, on certain days between the 2d day of January, 1886, and the filing of this petition on the 23d day of May, 1888; and that the aggregate of his *per diem* amounts to \$438, for which he asks judgment. The court finds the facts to be substantially as follows: That from the 2d day of January, 1886, up to the time of the institution of this suit, the plaintiff performed the duties in said courts of messenger, from which he received from the government a *per diem* compensation of two dollars; that during this same period, under appointment by the court, he also performed the duties of crier of said courts, during their sessions from January 2, 1886, up to the 23d day of May, 1888. The answer alleges, and the court finds the facts to be, that for the services thus rendered as crier the plaintiff was paid by the government up to February 8, 1886, since which time the comptroller of the treasury department has rejected the claims for such compensation on the ground that the plaintiff was not entitled to compensation for the two services of messenger and crier. As to so much of the claim as precedes the 3d day of March, 1887, the court holds that it has not jurisdiction over the subject-matter, as by the proviso of section 1 of the act of March 3, 1887, conferring jurisdiction on this court over such actions, the court cannot hear and determine such claims "which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." It has been expressly held by Judge BREWER in *Bliss v. U. S.*, 34 Fed. Rep. 781, followed by WEBB, J., in *Rand v. U. S.*, 36 Fed. Rep. 671, that the comptroller of the treasury having charge of the adjustment of

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accounts against the government, a rejection of an account by him is, in contemplation of said proviso, a rejection by a department authorized to hear and determine the same. It being conceded at the hearing that so much of the plaintiff's claim as precedes the 3d day of March, 1887, was presented to and rejected by said comptroller, it follows that this court has no jurisdiction "to hear and determine the same."

The court finds from the evidence that since the 3d day of March, 1887, to the 22d day of May, 1888, the plaintiff, under appointment by the courts, has rendered service as such crier for 88 days. The only remaining question, therefore, to be determined is, whether or not the law entitles the plaintiff to compensation for such services. I think this question is fully answered by the supreme court in *U. S. v. Saunders*, 120 U. S. 126, 7 Sup. Ct. Rep. 467, in which it is held that a person who holds two distinct, compatible offices or positions of employment, and performs the duties of each, may lawfully receive the salary of each. If there be no incompatibility between the respective duties of the two offices or employments, and the functions of each are separate and distinct, he is entitled to recover two compensations. The evidence in this case shows, what the observation of the court confirms, that the two duties of messenger and crier, performed by the plaintiff, are not only compatible, but, although performed contemporaneously, were distinct in their character, and devolved upon the plaintiff a double work. His duties, for instance, as messenger of the court, attached and were performed on the same day, prior to the sitting of the court, often during its sitting, as also during the noon recess of the court, and for the residue of the day after the adjournment of the sitting of the court. The one duty was in nowise connected with or in continuation of the other. No reason is therefore apparent why the plaintiff should not receive the compensation allowed by law for the performance of this double service, when there was no conflict of duty, nor any incompatibility between the office of crier and the employment of messenger. By section 715, Rev. St., U. S., such crier is allowed the sum of \$2 per day. The court therefore finds that the plaintiff is entitled to recover for the period of 88 days between the 3d day of March, 1887, and the 23d day of May, 1888, \$2 per day, making in the aggregate \$176. Judgment accordingly.

DAVIS *et al.* v. READ *et al.*

(Circuit Court, W. D. Michigan, S. D. January 22, 1889.)

1. SPECIFIC PERFORMANCE—FRAUDULENT REPRESENTATIONS.

Upon a bill for the specific performance of a contract to erect for defendants a creamery building, and to furnish creamery supplies, it appeared that complainants had represented that an association, which was the largest subscriber to the corporation to be organized by defendants for carrying on the business, was an independent corporation, doing business with a large number of creameries, and furnishing special facilities for handling and marketing creamery products, through which defendants would obtain an advanced price

for their products, while it was in fact complainants' firm under another name, and did not handle creamery products at all. *Held*, that, the contract would not be specifically enforced.

2. SAME.

It appeared also that the representation that defendants were to have the sole rights to a large territory surrounding their creamery was false, in that complainants had already sold a large part of the territory. *Held*, that, specific performance would be refused, though complainants tendered an assignment of these rights by their grantees, there having been much delay on complainants' part in finishing the building, and the building as tendered being in many respects defective and incomplete.

3. EQUITY—RESCISSION OF CONTRACT—LACHES.

The defendants having failed to elect to rescind the contract for fraud until the filing of their answer and cross-bill, their prayer for rescission must be refused.¹

In Equity. On pleadings and proof.

Taggart, Walcott & Ganson, for complainants.

H. D. Smith and M. L. Howell, for defendants.

SEVERENS, J. This cause was heard upon pleadings and proofs, and was quite fully and elaborately argued. The bill alleges, substantially, that Davis and Rankin, the complainants, having for some time prior to the transaction in question been engaged as a firm, under the style of Davis & Rankin, in the business of furnishing creamery supplies and erecting creamery buildings in various parts of the country, and having their head-quarters at Chicago, entered into a written contract, on or about the 17th day of December, 1885, with the defendants, who were farmers, or were to some extent engaged in that business, at and near Cassopolis, in Michigan, whereby the complainants agreed that upon the terms stated therein they would construct a creamery building, at Cassopolis, for the other parties to the contract, to be completed by the 1st day of April following, and to conform to the specifications which are set out in the contract with particularity. They were also to furnish the same parties with certain creamery supplies, some of which were patented, and including an engine and other machinery and tools adapted to operating the creamery. The complainants also stipulated that they would hire at the defendants' expense a competent butter-maker, and would superintend the business of the creamery for one year, and would aid the second parties in the development of routes and territory, etc. They further agreed that the territory of the Cassopolis creamery should extend to limits equidistant between it and other creameries already established,—presumably having reference mainly to the use of their patented cans, in which the milk is stored and delivered by the patrons of the creameries,—and that no other creamery should be established in Cass county. It was also provided that the second parties might become a corporation, taking stock according to the amount of their several sub-

¹ The right to disaffirm a contract for fraud must be exercised promptly after discovering the facts constituting the fraud. *Dennis v. Jones*, (N. J.) 14 Atl. Rep. 918; *Bell v. Keepers*, (Kan.) 17 Pac. Rep. 785; *Young v. Arntze*, (Ala.) 5 South. Rep. 253; *Whitworth v. Thomas*, (Ala.) 3 South. Rep. 781, and note. On the general subject of the rescission of contracts on the ground of fraud, and the necessity of offering to place the other party *in statu quo*, see *Gray v. Bowman*, (N. J.) 14 Atl. Rep. 905, and note; *Gridley v. Tobacco Co.*, (Mich.) 39 N. W. Rep. 754, and note.

scriptions. The parties of the second part consisted of a large number of subscribers, whose names are appended to the contract in a list, with the number of shares at \$25 each set opposite their names, as if subscribing for corporate stock. It was stipulated in the contract that the complainants were to be paid the sum of \$5,000 when the creamery should be completed, and this is the total amount of the sums set opposite the names of the parties of the second part. The first name upon the list of the parties of the second part was that of the "Chicago Creamery Association, 40 shares, \$1,000;" and this association, it is alleged in the bill, was identical with Davis & Rankin, and was a mere trade name or title which they had appropriated to themselves. The other subscribers were the present defendants. The complainants executed the contract in their firm name of Davis & Rankin. The bill alleges that complainants completed the building within the stipulated time, and prays for a specific performance of their part of the agreement by the defendants. The defendants answered, and filed a cross-bill, in which they alleged that they were induced to enter into the contract by misrepresentation of certain matters essential to it by the agent of the complainants, conducting this business for the firm. Several misrepresentations are complained of, the principal being the statement of the agent that the Chicago Creamery Association was a distinct corporation organized under the laws of Illinois, and having an intimate business relation with a great number of creameries in the north-west, for whom it operated at Chicago in providing a market for their products, furnishing special facilities for handling the product to the very best advantage to the different creameries, whereby the latter realized several cents per pound for their butter more than could be got without the aid of such association, and the further statement by him that all the territory equidistant from Cassopolis to the other creameries established by the complainants, and using their patented utensils, was unoccupied and unsold, so that the Cassopolis creamery could have tributary to it, and within which it could gather custom, the whole field half way to the other creameries. Respecting the first of the above points, the defendants say that the Chicago Creamery Association was a myth, put forward as a lure, and was in fact nothing else than Davis & Rankin in disguise, and that the defendants did not know this. Respecting the second, they allege that nearly the whole territory contiguous to Cassopolis had been appropriated and sold by Davis & Rankin to a creamery at South Bend, before the making of the contract in question. Other matters are set up as misrepresentations, but many of them are merely in the nature of promises of what the complainants were going to do, or statements of exalted coloring about the advantages of such creameries, too effusive to deceive men of reasonable prudence and the measure of discernment which the defendants must have possessed; and as those matters are not material to the grounds of the decision, they will not be further attended to. The cross-bill prays for cancellation of the contract. The defendants' answer denies that the complainants have completed the building, and they point out many particulars in which it is incomplete,

and is insufficient to meet the contract. The complainants answer and deny the affirmative allegations of the cross-bill.

The record is voluminous, and the testimony fills an immense space; but there are certain quite prominent features upon the facts which make it unnecessary to go into detail, and which, in the opinion of the court, must be regarded as controlling. The question whether the bill states a case for equity jurisdiction is one upon which I should have had great doubt if it had been presented; but as no objection has been made upon that ground, and both parties desire a determination here, and as there is a possibility that on account of the circumstance that complainants are parties of both parts in the contract they might be embarrassed in an action at law, I have, with some misgiving, concluded to allow that ground to be waived. The conclusion of fact which I have reached upon the evidence is that the complainants' agent did induce the defendants to believe that the Chicago Creamery Association was a distinct concern, having an interest in the business of creameries, and special facilities for marketing butter which would be of material advantage to the defendants. In the printed caption to the contract Davis & Rankin describe themselves as "General Managers" of the "Chicago Creamery Association,"—a description well calculated to produce the belief and understanding that it was a separate concern, whose interests they were in duty bound to observe and promote, and that interest was by the express terms of the contract made identical with that of the defendants. The complainants now say, in effect, that as Davis & Rankin were themselves the creamery association, they would have an equal motive in promoting the objects of the Cassopolis creamery to that which they could have as managers of the creamery association, and that thus the device was harmless to the defendants. But it also appears as a fact that Davis & Rankin did not handle the products of creameries at all, but that their business was the erection of creamery buildings, and the furnishing of machinery and supplies therefor. They took stock in some of the creameries they established, but it is evident that they did this only when they found it expedient in inducing the establishment of creameries which would furnish a local market for the sale of their utensils. It is thus manifest that the facts in regard to the character of the "Chicago Creamery Association" and its facilities and business were not as represented, and that this representation was quite likely to have had a material influence in leading the defendants to the contract. Indeed, the conduct of the complainants in so industriously presenting it indicates clearly enough that they understood the probable effect of such a scheme. It is the doctrine of the court that it will not enforce specific performance of a contract into which the defendant has been led by unfair inducement or covert enterprise on the part of the complainant by which the other party has been misled in regard to any matter material to the value of the contract. *Buxton v. Lister*, 3 Atk. 386; *Walpole v. Orford*, 3 Ves. 420; *Seymour v. Delancy*, 3 Cow. 445; *Modisett v. Johnson*, 2 Blackf. 431; *Fry*, Spec. Perf. §§ 283, 234, 425; *Rust v. Conrad*, 47 Mich. 449; 454, 11 N. W. Rep. 265.

It also appears beyond doubt that the complainants had, prior to the making of this contract, appropriated a large proportion of the territory about Cassopolis, and sold the right to use their patented utensils therein to the South Bend Creamery. At the hearing the complainants tendered an assignment from the South Bend Creamery to the defendants, which was not accepted. This would probably enable them to surmount this difficulty, subject to their being required to pay the costs, if it did not appear that the other conditions had changed in any material particular. *Fludyer v. Cocker*, 12 Ves. 25; *Morris v. Hoyt*, 11 Mich. 8; *Stevenson v. Maxwell*, 2 N. Y. 415. But the defendants have lost three seasons of the use of the building, and the inauguration of the enterprise has been so long delayed that its advantages may be to many of them substantially gone. The building, from being left in the condition in which it was, has suffered material dilapidation. It is without doubt the doctrine of the court that it will not regard time as material when it is obvious that by reason of it the situation of the parties and the subject-matter has not substantially changed, so that all the substantial advantages of the bargain are yet obtainable through its performance. *Parkin v. Thorold*, 16 Beav. 59; *Richmond v. Robinson*, 12 Mich. 193; *Hearne v. Tenant*, 13 Ves. 287. On the other hand, it is certain that the court will not enforce specific performance when it is clear, or when there is good reason to believe, that material circumstances are so changed that the full benefit of the bargain will not be realized by the defendant, if enforced, and he has not by his fault caused or contributed to the delay. *Fry*, Spec. Perf. § 715; *Smith v. Lawrence*, 15 Mich. 499; *Gram v. Wasey*, 45 Mich. 223, 7 N. W. Rep. 84, 762; *Milward v. Earl Thanet*, 5 Ves. 720, n. Besides, it cannot fairly be said, upon the evidence, that the building, which in April, 1886, the complainants tendered to the other parties as completed, and for which they demanded payment, was a just and fair fulfillment of the contract. It is admitted by the complainants that there were some defects in the work which should have been remedied, but it is claimed that they were not intentionally left, are unimportant, and can be allowed for by way of compensation in framing the decree.

I am not satisfied, however, that these defects are of so trifling a nature that they can be passed by, and a performance be compelled on the part of defendants of a contract in which performance was not due until it was earned by the complainants. On the contrary, the evidence leaves a strong impression on my mind that the building which they constructed was a cheap and scanty performance of their undertaking to do the work "in a substantial and workman-like manner." The sills and walls were light. The latter were to be built with three air chambers. These were constructed by nailing building paper on the outside and inside, horizontally, of four-inch studs, with strips outside of the paper, and the siding and ceiling nailed to the strips. There was nothing to keep the edges of the strips of paper together between the studs, and the whole wall was thus brought to a thickness of seven inches, while the specifications seem to show that the parties contemplated a wall a foot thick; though it was not, as I think, expressly contracted that it should be so. The

contract provided that Davis & Rankin should provide the building with their "system of drainage," which was explained by their agent to mean something superior to the ordinary, and peculiar to the complainants' structures. As completed, the water drainage is little else than a gutter, and a hole made in the ground a few feet outside of the building. The refrigerator room was to be constructed on the plan of the "New York Cold Storage Room." What was built was a simple compartment, constructed so as to project from the working room into the ice room, the ice being filled in over and around the refrigerator, except at the entrance end. The latter had no ventilation, the only opening being the door by which it was entered from the work room. The special characteristics of the "New York Cold Storage Room" do not appear to have been very clearly explained by the complainants' agent, but he created the impression upon the defendants that it was peculiar in structure, was built upon principles that were patented, and was a very desirable thing to have in a creamery, and of somewhat expensive make. There were other particulars in which the building failed to satisfy the contract, which I shall not stop to enumerate. The short and feeble performance of the undertaking, so far as the building was concerned, was such that it would not be equitable to compel the defendants to take it. While a court of equity will not allow an unimportant defect which has occurred without intention, and can be compensated for in damages, to stand in the way of compelling specific performance of a contract where there is no other objection, (*Winne v. Reynolds*, 6 Paige, 407; Will. Eq. Jur. 290; *Henry v. Graddy*, 5 B. Mon. 450; Fry, Spec. Perf. § 791,) still it will not compel a party to perform a contract which has not been substantially performed on the other side. Certainly this must be so when by the very terms of the contract the performance by the one is made the condition of the performance sought to be compelled. Fry, Spec. Perf. § 797; *Simmons v. Hill*, 4 Har. & McH. 252; *Marble Co. v. Ripley*, 10 Wall. 339, 357, 358. Applying these principles to the facts of the present case, it is clear that the bill cannot be sustained, and it must therefore be dismissed.

Other considerations apply to the cross-bill. The purpose of that bill is the rescission and cancellation of the contract; and the ground for that relief consists in the misrepresentations by the agent of the complainants in respect of material facts which were part of the inducement to the contract. Upon the facts disclosed by the evidence, I should be disposed to think that if there had been reasonable promptness and diligence in repudiating the bargain when the falsity of the representations was known; or should, with reasonable attention, have been known, many of the defendants were so far victims of imposition that they had an equity for rescission. It is clear enough from the evidence that the representations affected the different parties in a different way. Some appear to have been more completely misled than others. Some attached greater importance to the matters represented than others. There are difficulties in applying the remedy for rescission in cases where some of the parties on one side of a contract are in a situation entitling them on

their own account, and some are not; for if the contract is rescinded in part it must be *in toto*, and it is not difficult to see that such relief might thus in great measure miscarry under such conditions. Fry, Spec. Perf. § 696, and cases in notes. And there is a wide difference in the degree of merit which will enable a party to resist specific performance of a contract, and that which will entitle him to have it rescinded; and the attitude of the court towards the prayer for relief in such cases is for that reason not at all the same. Fry, Spec. Perf. § 233; *Willan v. Willan*, 16 Ves. 83; *Savage v. Brocksopp*, 18 Ves. 335; *St. John v. Benedict*, 6 Johns. Ch. 111. But the defendants are not, for another reason already indicated, entitled to a decree for rescission. The rule is that a party who seeks to rescind his contract on the ground that it was induced by the fraud of the other should take prompt action in repudiating the contract when the fraud is discovered, and should notify him of his purpose to disavow and disown it. *Grymes v. Sanders*, 93 U. S. 55; *Ayres v. Mitchell*, 3 Smedes & M. 683; *Lawrence v. Dale*, 3 Johns. Ch. 23; *McKay v. Carrington*, 1 McLean, 50. In the present case, while there is ample evidence that the defendants complained about the structure of the building almost from the laying of the foundations, there is no evidence sufficiently showing that they elected to rescind for fraud in the other party, and gave notice of such election. Indeed, there is nothing in the case, as it has been laid before me, to indicate that any claim for rescission was distinctly made until the filing of the answer and cross-bill. It follows that the cross-bill must also be dismissed. The defendants will recover costs in the main case, and the complainants should have costs in the suit upon the cross-bill.

SMITH v. GREEN *et al.*

(Circuit Court, D. Minnesota. February 6, 1889.)

EQUITY—PARTIES.

To a bill for the cancellation of a quitclaim deed from complainant to defendant G., P. and J. were made parties defendant, the bill alleging that they and each of them had made fraudulent representations for the purpose of procuring the execution of the deed, and a general confederating clause was inserted. There was no averment that P. and J., or either of them, were agents or attorneys for G., or that G. held the title in whole or in part for their benefit, or that they had or expected any interest in the land conveyed; and no relief was prayed for as against them. *Held*, that they could not be required to answer.

In Equity. On demurrer to bill.

The bill of complaint states that from July 23, 1858, to June, 1886, the complainant was the owner of an indefeasible estate of inheritance in and to lot No. 4 of the S. W. $\frac{1}{4}$ of section 28 of township 29 of range 24, containing 67.25 acres of land, situated in Hennepin county, in the state of Minnesota, and subject to a mortgage to the defendant John Green to

secure the payment of \$2,500 and interest thereon; and that between January 1, 1859, and January 1, 1862, Green made a pretended foreclosure sale thereof, which is averred to be defective, and that the same was subject to redemption on the 15th of June, 1886, at which time "the defendants, and each of them, came to (complainant's) place of residence at Burlington, in the state of Iowa, and represented and stated to him in each other's presence that the title of your orator in and to said land was utterly extinguished by the foreclosure of the mortgage above specified, and by the statute of limitations; and that your orator had not a shadow of a claim to said land and premises; and that any court would set aside your orator's claim in and to said land and premises in one year, but that it would cost about one hundred dollars to do so, and that they would prefer to give to your orator said money, rather than spend it in court; and that the said John Green, who claims the land, was a poor old man, and they knew in justice your orator was not entitled to anything, but to enable them to make sales soon they would pay him for a quitclaim deed thereof the sum of five hundred dollars; and further stated that the land and all thereof was almost valueless, and was an outlot partially covered with brush." It is averred that defendant Pumphrey had in other matters acted as complainant's attorney and agent, and was an old acquaintance, and introduced defendant Johnson as an attorney from Minneapolis, in whose statements your orator might place implicit confidence, and that, relying upon the said statements and representations made by said defendants to him, and believing the said statements to be true in every particular, he accepted \$500 from them, and executed a quitclaim deed of said land and premises to the defendant John Green. It is averred that the land is worth \$50,000, and that the statements of defendants Johnson and Pumphrey were false, fraudulent, and untrue, and made with intent to deceive and defraud your orator, and that he was deceived and defrauded thereby. There is an allegation of tender of money to Green, and demand for reconveyance. The general confederating clause is inserted, and specific interrogatories are required of defendants Pumphrey and Johnson, and the relief claimed is that the quitclaim deed to defendant Green be set aside. Defendants Pumphrey and Johnson interpose a demurrer for the reasons (1) that the complainant has shown no title or interest in the land in respect whereof these defendants or either of them ought to be compelled to answer or plead to said bill; (2) nor does said bill show said defendants or either of them to have any interest whatever in and to any of the subject-matters or things alleged in said bill of complaint, and sought to be litigated in this action, in respect whereof said defendants ought to be compelled to answer or plead to said complaint.

John B. & W. H. Sanborn, for complainant.

Hale & Peck, for defendants.

NELSON, J., (*after stating the facts as above.*) There is no averment in the bill that the defendants Pumphrey and Johnson, or either of them, were the agents or attorneys of the defendant Green, to whom the quit-

claim deed ran, or that Green was a trustee, and held the title for their benefit, in whole or in part; and it does not appear that they have any interest whatever, or expect any, in the land conveyed, and no relief is prayed against them. The fact that fraudulent representations were made by them which influenced the complainant cannot implicate Green, unless they are shown to occupy such relation as to charge the fraud upon him. In all cases the bill must show that one who is made a party defendant is in some way liable to complainant's demand, or has an interest in the subject of the suit. An exception is made in the case of the agent or officer of a corporation. Mr. Pomeroy states the rule concisely, viz.:

"The general rule is well settled and admits of only one or two special exceptions which are necessary to prevent a failure of justice, that no person can properly be made a defendant in the suit for a discovery or compelled as such to disclose facts within his knowledge, unless he has an interest in the subject matter of the controversy in aid of which the discovery is asked." 1 Pom. Eq. Jur. § 199.

In a note numerous authorities from which the rule is formulated are cited. Where an attorney or agent has assisted his principal in the accomplishment of a fraud, he may then be made a party defendant, and compelled to discover the fact, and relief must be prayed that he pay costs. He is made a party, not for the reason that every one who assists another in committing a wrong is answerable for the injury sustained by the aggrieved person, but as security for costs incurred in redressing the wrong. See 1 Daniell, Ch. Pr. 299, and cases cited in note. No such case is presented by the demurrer, and in settling the demurrer it is not necessary that defendants should answer denying the confederating clause. Demurrer sustained.

NORRIS v. ATLAS STEAM-SHIP Co.

(Circuit Court, S. D. New York. February 2, 1889.)

1. NEGLIGENCE—EVIDENCE.

In an action for injuries alleged to have been received from the falling of a maintopmast-stay on defendant's vessel, causing plaintiff's hand to be caught in an exposed winch, evidence that immediately after the injury the defendant caused the stay to be replaced and a guard to be put up at the winch, is admissible to show the actual condition of the stay and winch at the time of the injury.

2. LIMITATION OF ACTIONS—FOREIGN CORPORATIONS—ABSENCE OF DESIGNATED AGENT.

Code Civil Proc. N. Y. § 432, provides that personal service of a summons upon a foreign corporation may be made by delivering a copy to a person designated for that purpose; that such designation must specify a place within the state as the office and residence of the person designated; and that the designation shall remain in force until the filing of a written revocation. Section 401 provides that the statute of limitations shall not run in favor of non-residents, but that its provisions do not apply while a designation made as prescribed in section 432 remains in force. The defendant foreign corporation

designated a person upon whom process might be served, and specified his residence; but before the statute had run against the cause of action sued on such person left the state, and did not return to the place designated, and the designation was not renewed. *Held*, that the action was not barred.

At Law. On motion for new trial.

Hermion H. Shook, for plaintiff.

Everett P. Wheeler, for defendant.

WHEELER, J. This action was brought in December, 1887, to recover for an injury alleged to have been received on December 4, 1880, by the falling of the maintopmast-stay of one of the defendant's vessels, and causing the plaintiff's hand to be caught in an exposed winch at which he was working, in getting out of the way. Upon the trial the defendant denied that the stay fell and caused the injury in that manner, and relied upon the statute of limitations. The plaintiff was allowed to prove, against defendant's objection, that the defendant caused the stay to be replaced, and a guard to be put up at the winch immediately after. The case has now been heard on a motion for a new trial, and the defendant relies upon error being found in the rulings admitting this evidence, and holding the statute not to be a bar, in support of the motion. If this evidence had been admitted for the purpose of having negligence in not making repairs and alterations before inferred from the fact that they were made then, its admission or use for that purpose might have been erroneous. The making of repairs and alterations, in itself, shows care rather than neglect. But this evidence showed what was broken, and how, and what was wanting; and was admitted for, and limited to, the purpose of showing the actual condition of the stay and winch at the time of the injury. The question of negligence was made to turn upon the state of things then, and not upon what happened afterwards. This does not appear to have been erroneous.

The statutes of limitation appear to be in the Code of Civil Procedure. Section 383 puts among actions to be brought within three years "(5) an action to recover damages for a personal injury occasioned by negligence." The defendant is a foreign corporation, and necessarily a non-resident. *Falli v. Railroad Co.*, ante, 65. Section 401 provides:

"If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor after his return into the state; * * * but this section does not apply while a designation, made as prescribed in section four hundred and thirty, or in subdivision second of section four hundred and thirty-two, of this act, remains in force."

"Sec. 432. Personal service of the summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows: (1) To the president, treasurer, or secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions under another name. (2) To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the secretary of the state. The designation must specify a place within the state as the office or

residence of the person designated; and, if it is within a city, the street and street number, if any, or other suitable designation of the particular locality. It remains in force until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner; but the person designated may from time to time change the place specified as his office or residence to some other place within the state, by a writing, executed by him, and filed in like manner."

In May, 1880, defendant designated a person on whom process against it might be served, and specified his residence as being at 262 Fourth Avenue, and his office as being at 37 Wall street, in the city of New York. In 1881 he changed his residence to Thirty-Fourth street, and his office to State street; and in October, 1883, he went to Europe, and remained away until September, 1884. By the terms of section 401 the limitation operates only while the designation is in force. The object of the designation is to provide a person on whom service of process may be made. It is not accomplished by the mere making and acceptance of the designation in the manner prescribed. The service provided for is upon the person, and not at the place named, in his absence, for him, or for the defendant. The continuation of the presence of the person within the jurisdiction at least, if not in the same location, is absolutely essential to the continued operation of the designation for the purpose for which it is made, and to its continuing in force within the meaning of the statute. The provision in the statute that it remains in force until the filing of a written revocation, refers to the force derived from the act of the parties, and continues that until it is withdrawn in the manner pointed out, and not to the removal of the means by which the designation could have any effect. The designation did not continue in force at most any longer than until the person designated left for Europe in September, 1883, which was before the expiration of three years from the accruing of the cause of action, and before it was barred. The designation was not renewed; neither did he return to the place designated; the force of the designation was not in any manner restored; nor was there anything to set the limitation running again. This conclusion has been reached upon conference with and with the concurrence of Circuit Judge LACOMBE. Motion overruled, and stay vacated.

WASHBURN & MOEN MANUF'G Co. v. SOUTHERN WIRE Co.

(Circuit Court, E. D. Missouri, E. D. January 28, 1889.)

1. PATENTS FOR INVENTIONS—LICENSES—COVENANT TO UPHOLD PATENT.

Where a patentee is doing a large and profitable business in the manufacture and sale of the patented article, and his patents have been infringed, a covenant in a license granted by him to manufacture and sell such article, that the licensee will give his co-operation in properly maintaining the business and the patents, binds the licensee to assist in all lawful ways in suppressing and preventing the infringement of the patent.

2. SAME.

Though the covenant does not oblige the licensee to continue the manufacture and sale of the article for any specified period, or deprive him of the right of retiring from business and selling his plant, it is still a continuing obligation, which the licensee's abandonment of the business will not release.

3. SAME.

A sale by the licensee of his plant with knowledge that the purchaser intends to employ it in violation of the patent, and with intent to aid him therein, is a breach of the covenant.

At Law. On demurrer to the petition.

This was an action at law to recover damages for an alleged breach of a covenant contained in a license to manufacture and sell barbed fence-wire, granted by the plaintiff to the defendant on November 25, 1885. In consideration of the license granted, defendant, among other things, covenanted that it would pay the royalty reserved therein, and make monthly reports of the amount of wire by it manufactured and sold, and "that it would faithfully carry out and perform all and each of the terms and conditions set forth in said license, and would give to said Washburn & Moen Manufacturing Company its co-operation in properly maintaining the barbed-wire business, and the patents under which said license was granted." The act charged as amounting to a violation of the last-recited covenant consisted in a sale made by the defendant to a corporation known as the "St. Louis Wire-Mill Company," "of its plant, machinery, stock in hand, good-will, and business," including orders for barbed wire then on hand. The petition alleged, in substance, that the St. Louis Wire-Mill Company was not authorized to manufacture, use, or sell barbed wire made in accordance with the patents owned and controlled by plaintiff, and under which defendant had operated in conformity with its license up to the date of the alleged transfer; that such fact was well known to defendant at the time of the sale; and that the sale was intentionally made by the defendant to enable the wire-mill company to engage on a large scale in the manufacture of unlicensed barbed wire, in violation of plaintiff's rights, and with the intent of enabling persons, not duly licensed, to make, use, and vend barbed wire in violation of plaintiff's patents, and to its injury, and in competition with its business, and the business of its licensees. The petition also averred that some of the defendant's stockholders and officers were also stockholders and officers of the St. Louis Wire Mill Company and controlled the same, and that the sale complained of was a mere scheme on the part of such individuals holding office in both companies to violate and evade defendant's covenant and obligations expressed in the license. The petition also alleged in effect that when the license was executed a large demand had grown up throughout the west for barbed fence-wire made in conformity with the patents owned or controlled by plaintiff; that plaintiff was at the time manufacturing wire in large quantities to supply such demand, and was doing a very profitable business in that line; that certain unlicensed manufacturers of wire had theretofore from time to time pirated its inventions and improvements in barbed wire; and that all such facts were well known to the defendant. The fourth count

of the petition containing the averments aforesaid was demurred to on the ground that it showed no breach of the covenant "to give its co-operation," etc.

Hitchcock, Madill & Finkelnburg, for plaintiff.

J. R. Bennett and Dyer, Lee & Ellis, for defendant.

THAYER, J., (*after stating the facts as above.*) I have no doubt that the covenant involved in this case bound the defendant, and was intended to bind it, to co-operate with the plaintiff in all lawful ways in suppressing the manufacture and sale by unlicensed persons of barbed fence-wire that infringed plaintiff's patents. The covenant "to give the Washburn & Moen Manufacturing Company its co-operation in properly maintaining the barbed-wire business, and the patents under which the license to defendant was granted," must be construed in the light of all of the circumstances alleged to have existed when the same was executed. In view of the allegations in the petition to the effect that plaintiff, by virtue of its exclusive rights under its letters patent, was doing a large and profitable business in the manufacture and sale of barbed wire when the license was granted, and was interested in maintaining its exclusive rights, and that certain persons had theretofore from time to time infringed its patents, it is manifest that in stipulating for the co-operation of its licensee in maintaining the barbed-wire business, and the patents under which the license was granted, the plaintiff bargained for aid in suppressing unlicensed traffic in such barbed wire as was covered by its patent. The licensor and licensee unquestionably regarded the prosperity of the business in which they were engaged, or were about to engage, as largely dependent upon the rigid enforcement of the exclusive right to manufacture certain styles of barbed fence-wire, which plaintiff claimed under and by virtue of its patents. In all probability, when the licensor and licensee executed the license, they contemplated maintaining the barbed-wire business, mainly by a rigid enforcement of such exclusive rights, and by a diligent prosecution of infringers. For these reasons I conclude that the chief obligation assumed by the defendant, when it executed the covenant in question, was an obligation to co-operate or assist in all lawful ways in preventing infringements of the barbed-wire patents that are enumerated in the license.

I concur with defendant's counsel in the view that the covenant "to co-operate in properly maintaining the barbed-wire business and patents" did not obligate the defendant to continue the manufacture and sale of barbed wire during the life of the license, or for any specified period; and that it did not deprive the defendant of the right to retire from business, or necessarily deprive it of the right to sell its machinery, plant, stock in trade, etc. Nevertheless it is obvious that the agreement to co-operate in maintaining the business and patents in question was a continuing obligation, and that the defendant was not released therefrom merely by abandoning its business operations under the license. Such being, in my opinion, the proper construction of the covenant, the only doubtful question in the case is whether the alleged sale by the defend-

ant to the St. Louis Wire-Mill Company of its machinery and plant for the production of barbed wire, together with its stock in trade and unfilled orders, amounted to a breach of the covenant by reason of the fact that defendant knew, as the plaintiff avers, that the wire-mill company was an unlicensed manufacturer of barbed wire, and intended to employ the machinery, plant, and other property so acquired, in a manner that would violate plaintiff's asserted exclusive rights and privileges under its patents. A careful analysis of the fourth count of the petition, to which the demurrer relates, shows very clearly that no act is charged therein amounting to a breach of the covenant, unless the sale made by the defendant of its machinery and plant with the knowledge aforesaid, and with an intent on its part, as alleged, to aid the wire-mill company in the production of unlicensed wire upon a large scale, amounts to such breach. It is true that in actions *ex contractu* it is usually unnecessary to inquire with what knowledge or intent a given act was done, in order to decide whether it amounted to a violation of the agreement sued upon. It is ordinarily the case that if an act, considered by itself, does not amount to a breach of an agreement, the knowledge or intent with which the act is done will not render it unlawful. This result is due, I apprehend, altogether to the nature of ordinary covenants and agreements, and to the language in which they are expressed. I know of no reason, however, why parties may not put their engagements into such form as to render an inquiry into the knowledge with which a given act was done, and the motives that prompted it, both legitimate and necessary, even in an action *ex contractu*. It appears to me that the covenant now under consideration is of the character last indicated. The defendant bound itself to co-operate, that is, to act jointly or in concert with plaintiff, in maintaining the barbed-wire business and certain patents. That covenant necessarily implied that it would not, knowingly and intentionally, give aid and comfort to a class of barbed-wire manufacturers whom the licensor and licensee evidently had in mind, and regarded as the common enemy, when the license was granted. It certainly implied that defendant would not place machinery and tools that were specially adapted to the production of the patented article in the hands of the enemy, with knowledge that they were to be used in the production of unlicensed wire, and with intent to aid in the production. I accordingly conclude that the allegations in the fourth count of the petition, as to the knowledge and intent with which the defendant sold its machinery and plant, are material, and that the count, by reason of such allegations, states a good cause of action. Either this view should be taken, in my opinion, or the other view ought to be adopted, that defendant, before making the sale in question, was bound to provide at its peril that the machinery and plant were not employed in the production of infringing barbed wire. According to either view the demurrer should be overruled, and it is so ordered.

CRENSHAWE v. PEARCE.

(District Court, S. D. New York. January 12, 1889.)

SHIPPING—LIABILITY OF OWNER FOR CONTRACT—BILLS OF LADING—MISTAKE—AGENT'S OPTION.

U., the common agent of several different steamships, owned by different owners, and running independently upon stated days, forming the "Guion Line," agreed with libelants to transport about 800 bales of cotton per steamer A. ^{and} or W., agent's option. A part were sent by the A., the rest by the W., a week later. U. only had authority to determine by which vessel "and or" goods should go. Without his knowledge or assent, shipping receipts were delivered to libelants, through some mistake of the subemployes, apparently induced in part by the libelants' slips. The receipts stated that the goods were to go by the A. only; upon the faith of which, without U.'s knowledge, bills of lading were issued, at his office, for all the cotton per steamer A. The cotton shipped by the W. arrived about 10 days later than that by the A., and, the price falling in the mean time, the libelants sued the respondent, who is sole owner of the A., for the loss. *Held* (1) the original contract was the agent's contract only, and did not bind either the vessel or her owners; (2) the different vessels and owners were not liable for each other's contracts; (3) the shipping receipts and bills of lading per A. only, being issued by mistake, and without U.'s knowledge or authority, did not constitute any exercise of the option reserved in the original contract, and did not bind the respondent, as respects the goods carried by the W.; (4) that the W.'s goods had never been delivered to the A., or under her control; and that the respondents were not liable.

In Admiralty.

Action upon three bills of lading for failure to transport 559 bales of cotton by steamer Arizona.

Everts, Choate & Beaman, for libelants.

Wilcox, Adams & Macklin, for respondent.

BROWN, J. The libelants, in September, 1887, received from Underhill & Co., in this city, three bills of lading, reciting the shipment of 848 bales of cotton on board the steam-ship Arizona, for Liverpool, dated August 31st, September 1st, and September 2d. She sailed on Tuesday, September 6th. Only 289 bales went by the Arizona. The remaining 559 bales were carried by the Wisconsin, of the same line, which left a week later, and arrived in Liverpool about 10 days after the Arizona. During this interval there was a fall of three-eighths of a penny per pound in the market price of cotton, to recover which this libel was filed.

The evidence shows that on the 24th and 26th of August preceding, written contracts were made between the libelants and the representatives of Underhill & Co., whereby transportation was engaged for "about 800 bales of cotton on board a steam-ship of the Guion line, expected sailing the 6th ^{and} or 13th September, agent's option, subject to the terms and conditions of the form of the bill of lading approved by the New York Produce Exchange;" and that the bales in question were sent by the

libelants to the Guion line under these contracts. The "Guion Line" is a mere trade-name. The vessels that form the "line," and run on stated days, belong to different owners. They are run independently; the accounts are distinct; the owners of one vessel are not interested in, or liable for, the business of the vessels of the other owners. The respondent was sole owner of the Arizona, and had no interests in the other vessels of the "line." The Arizona was advertised to sail on September 6th; the Wisconsin, September 13th. A permit or order was issued, as customary, by Underhill & Co. for the receipt of the cotton by the line. The permit was delivered to the libelants about the 25th of August, and specified the steam-ship "Arizona and or Wisconsin, about 800 bales cotton; uncompressed, to Empire Stores; to be delivered on or after August 30th." Under this permit the cotton was all delivered by the libelants either to the Empire press, or at the Guion pier. Two hundred and nineteen bales were delivered to the press, and from there were sent to the Arizona, and carried by that vessel. The rest of the cotton was sent to the Guion pier.

When the permit provides for an option in transportation, by one or more steamers, as in this case, the shipping receipt given at the dock or press, for each lot delivered under such a permit, is required to be in the same form and to specify the names of both steamers; and the bills of lading, which in the usual course of business are obtained at Underhill & Co.'s office in exchange for the shipping receipts, are also issued, as of course, in the same form. In the present case seven different lots were delivered at the dock or press, under the permit; but all the shipping receipts that the libelants received therefor mentioned the ship Arizona only. The evidence shows that this was done without the knowledge or authority of Mr. Underhill, the only person authorized to determine by which vessel the goods should go. It was the result of mere mistake, or misinformation, or misunderstanding, in the absence of instructions from Underhill & Co.; and it was apparently, in part at least, brought about by the libelants themselves. A great number of the libelants' "slips," sent to the line by the car-men or lighter-men along with the goods, were produced in evidence, and all except one state that the goods were to go by the Arizona. The libelants had no right to send with the goods slips thus worded. They should have read "Arizona ^{and} or Wisconsin." Although the subagents at the dock or at the press had also no right to act upon the libelants' slips alone, such slips were calculated to mislead, and they no doubt conduced to the mistake in the shipping receipts, if they did not alone cause it.

The option reserved to Underhill & Co. to send goods by the one steamer or the other, was an option beneficial to both parties; to the ship, because it enabled her to take higher priced freights for perishable goods that might be brought forward for transportation on the last day; or, if these were wanting, to fill up with the lower priced cotton. It was beneficial to the libelant, because the ship could afford to take the cotton at a lower freight, in view of the option reserved as to the time of forwarding.

The bills of lading are not, as the libelants contend, the only contracts between the parties. Even if they had been regularly issued, they would only have been in execution of the previous contracts of affreightment, which provided that bills of lading should be given. The bills of lading stand in the same relation to the original contracts of affreightment that bills of lading hold to the charter-parties under which they have been given. In the latter class of cases it has been long settled, not only that the bills of lading do not supersede the provisions of the charter-party in so far as they differ from it, but that they are controlled by the charter-party, in the absence of any proof of authority and intention to make a new contract. 1 Pars. Adm. 286; *The Chadwicke*, 29 Fed. Rep. 524, and cases there cited; *Ardan v. Theband*, 35 Fed. Rep. 620. By those contracts Mr. Underhill had the right to send the cotton by either the Arizona or the Wisconsin, or in part by both, as was done. There was no intent by either party to make any new contract. There was doubtless an option to be exercised before the goods could be forwarded. But Mr. Underhill was the only person having authority to exercise this option. The bills of lading are *prima facie* evidence that he did exercise that option in favor of sending all the cotton by the Arizona; but they are only *prima facie* evidence. The answer sets up that they were issued by mistake, and without Mr. Underhill's knowledge or authority; and the proof establishes that fact, both as to the shipping receipts and as to the bills of lading, which followed the shipping receipts, as a matter of course. Papers thus issued by mistake constituted no exercise of the option reserved to Mr. Underhill; nor any new contract, for want of the necessary assent. When the shipping receipts were presented by the libelant at Underhill & Co.'s office to be exchanged for the bills of lading per Arizona, Mr. Underhill, or the clerks, might lawfully have refused to issue the bills of lading for the Arizona only; and the evidence leaves no room to doubt that they would have done so had either of them known that the shipping receipts had been improperly issued per Arizona only. *Fowler v. Liverpool*, 87 N. Y. 190. The shipper is entitled to no advantage from such a mistake.

The libelants' claim rests entirely on their possession of the bills of lading, stating the transportation to be by the Arizona alone, as though the delivery of the bills of lading to them were a final and absolute determination of the option previously reserved, and formed, from the moment of delivery, the only contract between the parties. Even had the bills of lading been deliberately issued by Mr. Underhill himself, it may be doubted whether they would necessarily have had any such effect. Until the libelants had acted upon the faith of such bills of lading, and changed their rights or obligations, I see no reason why a previous determination to send by the Arizona might not have been revoked under the option in the original contracts. Notice of any such revocation would perhaps have been necessary for protection against any subsequent claim by the shipper for damages incurred upon the faith of the bills of lading; but, so far as I perceive, for no other purpose. In this case the libelants in no way changed their situation upon the faith

of the bills of lading. The goods all arrived safely, and in exact fulfillment of the original contracts; and the lack of notice to the libelants that part went by the Wisconsin became immaterial. That question, however, is not presented in this case, because there is no doubt, upon the evidence, that the shipping receipts and bills of lading were not properly issued, and were not any exercise of the option reserved.

Again, upon the evidence, Underhill & Co. had no authority to bind the respondent upon contracts of affreightment for transportation by any other vessel than the Arizona. The original contracts, therefore, were the obligations of Underhill & Co. only, and did not bind the respondent. Under such a contract, the respondent could not become bound until the goods were delivered to the Arizona or her officers, or some other act was done amounting to a final appropriation of the goods to the Arizona, or which imported a contract to transport the goods per Arizona alone. Only Mr. Underhill had authority to make any such appropriation, or any such contract; and, as respects the 559 bales in question, he never made any such appropriation or contract. He did not exercise any such option, nor authorize the bills of lading or the shipping receipts in the form in which they were issued.

Still further, bills of lading, as executory contracts, have not the effect which the libelants ascribe to them. They import a receipt on board of certain goods, to be transported and delivered at the place of destination. The executory contract to transport extends only to the goods actually received on board, or within control of the officers of the ship or her representatives; and parol evidence is admissible to show that only part or none at all of those receipted for in the bill of lading were received, and the contract to convey is thereupon limited accordingly. In *Pollard v. Vinton*, 105 U.S. 8,—an action *in personam*,—Mr. Justice MILLER says: "The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." Accordingly, it is the constant practice for the ship or her owners to limit their apparent responsibility under the bill of lading by proof that less goods were received. 1 Pars. Adm. 190; Carv. Carr. by Sea, § 69; *Goodrich v. Norris*, Abb. Adm. 196; *The Saragossa*, 2 Ben. 544; *Sears v. Wingate*, 3 Allen, 103, and cases cited; *Querini Stamphalia*, 19 Fed. Rep. 123; *Robinson v. Railroad Co.*, 9 Fed. Rep. 140, 16 Fed. Rep. 57. There is manifestly no difference, as respects liability, between an action for not delivering the goods specified in the bill of lading, and an action for damages for not carrying the same goods. The contract in the bill of lading is the basis of both actions alike; and that contract is limited to the goods actually delivered to the ship, or to her representative, under it. Had Underhill been the agent of the Arizona only, a delivery of goods to him at the dock, under a previous contract, on the respondent's account to transport them by that ship alone, would probably be deemed a delivery to the ship, and binding on her owner. But as he was the common agent of all the ships of the line, and had neither made any contract for the Arizona alone, nor appropriated the 559 bales to the Arizona, those bales were never delivered to the Ari-

zona, either actually or constructively; and as to those bales, the bills of lading, which Underhill had never authorized, had no force or validity as receipts or as contracts, as against the ship or her owner.

The present case very closely resembles that of *The Lady Franklin*, 8 Wall. 325, where a common agent of several independent vessels forming a "line," as in this case, agreed to send the libelants' goods by "one of the vessels of the line," and did so; but a clerk, by mistake, and in ignorance of the facts, delivered a bill of lading as upon a shipment by another vessel of the line,—the *Lady Franklin*,—which was accordingly sued. That case was stronger for the libellant than the present, as most of the goods shipped on one of the other vessels were lost. Mr. Justice DAVIS, in delivering the opinion of the court, says:

"It would be strange indeed, if the owners of the *Franklin* were made to suffer because the common agent of all the boats had, through inadvertence, given a receipt for merchandise not on the boat, or in the warehouse even, but which was then on board other boats, on its way to its destination."

The case of *Pollard v. Vinton*, *supra*, shows that the same rule is applicable to actions *in personam*. On principle and authority the libel must be dismissed, with costs.

THE SERAPIS.¹

SALMON v. THE SERAPIS *et al.*

(District Court, S. D. New York. January 9, 1889.)

1. SHIPPING—BOTTOMRY—MASTER'S DRAFT—PERSONAL LIABILITY—PARTIES—ADMIRALTY RULE 18.

A master's draft was drawn in the following form: "On arrival at port of destination I promise and bind myself to pay, * * * for the payment of which I hereby pledge my vessel. This is my obligation, which settles definitely every accounts with the charterer, and I have signed this in settlement and fulfillment of the obligations contracted by my owners, M. Bros. & Co., with the charter-party, and I give this bill in their name, account, and order, and acting as their empowered representative. Any other obligation or draft drawn by me to be secondary to this. [Signed] G. D., Master of steam-ship S." In an action brought by an indorsee of the draft against the ship and master upon the draft only, *held*, that the draft did not purport to bind the master personally, and that the joinder of both was improper under admiralty rule 18.

2. SAME—NEGOTIABILITY.

Such an instrument is only *quasi* negotiable, and is subject to all equities as respects the ship. When given in settlement of differences of freight, without authority, it creates no lien on the ship; and, as it does not purport to bind the master personally, no suit against him lies on the instrument itself, but only against him "as a wrong-doer," under rule 18, upon his false representation or implied warranty; and where the payee has knowledge of all the facts, and the indorsee easy means of knowledge *semble*, proof of his *bona fide* purchase of the draft, without notice of equities, is requisite to enable him to set up any estoppels against the master appearing on the draft itself.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

3. SAME—CHARTER PARTY—CESSER CLAUSE—SETTLEMENT—ERRORS.

The cesser of liability clause in a charter, "all claims on charterer to cease" after settlement between the master and the charterer, will not prevent the correction of errors in the settlement itself.

4. SAME—COMPUTATION OF FREIGHTS—FOREIGN WEIGHTS—LEX SOLUTIONIS.

The Italian mode of turning cantars into English pounds being different from the New York mode, and the bill of lading making the freight payable in New York, on the number of "cwt. delivered," *held*, the rule in force here must govern.

5. ADMIRALTY—PRACTICE—ANSWERS TO INTERROGATORIES—EVIDENCE.

Answers to interrogatories annexed to the pleadings stand, as evidence, like the pleadings only. What is admitted, needs no further proof; but as respects matters that still remain at issue, answers to interrogatories are not affirmative evidence in favor of the party making them.

6. SAME—COSTS—CLERK'S AND MARSHAL'S FEES—TENDER.

Upon deposit of money as a tender in the registry of the court, the clerk's and marshal's statutory fees payable thereon must be also added and paid by the depositor, in order to make the tender good, if the tender and deposit are first made after suit brought; otherwise, if the deposit is only in support of a sufficient legal tender made before suit brought. In the former case the tender will be held available only for the deposit less the clerk's and marshal's charges.

In Admiralty. Libel by an indorsee of a master's draft against the vessel and the master personally to enforce payment of the draft.

Butler, Stillman & Hubbard and *W. Mynderse*, for libelants.

E. B. Converse, for respondents.

BROWN, J The libel in this case was filed against the British steamship *Serapis*, and George Dobson, her master, to recover £545.18.7, the amount of an obligation drawn by the master at Palermo, February 11, 1888, payable to the order of the charterer, Pietro Tassi, on arrival of the steamer at New York, pledging the ship for payment, and indorsed to the libellant. The obligation was a brief form of bottomry, given in settlement of differences between the charter money owing by Tassi for the hire of the vessel and the freight to be collected by the steamer upon the bills of lading on arrival at New York, for goods shipped on board at Palermo, the last port of loading. The form of the master's obligation, and the provisions of the charter, so far as they relate to this subject, are identical with those in the recent case of *The Lykus*, 36 Fed. Rep. 919, except as to names, dates, and amounts. Before and on arrival of the steamer at New York it was found that various errors had been made in fixing the amount of the bill, to-wit:

(1) Error in addition by the master,	£100. 0.0
(2) Erroneous allowance of insurance,	9.12.0
(3) Difference between bill of lading given by the master to the charterer for fruit, and certain sub-bills of lading, issued by the charterer to the owners of the fruit,	19. 9.5
(4) Shortage of freight collectible on 5,200 cantars of ore, through the different modes of converting cantars into pounds at Palermo and New York,	11.11.7
(5) One bill of lading omitted,	12. 8.6
Total,	£158. 1.6

The first four items would by so much reduce the ship's debt; the last would increase it. The third item (excepting 18/4, accounted for) was returned by Tassi to the defendants by his draft, which was received by them, but has not been paid, and was offered to be returned for the first time upon the trial. If all the above corrections were made, the bill would be reduced by £128.4.5, leaving due £417.14.2, amounting to \$2,037.30. This sum, with interest and costs, the owners of the vessel paid into court soon after the commencement of the suit. The litigation is as to the residue only of £128.4.5.

1. As against the ship, the libellant cannot recover, because, as in the case of *The Lykus*, *supra*, the master had no authority, either under the maritime law or under the terms of the charter, to execute bottomry, or any express hypothecation of the ship, for differences in freights in favor of the charterer, or for his advances of charter money. As regards any express lien, the obligation is, therefore, invalid; and if any implied lien arises against the ship for the fulfillment of her charter obligation to pay any differences in freight to the charterer, such an implied lien does not extend beyond what the ship actually owed. The indorsee stands in this regard in no better position than the payee; so that any mistakes in ascertaining the amount owing by the ship must be corrected in the ship's favor. This is not contested in this case.

Although by the Codes of France (section 313) and of Italy (section 592) bottomry bills payable to order have the full qualities of negotiable paper, saving defects of assent or authority, (3 Valroger, *Droit Mar.* § 1013; 5 Desjardins, *Droit Mar.* § 1148, p. 187; 2 Laurin, *Cresp.* 251, note 40,) I understand our law to be otherwise. Such instruments, being payable only on a condition, are not fully negotiable like promissory notes and bills of exchange; but, like bills of lading, only *quasi* negotiable; and, except in cases subject to the principles of equitable estoppel, the indorsee takes only the payee's rights; *i. e.*, subject to any equities affecting the obligation itself, though not, perhaps, subject to wholly independent offsets available against the payee, (*Shaw v. Railroad Co.*, 101 U. S. 557;) and any errors, imposition, or sharp practice in bottomry obligations are freely corrected by our courts of admiralty. *Nunez v. Dautel*, 19 Wall. 560; *The Virgin*, 8 Pet. 538; *The Woodland*, 104 U. S. 180; *The Catherine*, 3 Wm. Rob. 1, 5; *The Osmanli*, Id. 198; *The Prince of Saxe-Cobourg*, 3 Hagg. Adm. 387, 394, affirmed, 3 Moore, P. C. 1, 10; *The Zodiac*, 1 Hagg. Adm. 320, 327, 332; *The Cognac*, 2 Hagg. Adm. 378; *The Packet*, 3 Mason, 260; *Coolidge v. Ruggles*, 15 Mass. 387; *The Archer*, 15 Fed. Rep. 276, 282, 23 Fed. Rep. 352; *The Lykus*, *supra*. See, also, German Code, art. 687; Wendt, *Mar. Leg.* (3d Ed.) 739; The Netherlands Code, § 573.

2. The cesser of liability clause in the charter, "after such settlement all claims on charterers to cease," does not prevent the correction of errors in the settlement itself, as between the ship and Tassi—(1) Because the parties are presumed to have meant by that clause a true and proper settlement, not a false or erroneous one. On an account stated, upon a settlement, errors or mistakes, clearly proved, are corrected as of course.

Perkins v. Hart, 11 Wheat, 256; *Wiggins v. Burkhams*, 10 Wall. 129. (2) Because the parties have treated the settlement as provisional only, as in *Eisenhauer v. De Belaunzaran*, 26 Fed. Rep. 784, 790. Both sides, before this litigation began, made proffers for the proper correction of some of these errors. (3) Because the defense here does not come within the letter of the cesser clause as a "claim made upon the charterer." It is a resistance against payment to the charterer, or his indorsee, of a larger sum than was due them. The charter does not say that the captain's "settlement" shall be final and conclusive as to the amount owing by the ship, or as to the amount of the charterer's claim on the ship, so as to preclude any subsequent correction of mistakes. I do not think any such thing was intended by the cesser clause. The common practice under it confirms this view. If the parties meant that such settlement should be conclusive for all purposes on ship and owners, that should at least have been stated. Such a construction is too prejudicial to justice, and too liable to abuse, to be supplied by implication merely. The history of such clauses in charter-parties, moreover, shows that they were originally designed to relieve charterers or agents, abroad, from future responsibilities for the voyage; as in the collection of freights, or the detention of the ship, over neither of which could they exercise any control or supervision. *Macl. Shipp.* 356-359; *Christoffersen v. Hansen*, L. R. 7 Q. B. 509; *French v. Gerber*, L. R. 1 C. P. Div. 737, 744; L. R. 2 C. P. Div. 247, 253.

3. The item of £11.11.7, shortage on freight, arises through the different modes of turning Italian cantars into English pounds. The bill of lading made the freight payable "on arrival in New York at the rate of 11/9 sterling per ton of 20 cwt. delivered in full." In the "settlement" at Palermo, the cantars, by the Italian reckoning, amounted to 1,371 tons; by the New York mode of reckoning, the same number of cantars made only 1,352 tons. But as the freight was payable in New York on the number of "cwts. delivered," the rule of computation in force here must govern.

All the corrections claimed must therefore have been allowed, if this action had been brought by Tassi; and the libellant, as indorsee, can claim no greater lien against the ship than Tassi could have claimed.

4. As against the master, it is contended that he is equitably estopped from disputing his liability for the full amount of the bill to a *bona fide* indorsee, by the false representation that the bill was given "for necessary last disbursements, as well as for differences in freight," and that he had "signed it in settlement and fulfillment of the obligations contracted by his owners, McIntyre Bros. & Co., London, with the charterers." But if this instrument is not the personal obligation of the master, the proper remedy for the false representation, or implied warranty of authority, would be by an action on the case for damages for such false representation and warranty; not like this, upon the bill itself. 1 Pars. Cont. (7th Ed.) 69; *Richardson v. Williamson*, L. R. 6 Q. B. 276, 278; *Simmons v. More*, 100 N. Y. 140, 2 N. E. Rep. 640; *Baltzen v. Nicolay*, 53 N. Y. 467. Such an action could not properly be conjoined with a

suit *in rem* against the ship. Admiralty rule 18. But, dismissing the libel as against the ship, the suit might be retained against the master on the allegations of the libel, if this obligation purports to bind him; and, in that case, he would be concluded by any estoppels that might be found on the face of the paper.

The language of the bill is as follows:

"On arrival at the port of destination I promise and bind myself to pay to the order of Pietro Tassi, £545.18.7 in cash, or approved bankers' demand bills on London, * * * for the payment of which I hereby pledge my vessel. This is my obligation, which settles definitely every [all] accounts with the charterer, and I have signed this in settlement and fulfillment of the obligations contracted by my owners, McIntyre Bros. & Co., with the charter-party, and I give this bill on their name, account, and order, and acting as their empowered representative. Any other obligation or draft by me drawn to be secondary to this.

GEORGE DOBSON, Master S. S. Serapis."

The bill is a printed form with names, dates, and amounts filled in. Taking this language all together, I do not think it was designed or understood to create any personal obligation of the master. Aside from the considerations applicable to it as a bottomry obligation, and regarding it as an ordinary commercial contract, signed by an agent, though the cases bearing on the question are not free from some conflict, the weight of authority, I think, is to the effect that, where the instrument is made by a known agent, is signed in that capacity only, discloses the principal, and clearly indicates that it is given in the principal's business, and on his account, it will be construed as the obligation of the principal, and not of the agent. The use of such words as "I promise," or "we bind ourselves," etc., are construed as used in the official or representative character only, not binding the agent personally. *Falk v. Moebs*, 127 U. S. 597, 8 Sup. Ct. Rep. 1319; *Smith v. Morse*, 9 Wall. 76, 82; *Metcalf v. Williams*, 104 U. S. 93, 97; *Rice v. Gove*, 22 Pick. 158; *Goodenough v. Thayer*, 132 Mass. 152; *Alexander v. Sizer*, L. R. 4 Exch. 102; *Gadd v. Houghton*, L. R. 1 Exch. Div. 361; *Lindus v. Melrose*, 2 Hurl. & N. 293; *Story*, Ag. §§ 154, 271; 1 Pars. Cont. (7th Ed.) *57, note; 1 Pars. Notes & B. 98, 99; *Evans*, Prin. & Ag. (2d Ed.) 226, 246, 248.

This obligation states expressly that it was given "on account and by order of the owners," and in the master's "representative capacity." No stronger declaration of its representative character could be made. The charter uses similar language: "Differences of freights to be settled, if in captain's favor, by cash; if in charterer's favor, by captain's bill; captain having a lien on cargo for all freight," etc. Manifestly the cash to be paid to the captain was not to be his individual property; nor his bill to be his individual obligation; nor the lien to be for his own benefit. His representative capacity is alone referred to.

Emerigon treats of this point with entire clearness, *Contrats a la Grosse*, c. 4, § 12. Putting a case from the Roman law he says:

"As agent of Octavius Felix, I have received of you one thousand crowns, which I will repay you within a certain time. I am not bound in my own person, because I have signed this obligation in my capacity as agent. * * *

In a word, the agent who in the obligation designates his capacity, of whatever kind it be, * * * is not himself bound. * * * But the agent who pledges his own faith to another cannot be relieved from his contract."

As to the captain's personal liability on a bottomry obligation, he says:

"A distinction is to be made. If in the contract of bottomry the captain has bound his own goods and his person (of which I have seen a thousand examples) he is personally held. But if he has contracted only in the quality of the captain, the lenders * * * will be limited to their action *in rem*."

The forms long in use show the two kinds of bottomry contract indicated by Emerigon,—the one, whereby the master simply "binds himself, his heirs," etc.; the other, whereby he "binds himself, his heirs," etc., " * * * and his goods and chattels," or his "lands, tenements, goods, and chattels." Abb. Shipp. App. form 2; Macl. Shipp. pp. 947-949; *The J. Goodhue*, 1 Swab. 524, 527. The former words are but the formal language constituting a representative obligation only, for which the ship alone is liable. *The Virgin*, 8 Pet. 554. This instrument is of that class. In *The J. Goodhue*, *supra*, the bond was of the latter class, pledging the master's "lands, tenements, goods, and chattels."

The eighteenth supreme court rule in admiralty, in declaring that "in all suits on [valid] bottomry bonds the suit shall be *in rem* only," seems to determine our law on this point in the master's favor, at least on all ordinary bottomry instruments; so that, unless the master has pledged his own property, or pledged his own credit by some unusual language, he is not personally liable; and if he has pledged his own property, then that is part of the "property hypothecated," and falls within the eighteenth rule. Other phases of this question have been forcibly presented by BENEDICT, J., in the case of *The Irma*, 6 Ben. 1, and need not be repeated here. The language of this instrument has less indication of a pledge of the master's personal credit than the ordinary forms of simple bottomry that contain no pledge of the master's goods. Thus, the ordinary forms often state, as in *Simonds v. Hodgson*, 3 Barn. & Adol. 50, that the master "binds himself, his heirs, administrators and assigns," which latter words are absent in the present case; yet, with reference to such a bottomry, Lord TENTERDEN, in the case cited, says:

"It cannot be supposed that the lenders looked to him [master] personally, or to his personal means; nor that he intended to pledge himself personally and absolutely for the payment, without regard to the means with which he might be furnished by the ship and her freight."

As this bottomry obligation, therefore, does not bind the master personally, any suit seeking to charge him for a false representation, or for want of authority in executing it, must be upon a libel against him as a "wrong-doer," under rule 18, with the appropriate allegations; none of which exist in the present libel. Such a libel could not be sustained in Tassi's favor, since he had notice of all the facts. He knew that the amount was more than was due to him, and that the error of £100 was a mistake by the master. To negotiate the draft for its full amount, without notice given of the error, would be none the less a fraud upon

the ship and her owners; even if this, the largest, mistake of £100 was caused, as the libelant claims, by the master's obstinate refusal to listen to the suggestion of Tassi's representative that there was error in the amount, though the master asserts the contrary. As fraud is not presumed, it might be inferred that the libelant, the transferee, was notified of the mistake, in the absence of any evidence to the contrary. Strict proof should, therefore, be required of what occurred upon the transfer; what inquiries, if any, were made; and what knowledge or notice was given to the libelant, before admitting such an equitable estoppel as is claimed.

The libelant's answers to the interrogatories do not cover this point. Such answers to interrogatories propounded at the close of the pleading under admiralty rules 23 and 27, are not strictly evidence in the cause, in any different sense than that in which the pleadings are evidence. *Andrews v. Wall*, 3 How. 568. Though sworn to, they are not a "deposition" for which costs can be taxed under Rev. St. § 824. Such answers to interrogatories are designed rather as compulsory amplifications of the pleadings on the specific subjects propounded in the interrogatories, so as to dispense with the taking of proofs, or evidence proper, on the facts that may be admitted. When the interrogatories are propounded by the libel, the replies usually make part of the answer itself. *Dunl. Adm. Pr.* 201. It is immaterial whether they are answered as a part of a pleading or separately. As evidence, they stand like the pleadings only. They are parts of the record, and may, like the pleadings, be referred to by either party. What is admitted, needs no further proof; but as respects matters which still remain at issue, such answers are not affirmative proof in favor of the party making them. *Williams & B. Adm. Prac.* (2d Ed.) 410.

The libelant did not answer the second interrogatory as to whether he bought or discounted the draft absolutely, or subject to its collection at New York; he says:

"I bought the draft because it was signed by the captain, pledging the ship for its payment, which I considered a true guaranty, inasmuch as charterer indorsed to me the relative policy of insurance for the case of the ship's loss."

He further states that the transaction was verbal, and that he has "no claim to make against Tassi." Neither in the libel, nor in the answers to the interrogatories, is there an indication of any reliance on the master's credit. The language just quoted indicates that the bill was taken upon the credit of the vessel only. Considering that the bill makes express reference to the charter, and that neither the charter, nor the general maritime law, nor the Italian law, authorize bottomry of the ship for debts of this kind, the libelant was specially put upon inquiry as to the facts and the terms of the charter, which were easily procurable from Tassi; and it is doubtful whether any equitable estoppel could in this case arise. See *The Prince of Saxe-Cobourg*, 3 Moore, P. C. 1, 11. That question, however, cannot be determined in this action.

The libelant may take a decree for the amount deposited in court, without further costs to either party.

(January 21, 1899.,

Upon the settlement of the decree a question arises as to which party shall bear the charge of 1 per cent. on the amount tendered and paid into court, which section 828 of Rev. St. U. S. makes payable to the clerk for "receiving, keeping, and paying out money," as well as the marshal's percentage on the same.

In the case of *Upton v. Tribblecock*, 4 Dill. 232, note, Mr. Justice MILLER held that where a party is adjudged to pay money, and, instead of paying it to the other party or his attorney, elects to pay it into court, he must pay in addition the clerk's statutory charge. In *Kitchen v. Woodfin*, 1 Hughes, 340, the ruling was similar as to the clerk's fees upon money collected on execution and paid into the registry of the court.

When a full tender is made before suit brought, the defendant, by rule 72 of this court, in order to avail himself of the tender in discharge of costs, must, "before answer, plea, or claim filed," deposit in the registry "the same tender." He need deposit no more; for if the original tender was sufficient, all subsequent costs and charges should be borne by the libellant, and the libellant therefore recovers only the deposit, less the clerk's charges thereon.

If the tender is first made *after* suit brought, by deposit with the clerk under rule 73, then the defendant elects to make use of the registry of the court to avoid subsequent costs, and he must therefore deposit, in addition to the amount due to the libellant, the clerk's and marshal's statutory percentage thereon. The clerk is entitled to deduct from the fund deposited these statutory fees; so that, in effect, the amount inuring to the credit of the libellant as a tender to the defendant, is the amount deposited, less these statutory charges. It is the same with any other payment to the clerk, or deposit under the order or decree of the court. See *The Georgeanna*, 31 Fed. Rep. 405. This tender was first made after suit brought; and the clerk's percentage, therefore, must fall upon the defendant.

It is the same with executions. Under rule 157, the marshal being required to pay into the registry all moneys coming to his hands by any process of the court, he should be directed upon execution to collect of the judgment debtor the clerk's percentage, as well as his own fees. The debtor may avoid both these charges by payment of the judgment to the proctors before the execution issues. His failure to do so is an election to leave the collection of the judgment to legal process; and this properly charges upon him all the fees consequent on that process.

THE POMONA.

LOUISIANA & T. R. & S. S. Co. v. THE POMONA AND HER CARGO.

(District Court, D. South Carolina. January 29, 1889.)

SALVAGE—COMPENSATION—AMOUNT.

The three-masted propeller Pomona, bound from Port Maria, Jamaica, to New York, broke the tail-end of her shaft, her propeller became useless, and soon after was lost. Her steering apparatus was seriously strained, she became unmanageable, refused to obey her rudder, and made no way. She was out of the regular track of steam-vessels, and could get no substantial assistance for 17 days, during which time she had out signals of distress. The City of New York, valued at \$225,000, with a full cargo, bound from New York to Galveston, having been carried out of her course, sighted the Pomona, and at once came to her aid, towed her some 240 miles to Charleston, and hired a tug to take her over the bar. The trip was neither difficult nor dangerous, but was only just in time to avoid very bad weather. The Pomona and her cargo were worth \$14,830. The court awards \$2,000, including the sum paid to the tug.

In Admiralty. Libel by the Louisiana & Texas Railroad & Steam-Ship Company against the steam-ship Pomona and her cargo, for salvage. *Barker, Gilliland & Fitz Simons*, for libellant.

T. M. Mordecai and *Wing, Shoudy & Putnam*, for respondent.

SIMONTON, J. This is a case of salvage. There is always much embarrassment in determining the amount of a salvage award. The general principles are well established. Mr. Justice BRADLEY, in *The Suliste*, 5 Fed. Rep. 99; Judge WALLACE, in *The Baker*, 25 Fed. Rep. 774; the supreme court in *The Blackwell*, 10 Wall. 13, and in *Cope v. Dry Dock Co.*, 119 U. S. 628, 7 Sup. Ct. Rep. 336,—clearly present the rules which govern in these cases. The application of the rules creates the difficulty. No two cases are ever alike. Each case must be governed by the special circumstances surrounding it, and the final impression left upon the mind after consideration of them. Of the elements which make up the award the chief, and, it may be, the most important, is the danger from which the salvaged property was rescued. It must pay the price; what was this service worth to it?

In the case at bar, the Pomona, a three-mast propeller, left Port Maria, in Jamaica, on her regular trip to New York, about the 3d of March, 1888. She was of 170 tons burden, 150 feet long, 21 feet beam, and 18 feet in depth. Her cargo consisted of coffee, bananas, and annatos. Shortly after the commencement of her voyage she met tempestuous weather, and on the 8th of March broke the tail-end of her shaft. This rendered the propeller useless, and in a day or two she lost her propeller. Having a full complement of sails, she attempted to prosecute her voyage. In despite of all her efforts, buffeting with the winds and waves, she was constantly driven from her course, became at times unmanageable, not obeying her helm, frequently drifting, and exposed to oft-recur-

ring storms. Although during this time she did not leak, and behaved admirably, and there is no evidence that her master and crew had lost heart, yet the log shows that they kept an anxious lookout for a steamer as the only mode of extrication from their trouble. They kept their colors flying on two masts Union down, and used every means of attracting the attention of passing vessels. One steamer, her consort, the *Vertumnus*, came to her aid, and endeavored to tow her. But after parting a chain and hawser, and injuring the windlass of the *Pomona*, she was obliged to leave her, and go on her voyage. One or two sailing vessels hailed her, and offered provisions, which were not needed, and therefore declined. They could afford her no other aid. Although several steamers were sighted in the distance, and on one occasion she exchanged signals with a steamer, she was not visited; certainly she found no opportunity, and received no offer of aid from any of them. On the 25th March, the *City of New York*, one of a line of steamers plying between New York and Galveston, owned by libelants, then out from New York about three days, on her way to the gulf, observed her signals of distress, and went to her aid. The *New York* had on that trip got out of her usual course some 40 miles to the eastward, and in this way came upon the *Pomona*. Going along-side of her and learning her disabled condition, and that she wanted to be carried to the nearest port, the *New York* promptly put out her hawser, took the *Pomona* in tow, and proceeded at once to the port of Charleston, then being some 246 miles distant, and bearing a little—very little—north of west. The line was made fast between 4 and 5 o'clock on the afternoon of the 25th of March. On the next afternoon, about 5 o'clock, the two ships reached Charleston bar. The master of the *Pomona*, having lost one anchor at sea, and having but one left, was unwilling to be left outside the bar. So the master of the *New York* engaged the services of a tug, which carried the *Pomona* over the bar and into the port of Charleston to a safe anchorage. The weather was excellent after the *New York* reached the *Pomona*. The tow was an easy one, both vessels using their sails. Bad weather came on just as they were reaching the Charleston bar, and during the night after leaving her the *New York* encountered a heavy gale. We see from this that the *Pomona* had been seriously disabled for 17 days. When she lost her propeller she was in longitude 74 deg. 48 min., latitude 33 deg. 20 min. When the *New York* reached her she was in longitude 75 deg. 36 min., and latitude 31 deg. 45 min.; that is to say, in 17 days, using her sails, she had gone westward 48 min. of longitude, and had drifted towards the south 1 deg. 35 min. Unable to make any progress, she was equally unable to obtain substantial assistance. Evidently she was out of the direct pathway of steam-ships, and her size prevented her from being easily observed. The presence of the *City of New York* was due to what is called an accident. Although nothing occurred after the loss of the propeller but the loss of her drag-out at her bow, and an anchor, yet the log shows that her steering apparatus was greatly strained, and she was in imminent danger of losing all control over her movements. Of course it is impossible to say what might have happened to her if the

New York had not come up. It is difficult to escape the conclusion that the property, as well as the lives of those on her, were in grave peril.

The service was rendered by a powerful steam-ship, valued at \$225,000, with as full a cargo as she could carry over the Galveston bar. She was on her regular voyage, on schedule time. She deviated from her voyage, abandoned a course which had been selected by her master for prudential reasons, and came out of her way 240 miles, losing in going and returning at least 48 hours. The most valuable ingredients of her service were the promptness, celerity, skill, and success with which it was performed. These prevented in the smallest time the recurrence of danger. The storm encountered by the New York the night after she left the Pomona, which followed her into the Gulf of Mexico, shows the imminence of that danger. Whether in the deviation she forfeited her insurance, and took the risk of her cargo, does not appear. Neither the policies nor the bills of lading were in evidence. But the master took the risk of this. His conduct cannot be too highly commended. All that he asked was the condition of the Pomona, and the wishes of her master. Without a word he proceeded to relieve the one and comply with the other. His large ship, with a full complement of master, officers, engineers, employes, and crew, 30 in all, was put at her service.

The Pomona, after repairing her injuries, has been valued at \$15,000. The repairs cost \$2,700. Her cargo is valued at \$2,032. We may put the property in peril at \$14,330. Here we have a valuable and powerful agent rescuing property of no great value. It is no place for the application of a percentage. It is a matter of regret that courts ever measured salvage services by a percentage. A uniform percentage would work great injustice and inequality. If it be not uniformly applied, the rate always creates discontent. The reasons which have induced the award of salvage, as distinguished from ordinary service, is the allowance "of a generous recompense to the salvors, so as to encourage them, and also to stimulate similar services in others." The service is the relief of property from an impending peril of the sea. Humanity induces the relief whether the value of the property be great or small. The merit of the act consists in the relief, not in the magnitude of the property saved. Perhaps a good mode of measuring salvage services would be to estimate the time consumed and the value of the means and appliances used in the services; then to apply the bounty given by the courts, both as their appreciation of and as an encouragement of such favored services. And if there are, in addition, special circumstances, such as great peril incurred, or great heroism displayed, by the salvors, or a large and valuable property rescued by them, the compensation awarded is to be increased accordingly. Considering all the circumstances of this case as nearly as can be in the method suggested, I award to the libelants, including the sum paid by them to the tug towing the Pomona across the bar at Charleston, the sum of \$2,000. The crew have intervened in this matter for their share. The mode of distribution will be determined hereafter. Let an order be prepared carrying this decision into effect. The costs are very small; let them follow the decree.

RAVESIES v. UNITED STATES.

(Circuit Court, S. D. Alabama. January 30, 1889.)

SEAMEN—SHIPPING COMMISSIONER—FEES—COASTWISE TRADE.

A vessel engaged in the carrying trade on a navigable river is "engaged in the coastwise trade" within the meaning of the act of June 19, 1886, and the shipping commissioner is entitled to fees for shipping seamen on such vessel.

On Writ of Error to District Court. 35 Fed. Rep. 917.

At law. Action by Paul Ravesies against the United States for fees as shipping commissioner for the port of Mobile. A demurrer to the petition was sustained, and the case is brought up as on writ of error by plaintiff.

J. L. & T. H. Smith, for plaintiff in error.

John D. Burnett, U. S. Atty.

PARDEE, J. All formalities in the bringing up of this case from the district court having been waived, the case is treated as though regularly brought up on writ of error to the district court. The facts of the case are well stated in the opinion of the district judge, on file in the record, and reported 35 Fed. Rep. 917.

The error assigned in the case, and the only matter presented to this court for decision, is whether the words, "any vessel engaged in the coastwise trade," as used in section 2 of the act of congress approved June 19, 1886, (24 St. at Large, 80,) include vessels engaged in the carrying trade on navigable rivers, or is to be limited to vessels engaged in the carrying trade along the sea-coast. The district judge held, and gave judgment accordingly, that "coastwise trade" means trade or intercourse carried on by sea between two ports or places belonging to the same country, and does not include trade carried on on the navigable rivers. I am inclined to the opinion that this interpretation is too narrow. In the statutes of the United States relating to commerce, navigation, and revenue, the words "coasting trade" and "coastwise trade" are used synonymously. See act April 14, 1874, (Rev. St. §§ 2513, 4358;) 16 Op. Atty. Gen. 247. In the case of *Gibbons v. Ogden*, 9 Wheat. 214, it is said by Chief Justice MARSHALL, in giving the opinion of the court:

"The coasting trade" is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness the various operations of a vessel engaged in it, and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations."

In the case of *Steam-Boat Co. v. Livingston*, 3 Cow. 747, Chief Justice SAVAGE, giving the opinion of the majority of the court, says:

"This brings me to the inquiry, what is the coasting trade? The answer to this inquiry is to be found in the laws of congress, the first of which is entitled 'An act for registering and clearing vessels, regulating the coasting trade, and for other purposes,' passed September 1, 1789, but more par-

ticularly in 'An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same,' passed February 18, 1793. It cannot be necessary to enter into a minute analysis of the sections of this last-mentioned act, a general reference to some of its provisions being sufficient for my present purpose. This act contains in the first section a prohibition to all vessels except those authorized, as is therein provided, from carrying on the coasting trade. The license then gives the authority, or the act regulates a right previously existing, (and it is, in my judgment, immaterial which, for the purpose of deciding this controversy,) and particularly specifies the mode of carrying on trade in certain vessels on the coast or a navigable river, between districts in different states and districts in the same state, and different places in the same district. This then is the definition given by congress to the term 'the coasting trade.' Chief Justice MARSHALL so understands it when he says: 'The "coasting trade" is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness the various operations of a vessel engaged in it.' According to the definition of the 'coasting trade,' as extracted from the act of congress of February 18, 1793, it means commercial intercourse, carried on between different districts in different states, between different districts in the same state, and between different places in the same district, on the sea-coast, or on a navigable river. Agreeably to this definition, a voyage in a vessel of suitable tonnage from New York to Albany is as much a coasting voyage as from Boston to Plymouth, or New Bedford."

See *Walker v. Blackwell*, 1 Wend. 557; 1 Kent, Com. 438; *Conway v. Taylor*, 1 Black, 603; sections 4328, 4348, 4349, 4351, 4352, 4354, 4355, 4359, Rev. St. In these sections congress includes in the coasting trade vessels bound from a district in one state to a district in the same or any other state, whether they navigate rivers or the sea-coast proper.

The record in the case shows that the original account of plaintiff for fees as shipping commissioner was partly allowed by the treasury department, and, as allowed, included fees for shipments upon vessels solely navigating Alabama rivers; from which it would seem that the construction given by the treasury department of the meaning of "coasting" or "coastwise" trade does not restrict the said words to trade on the sea-coast. I have examined the two cases cited in the court below from 1 Newberry.¹ The point in each case was whether or not a ferry-boat was engaged in the coasting trade. Keeping that point in view, and considering that rivers have shores along which boats can coast to touch and trade, those decisions do not conflict with the case cited from 3 Cow. *supra*. In my opinion, the district judge erred in sustaining the demurrer to the plaintiff's petition, and his judgment should be reversed.

The finding of facts in the district court does not cover the issues raised by the plaintiff's petition with regard to his fees on navigable rivers, and the case will have to be remanded for further evidence and findings of facts. Judgment will be entered remanding the case to the district court, with instructions to overrule the demurrer of the United States to plaintiff's petition, and thereafter proceed as justice and equity may require.

¹The *James Morrison*, 1 Newb. Adm. 241; The *William Pope*, Id. 253.

*LANGDON et al. v. BRANCH et al.**(Circuit Court, S. D. Georgia, E. D. November 20, 1888.)***1. CORPORATIONS—TRAFFICKING IN STOCK OF COMPETING CORPORATION—RAILROAD COMPANIES.**

An insolvent construction company contracted to build a railway for a corporation, and received nearly all of the latter's stocks, bonds, and assets as security for its outlay. Without beginning the work, the persons in control of the construction company transferred all the stock to the persons managing another railway already in operation, among whom were the president and many of its directors. The funds of the latter corporation were used in purchasing the stock of the construction company, and in this manner the said stock, and the stock and assets of the projected road, were controlled by the same management as the road then in operation. The latter began at the same point, and ran for nearly the same distance, and in the same general direction, as the projected line, which would be, when completed, a competing line. *Held*, that the evident purpose and effect of the transaction was to violate by indirection Const. Ga. art. 4, § 2, par. 4, rendering the purchase of the stock of one corporation by another, and any contract between them tending to lessen competition in their respective businesses or to encourage monopoly, illegal and void.

2. SAME—INJUNCTION—RIGHTS OF PLEDGEES.

Equity will enjoin the carrying out of such an agreement, and will seize the assets of the insolvent construction company at the instance of persons who have loaned money to its president and sole manager to use in building the road, on the faith of his pledge of a share of the profits derived from the work; the company occupying as to them the relationship of derelict trustees.

3. EQUITY—PLEADING—MULTIFARIOUSNESS.

Three creditors, each of whom severally loaned money to the president for the purpose mentioned, underpledges of portions of the profits, may join in a bill for such relief.

In Equity. Bill for injunction.

The complainants, Richard Langdon, J. C. McNaughton, and L. A. Conwell, citizens of the state of Pennsylvania, bring their bill against the Savannah, Dublin & Western Short-Line Railway, a corporation of this district; the United States Construction & Improvement Company of New Jersey, doing business in the city of Savannah; James A. Simmons, of the state of New York; Thomas P. Branch, a citizen of this district; and the Central Railroad & Banking Company of Georgia,—and allege that the Savannah, Dublin & Western Short-Line Railway Company is incorporated to build and operate a railway from Savannah to Dublin and Americus; that the Macon & Dublin Railway Company is incorporated to build a railroad from Macon to Dublin; that the former bought all the charter rights and franchises of the latter, and in that manner became authorized to build and equip a railroad from Savannah to Macon; that on the 18th of March the Savannah, Dublin & Western Short-Line Railway Company (which, for conciseness, we will term the Short-Line Company) and John McKetchney made a contract by which the company deposited with McKetchney all its capital stock except \$60,000, its mortgage bonds to the amount of \$3,000,000, with its local aid and all the bonds to be issued on that part of the road between Dublin and Macon,—the entire property to be delivered, to be held by McKetchney as security for all of his outlay on the road, with full power to sell or pledge the same to

secure funds for its construction. McKetchney, in consideration of this agreement, obliged himself to build, construct, and equip the road from and to the terminal points above mentioned, subject to any changes that might be agreed on by the parties. On the 19th of March, McKetchney assigned by written instrument his rights under this contract to the United States Construction Company, chartered in New Jersey, to construct, build, lease, or purchase railroads. This was done with the assent of the Short-Line Company; and the bill alleges with distinctness that this created a trust in the Construction Company to build the road from Savannah to Macon. On the 19th of March, 1887, the Construction Company and the Short-Line Company made a supplemental contract, whereby the former undertook to pay certain existing liabilities of the latter in the amount of \$19,228.92 for the pay of civil engineers' work, services, and material, as indicated in a schedule attached to such contract; the payment to be deemed a part of the cost of construction. The Construction Company agreed further to pay to the Short-Line Company \$28,940.95 for the charter and franchises of the Macon & Dublin, to enable the Short-Line Company to perfect its title to the Macon & Dublin Company. Copies of the several agreements before referred to are attached as exhibits to the bill, and are not questioned. On the 22d of March, 1887, an agreement was entered into between Thomas P. Branch, of Augusta, and James A. Simmons, of New York, reciting the facts that they had obtained the organization of the Construction Company in New Jersey, with a capital stock of 1,000 shares, of the par value of \$100 each, and that 946 shares had been issued as full-paid stock to John McKetchney, and, together with \$2,700, delivered to him as the consideration for the assignment to the Construction Company, of the contract of March 16, 1887, between the Short-Line Company and McKetchney; and that the Construction Company had undertaken to pay certain debts of the Short-Line Company, amounting to about \$19,292, which John McKetchney had not assumed; and that by "assignment" and "transfer duly made" the 946 shares of Construction Company stock owned by McKetchney was now the property of Branch and Simmons, share and share alike; Branch and Simmons undertaking to advance equal portions of the amount necessary to pay the claims before mentioned against the Short-Line Company. They agreed further to hold for three years from March 22, 1887, 510 of the 946 shares of the Construction Company stock, unless otherwise mutually agreed, and that one certificate for the 510 shares should be issued to James A. Simmons and Thomas P. Branch, jointly; that it could be transferred by consent of both; that its voting power should be exercised jointly. It was agreed that the remaining 436 shares should be issued in like manner to Thomas P. Branch and Cornelius V. Sidell, jointly, with like provision as to transfer. This agreement was made binding on their legal representatives and assignees. The parties were to be entitled to an interest in the said shares proportionate to the amount each paid only, to the sum necessary to pay the debt of the Short-Line Company. Sidell and Branch received the 436 shares, and agreed to hold them upon the terms agreed to by Simmons and Branch on the 23d

of March, 1887. A copy of the agreement is attached. Simmons thereafter obtained Branch's and Sidell's interest in the entire matter. He became in this manner fully possessed of the assets of the Short-Line Company and the trusts of the Construction Company. On the 20th of April, 1887, Simmons agreed with Richard Langdon, one of the plaintiffs, that if he (Langdon) would discount Simmons' promissory note for \$5,000, payable four months after date, for the purpose of raising the sum which Simmons had undertaken to pay by his contract with Branch, he (Simmons) would pay to Langdon one-fourth of all the gains, profits, and emoluments which should accrue to Simmons by virtue of the contract before described. In case it became necessary to pay the note, Langdon and Simmons each agreed to pay an equal proportion. Langdon avers that he performed his part of the agreement, but that Simmons failed to perform his. The bill further alleges that on the 21st day of April an agreement was made by Simmons and J. C. McNaughton, one of the complainants, who gave his note the 21st of April, 1887, to the said James A. Simmons, payable four months after date, for the sum of \$5,000. Subsequently, in lieu of this note, he gave Simmons his check for \$2,000, and a new note for \$3,000. McNaughton did all he had promised, but Simmons wholly failed to keep covenant. On the 27th of December, 1887, the defendant Simmons and the plaintiff L. A. Conwell agreed that, in consideration of the payment to Simmons by Conwell of \$2,300, Simmons, his heirs, assignees, etc., agreed to pay Conwell one-sixth of the profits and emoluments of the contracts before described. In case the advances were repaid by the Construction Company, Simmons agreed to pay Conwell \$791.66. Conwell paid the \$2,300. In this manner the required sum was raised. Copies of all the contracts referred to are annexed and made exhibits to the bill. The complainants aver that under these several agreements they became equitably interested in all of the contracts for the construction, building, and equipment of the railway, and further that they became equitably entitled to the extent of their interest to the security of the stocks, bonds, and other assets of the Short-Line road which had been originally transferred to McKetchney for the purposes of the trust created in him, viz., to build the Short-Line road, and subsequently vested in James A. Simmons for the United States Construction & Improvement Company.

The complainants charge that Branch and Simmons, who themselves, without consulting the stockholders or other officers, managed the affairs of the Construction Company, have unlawfully, secretly, and privily conspired and confederated with unknown parties to cheat and defraud the complainants; and, without the knowledge or authority of plaintiffs, or the directors and stockholders in the Construction Company, they have sold to Thomas P. Branch, for a nominal consideration, all of their interests in the stock of the Construction Company; and that Branch and Simmons have entered into an agreement to sell and deliver the entire control of the Construction Company, with all the securities, stock, and bonds of the Short-Line Company, delivered to them to build, construct, and equip the road, to the Central Railroad & Banking Company of

Georgia, for the purpose of defeating the construction of the road, and to render it impossible for the Construction Company to do so, and thus to cheat and defraud plaintiffs of all returns to which they were legally entitled by their contract. The plaintiffs charge upon information and belief that Simmons and Branch have made a large profit for themselves out of the action, and that their action was void, and in excess of their power; that Branch and Simmons have not disclosed their designs, but lulled plaintiffs into a false sense of security; that plaintiffs will now be totally defeated of their rights and interests, which are of great value. Complainants distinctly charge that the attempted purchase by the Central Railroad & Banking Company of the control of the stocks, assets, and properties of the United States Construction Company is a contract or agreement which has the effect, or was intended to have the effect, to defeat or lessen competition in their respective business, and to encourage a monopoly, contrary to the express provision of paragraph 4, § 2, Const. Ga., and that the same is therefore illegal and void, and should be so decreed by the court. They allege that the amount or value in dispute exceeds the sum of \$2,000, and that all the assets and property to which they have an equitable lien are in the district, and in the jurisdiction of the court.

An amendment to the bill makes a party E. P. Alexander, a citizen of Georgia, residing in this district, and within the jurisdiction of the court, and the Savannah & Fort Valley Railway Company, a corporation also within the jurisdiction. The amendment further charges that the whole scheme of Branch and Simmons was a fraudulent speculation; that they had no intention to comply with the contract of the Construction Company to build and equip the Short-Line road; that the Construction Company was in truth nothing but a fiction, and was used to protect Branch and Simmons from any individual liability; that they had absolute control of the Construction Company; and that its capital stock was never actually paid in by them, but that Branch and Simmons adopted the favorite plan and device of corporate manipulators to realize large gains and accumulate fortunes at the expense of the public, and used that as stock which was a mere fiction. They charge further that the United States Construction Company is insolvent, and had admitted the rights of complainants. This was made evident by placing the plaintiff Langdon on the board of directors of that company; and Branch also admitted the rights of the complainants as they are set out in the bill; that the Savannah, Dublin & Western Short-Line Railroad Company also had knowledge of plaintiffs' advancements to its construction fund, and their resulting rights, and placed Langdon on the board of directors of that company also, in order that he might protect the rights of himself and of his associates; that E. P. Alexander, made party by the amendment, is president of the Central Railroad & Banking Company, and in contracting for the purchase and transfer of the stock of the Construction Company acted in the interest of the Central Railroad & Banking Company; that the Savannah & Fort Valley Railway Company is a corporation recently formed of the friends of the Central Rail-

road & Banking Company; that E. P. Alexander is likewise its president; that it is a creature of that company; that the purchase of the stock of the stockholders of the Short-Line Company was made by H. C. Cunningham, and A. R. Lawton, Jr., of the firm of Lawton & Cunningham, the general counsel of the Central Railroad & Banking Company, and *ex officio* of the Savannah & Fort Valley Railroad and the Short-Line Company, and the United States Construction & Improvement Co.; and that the money paid was the money of the Central Railroad & Banking Company. The bill further charges that the Fort Valley Company, and the parties in whose name the stocks purchased as aforesaid stand, are not holders for value, but in truth hold them for the Central Railroad & Banking Company of Georgia; and that the assumption by the Savannah & Fort Valley Railroad Company of the Construction Company stock bought by E. P. Alexander is itself a contract or agreement which has the effect to defeat or lessen competition, and to encourage a monopoly, contrary to the express provision of paragraph 4, § 2, Const. Ga., and should be so decreed by the court. There is a general prayer for discovery, and many interrogatories addressed to E. P. Alexander and the Savannah & Fort Valley Railroad Company, by which they seek disclosure of the transaction hereinbefore described, and the present relations of the parties, and their purposes and dispositions with reference to the complainants' alleged interest and the stock assets generally of the Short-Line Company, upon which complainants seek to assert and enforce an equitable lien.

The prayers of the original bill are (1) that the attempted purchase of the contracts, stock, securities, and assets of the United States Construction & Improvement Company be declared void and of no effect, and that the Central Railroad & Banking Company of Georgia be declared a trustee for the benefit of complainants of all the stocks, contracts, assets, and other properties belonging to the Construction Company, in its possession or under its control, to the extent of orators' interests; (2) that Simmons and Branch may be compelled to account generally for all money or properties received by them from the Central Railroad & Banking Company or its representatives or other parties, and that an account may be immediately taken, and that they may be declared trustees for the benefit of plaintiffs; (3) a general and special prayer for discovery, with many interrogatories to Branch and to Simmons, and others, and to the Central Railroad & Banking Company. They pray for a temporary injunction until the hearing to restrain Branch and Simmons, the Construction Company, the Short-Line Company, and the Central Railroad & Banking Company, and other parties defendant, from consummating or carrying into effect any contracts, engagement, or agreement by which complainants may be defrauded of their rights, and for general relief, subpoena, etc.

In the amended bill the plaintiffs pray that E. P. Alexander, the Fort Valley Railway, and Construction Company may be compelled to make full and complete discovery under oath of all contracts, dealings between themselves and Branch, Simmons, the Construction Company, and the

Short-Line Company, in relation to transfer of all the stocks, bonds, assets, and other properties of the Short-Line Railway Company, which were pledged with the Construction Company as security for their contract to build the road from Savannah to Macon, which may be in the possession and under the control of either of the defendants; and of all copies of the correspondence; and that they attach to their answer true and correct copies of all agreements, etc. They pray also that all the defendants may be enjoined from moving out of the jurisdiction of this court any of the contracts, stocks, bonds, securities, or other property in which the complainants are alleged to be interested; and, further, that the United States Construction & Improvement Company be enjoined from transferring to any one the stocks, contracts, etc., received by it from the Short-Line Railway Company under the contract described, and for general relief. There is a prayer for subpoena against E. P. Alexander and against the Savannah & Fort Valley Railway Company in the usual form. The bill and the amendment are properly verified.

E. P. Alexander, the Central Railroad & Banking Company of Georgia, the United States Construction & Improvement Company, the Savannah, Dublin & Western Short-Line Railway Company, all demurred to the bill generally, upon the ground that there is no equity in the bill; that the bill is multifarious both as to the subject-matter and to the parties; that the complainants have no title such as would justify their prayers for discovery. The demurrers were overruled, and held not sufficient to defeat the application for injunction.

Thomas P. Branch has filed a formal answer, denying that legal service has been effected upon him. The other defendants have also answered. E. P. Alexander and the Central Railway & Banking Company of Georgia, somewhat in detail, and the Short-Line Railway Company, the Construction Company, and the Savannah & Fort Valley Railway Company, adopt the answers of E. P. Alexander and the Central Railroad & Banking Company for the purpose of this motion. The answers may therefore be treated as identical. They cannot be held sufficiently responsive as answers upon the final hearing, and are apparently intended to be used simply in reply to the rule to show cause, and are so entered. E. P. Alexander, in his answer, admits that he purchased from Thomas P. Branch all of the stock of the United States Construction Company in good faith, and paid Branch the sum of \$100,000 therefor; that by the purchase he became entitled to all the stock, and the same was by his direction transferred and put in the names of the parties now holding the same; that he was not aware of the rights of the plaintiffs, as evinced by their contracts appended to the bill; that Branch exhibited to him two certificates of stocks in the Construction Company,—one for 510 shares, and one for 436 shares; that both of said certificates were signed by Douglas Green, president, and M. J. Verdery, treasurer, who are known to him as the president and treasurer of the Construction Company. A copy of the certificate is incorporated in the answer. That in addition to these 946 shares he bought the stock of the following parties: M. J. Verdery, 20 shares; Thomas P. Branch, 15 shares; A. F. McLeish, of New York city,

15 shares; Thomas A. Simons, 2 shares; Edward W. Scott, of New York city, 1 share; Douglas Green, of New York, 1 share. He answers that he does not believe that the United States Construction & Improvement Company was organized for fraudulent speculation, and if it was he does not know it; that it is not more insolvent now than it was at the time the plaintiffs made their contracts with it, and that it has the same assets now that it had at the time of the sale to him, except 1,500 shares of the capital stock of the Savannah, Dublin & Western Short-Line Railway Company, which have since been transferred by the Construction Company for a valuable consideration. As complainants are only interested in the profits that might accrue to Simmons under the contracts of the Construction Company and the Short-Line Railway Company, if the Construction Company is insolvent there could be no profits accruing out of the contracts, and the company will not be bound to respond to the plaintiffs in any amount. He denies that the Construction Company ever admitted the rights of plaintiffs, and insists that if the plaintiffs have lost, it is from their own laches. He denies that Richard Langdon was ever a director in the Construction Company, and gives as a reason that Langdon never owned any stock in said company. He denies that the Savannah, Dublin & Western Short-Line Railway Company, since the assignment of McKetchney, could admit the existence of a lien against the Construction Company, or could bind them or any other person. He answers further that, in acting in the purchase of the stock of the Construction Company, he did not act for the Central Railroad & Banking Company, but acted in behalf of and for the interest of the Savannah & Fort Valley Railway Company, which company was duly chartered to build and operate a railway from Savannah to Fort Valley, and the stock of the Savannah, Dublin & Western Short-Line Railway Company was not purchased for the Central Railroad & Banking Company, but was purchased *bona fide* for the Fort Valley & Savannah Railway Company, which company was chartered to build a road from Savannah to Fort Valley, which was the general direction in which the Savannah, Dublin & Western Short-Line Railway was projected; that the stock so purchased by the Fort Valley and the Savannah Railway Company was that in which the Construction Company had no interest, and was that portion of the stock of the Short-Line Company which was in the names of its original projectors, and which had never been transferred or assigned to any one else; that plaintiffs never had any interest, equitable or legal, or any lien on said stock. This answer is verified by the oath of E. P. Alexander.

The answer of the Central Railroad & Banking Company of Georgia is verified by E. P. Alexander, also, as the president of that company. This answer denies that the Short-Line Railway Company purchased from the Macon & Dublin Company its franchises, or any part of them; and that the Short-Line Company has no authority under its original charter, or under any purchases, to build a railroad from Savannah to Macon; that the contract referred to and set out in the resolution of the Macon & Dublin Railroad Company was never carried out, and it could not now

be carried out, however desirable such contract might be. It admits that the contract in Exhibit A to the bill was entered into between John McKetchney and the Short-Line Railway Company; that said contract was assigned to the Construction Company under the terms set forth in Exhibit B to the bill; that the contract set out in Exhibit C to the bill was also made. As to the contract set out in Exhibit D, as made between Thomas P. Branch and James A. Simmons, it denies any knowledge save that derived from the plaintiffs' bill. The answer admits that it was aware that 946 shares of the stock of the Construction Company had been issued in two certificates,—one for 510 shares in the name of James A. Simmons and Thomas P. Branch, jointly; and the other 436 shares in the names of Thomas P. Branch and Cornelius P. Sidell, of Georgia. These certificates are now in the hands of the Construction Company, and the assignment on the back of the two certificates is signed by the parties in whose names they were issued, and they have been delivered to the company for cancellation and the issue of new scrip therefor in names of other parties, and this has been done by the Construction Company. It denies any knowledge of the contracts between Simmons and Langdon, and Simmons and McNaughton, and Simmons and Conwell, and it denies that either of the plaintiffs under the three agreements, E, F, G, annexed to the bill, are equitably interested in any of the contracts for the construction, building, and equipment of the Short-Line Railway; and it denies that the plaintiffs have any interest, legal or equitable, in the stocks, bonds, or other securities which were turned over to John McKetchney under the first contract set out in Exhibit A. It avers that Thomas P. Branch is neither a director in the Construction Company nor in the Short-Line Company. James A. Simmons is the nominal president of the Construction Company, but before the filing of the bill of complainants he had sold his interest therein, and his place in the board of directors would have been filled at the next meeting of the board. It is unaware of a conspiracy between Branch and Simmons to defraud Langdon, McNaughton, and Conwell, or either of them; and it further says that no part or portion of the stock, bonds, and other securities of the Short-Line Railway was ever deposited with any one for securing the contracts referred to by complainants in their bill. This is stated on the knowledge, information, or belief of the defendant. The answer states further that it is not advised what consideration Thomas P. Branch paid for the stock of the Construction Company, but denies that Branch ever purchased an interest in the contracts to build the Savannah, Dublin & Western Short-Line Railway; that all the interest in these contracts was vested in the Construction Company under the assignment made by John McKetchney, and the said contracts have remained in the possession of the Construction Company ever since that assignment, and are now in its possession, and owned exclusively by it. It denies that Branch and Simmons, or either of them, has entered into any agreement to sell and deliver the control of the Construction Company or any of its contracts to the Central Railroad & Banking Company; and it alleges that all the stock of the Construction Company has already been sold and transferred to, and is

now held by, the stockholders in said company; and that said Branch has no interest whatever in said company, nor said Simmons any other interest than that heretofore set out. The defendant admits, however, that while the stock of the Construction Company is not held by the defendant, it is held by persons who are interested in defendant. It does not know of any purpose or intent on the part of any person to cheat or defraud either of the complainants; and if such fraud was accomplished, and if the stock of the Construction Company, was intended to be held for the security of the plaintiffs, for their advancements to Simmons, the laches of the plaintiffs made it possible for Branch and Simmons to dispose of said stocks. It denies further that the contracts, securities, stocks, and bonds of the Short-Line Company have been sold or transferred to this defendant, the Central Railroad & Banking Company, and insists that all of said contracts and securities are now held by the Construction Company, as they were at the time of the sale by Branch and Simmons, with the exception of 1,500 shares of the capital stock of the Short-Line Railway Company, which have been transferred to sundry parties for money advanced to said Construction Company to carry out the purposes of its organization. It does not know what profits Branch and Simmons made. It was not advised of any limitation on the power of Branch and Simmons to transfer and assign their interest in the Construction Company. If such limitation existed, and was known to the plaintiffs, they are in laches, which rendered it possible for Branch and Simmons to transfer and sell out their interest, and plaintiffs are not therefore entitled to any relief as prayed for in the bill. The answer denies that the plaintiffs have any title or interest which will justify their prayer for relief, and it denies that it has made any attempt to purchase the control of the contracts, assets, and property of the United States Construction & Improvement Company. It denies that it has the control of the Savannah, Dublin & Western Short-Line Railway Company; and that it is under the control of its own board of directors, duly elected at its last annual meeting, which board is engaged in discharging its duties devolving on them as such directors, and is endeavoring to bring order out of chaos, that has developed in the management of said company.

The answers to the interrogatories are substantially the same as the denials in the bill. The gist of the answers are as follows: That it is not true that Simmons and Branch have transferred to the Central Railroad & Banking Company of Georgia, or to persons suggested by it, the interests of the Construction Company in the Short-Line Company. The Central Railroad & Banking Company has not bought, paid, or promised to pay Branch and Simmons or anybody for such interest, but the contract was entered into by E. P. Alexander individually on the one part and Thomas P. Branch on the other part, whereby the said Alexander covenanted and agreed to pay to the said T. P. Branch \$100,000, on delivery to him of all the capital stock of the United States Construction & Improvement Company, which was duly carried out by the said T. P. Branch; and the said sum of \$100,000 was duly paid by the Sa-

vannah & Fort Valley Railway Company, of which the said E. P. Alexander was and is a director, said company having assumed the said contract. It is not true that the Central Railroad & Banking Company of Georgia has bought out the interest of the stockholders and incorporators of the Savannah, Dublin & Western Railway Company residing in Georgia. In the answer to the fifth interrogatory the defendant said the stockholders of the United States Construction & Improvement Company are as follows: T. G. Hillborn, 946 shares; E. P. Allen, 47 shares; C. R. Woods, 2 shares; H. B. Hollins, 2 shares; H. C. Cunningham, 1 share; and two shares standing in the name of James A. Simmons, which have been assigned by Simmons. The stock-book of the Savannah, Dublin & Western Railway Company shows that there are now standing 29,775 shares in the names of the following parties: United States Construction & Improvement Company, 27,900; H. Blunn, 115; C. R. Woods, 135; S. A. Woods, 50; H. C. Cunningham, 150; A. R. Lawton, Jr., 149; J. K. Garrett, 50; E. P. Alexander, 49; A. Vetsburg, 50; D. M. Hughes, 1; J. L. Warren, 1; Douglas Green, 25; J. J. Wilder, 98; E. M. Green, 102; F. G. Du Bignon, 201; W. W. Frazer, 197; Wallace Cummings, 204; Charles H. Dorsett, 100; George J. Baldwin, 175. The answer closes with a general denial of the plaintiffs' complaint, and prays that the defendant be discharged, with its reasonable costs.

Charlton & Mackall, for complainants.

Lawton & Cunningham and *George A Mercer*, for defendants.

SPEER, J., (*after stating the facts as above.*) The foregoing is a statement of the issues involved in the motion under consideration. Upon the hearing first had, a temporary injunction was granted, as prayed for in the bill, until more complete argument could be made. Pending this argument, the hearing was adjourned from chambers at Savannah to chambers at Macon. The solicitors for the complainants and the defendants, except for James A. Simmons and Thomas P. Branch, were fully heard. No one appeared for these parties. After the argument had concluded, the papers were taken *sub judice*, and the decision has just been reached. Stripped of the amplification and verbiage of the bill, answers, and affidavits, the facts may be condensed as follows: The Savannah, Dublin & Western Short-Line was chartered to construct a railway from the city of Savannah to Dublin; and for the purpose of extending the road to Macon that company secured or attempted to secure the franchises of the Macon & Dublin Railroad Company, which would enable it to complete the line. It is unnecessary, for the purpose of this motion, to determine whether or not the Short-Line actually secured the rights of the Macon & Dublin Company. It is undeniable and indeed admitted that the Short-Line made a valid contract with John McKetchney to build, equip, and construct its road as far as its charter rights and purchased rights permitted. The language of this contract is highly essential to the comprehension of the trust, which the plaintiffs insist has been betrayed to their injury, and in violation of the organic law of the state. It is as follows:

"This agreement, made and entered into this 18th day of March, A. D. 1887, by and between the Savannah, Dublin & Western Short-Line Railway Company, party of the first part, and John McKetchney, party of the second part, witnesseth: Whereas, the said party of the first part is duly incorporated under the laws of the state of Georgia to build, construct, equip, and operate a railway from Savannah, Georgia, to Dublin and Americus, in the same state; and whereas, the Macon & Dublin Railroad Company, a corporation also incorporated under the laws of the state of Georgia to build, construct, equip, and operate a railroad from Macon to Dublin, in the state of Georgia; and whereas, the first-named company have purchased from the Macon & Dublin Railroad Company all of their rights, franchises, and privileges, together with all work done and materials furnished on said railway, as by reference to a resolution of the board of directors of the Macon & Dublin Railroad Company, hereto attached, will more fully appear; and whereas, the said party of the first part is now desirous of building and completing the said railway from the city of Savannah to Macon by way of Dublin, and from Dublin to Americus; and whereas, the said party of the first part has already executed a mortgage on its said road, and has issued its mortgage bonds to the amount of three million (3,000,000) of dollars, and has issued its capital stock to the amount of 3,000,000 of dollars, and has secured local aid along the line of the said roads by subscription to the capital stock at par to the amt. of about \$278,000, and does agree that so soon as it shall be legal to do so it will properly execute and record a mortgage on that portion of its line between Dublin and Macon, and will simultaneously issue its mortgage bonds and capital stock on the same at the rate of fifteen thousand (15,000) dollars per mile respectively: Now, therefore, for and in consideration of the sum of one dollar, each to the other in hand paid, the receipt whereof is hereby acknowledged, and other good and valuable considerations, it is agreed and understood as follows: *First.* The party of the first part shall forthwith deposit with the party of the second part all of the before-mentioned capital stock except sixty thousand (60,000) dollars, taken by the corporators' mortgage bonds and local aid, which have already been issued and secured; and will further deposit with the party of the second part, immediately on the issuing of the same, all of the before-mentioned stock and bonds applicable to that portion of the road between Dublin and Macon; also any and all local aid it may hereafter secure; all of which said stock, bonds, and local aid shall be held by the party of the second as security for any and all advances made, expenses incurred, money invested, work done, and materials furnished on said road, with full power to the party of the second part to use by sale or otherwise the said stock, bonds, and local aid for the purpose of securing the funds to carry on the construction of said road substantially as hereinafter set forth. *Second.* In consideration of the before-mentioned covenants and agreements, to be kept and performed by the party of the first part, and the before-mentioned stocks, bonds, and local aid to the extent of \$3,700,000 of said bonds and \$3,940,000 of said stock, and all local aid procured or hereafter to be procured by said company, the said party of the second part agree to build, construct, and equip the said railroad from and to the terminal points above mentioned, subject to any changes that may hereafter be agreed upon by the parties hereto; such road to be of single track standard gauge, with steel rails of fifty-six pounds to the yard, to be well laid with the usual ballast in that locality, to have the necessary sidings, turn-outs, depots, water-tanks, and turn-tables, with 2,640 ties to the mile, which shall be of good, sound yellow-pine, of not less than eight-inch face, six inches thick, and eight and one-half feet long. The road-bed on embankments shall be fourteen feet wide on the top, with slopes of one and one-half feet horizontal to one foot perpendicular; with cuts eighteen feet wide at bottom, with one foot horizontal to one foot perpendicular, except when in rock, when it shall

be one-quarter foot horizontal to one foot perpendicular. The cuts shall be properly drained with ditches three feet wide, on either side, leaving a twelve-foot road-bed at sub-grade. The bridges shall be what are known as the 'Howe Truss or Combination.' The trestles and water-ways shall be ample, and constructed of first-class material. The grades shall not exceed seventy-five feet to the mile, and the curves shall not exceed six degrees. The work on the entire line shall be done in a first-class, workman-like manner, and, when complete, compare favorably with new roads of a like character that are now being constructed in the state of Georgia. The terminal and depot facilities shall be ample for the requirements of said road. The rolling-stock shall be first-class, and of sufficient quantity to fully meet the requirements of the operation of the said road; the details of same to be hereafter agreed upon. The said road shall be completed from Savannah to Macon in twelve months from date, and from Dublin to Americus within six months from the time of the completion from Savannah to Macon. The said party of the first part may appoint a consulting engineer of the said party of the second part as to alignments, grades, curvatures, and general character of work to be done. The said party of the first part, through its president, A. B. Ninderman, shall at all times be at the service of the said party of the second part for the purposes of securing local aid and the necessary rights of way and terminal facilities required. It is understood and agreed that all the covenants herein contained shall be binding on the heirs, executors, administrators, and assigns of the respective parties hereto. In testimony whereof the said parties hereto have set their hands and seals the day and year first above written."

Thus, to enable McKetchney to raise the necessary funds to construct the road, it transferred its entire assets to him. McKetchney undertook the contract, but subsequently, with the assent of the Short-Line, transferred his contract to the United States Construction & Improvement Company, a corporation chartered under the laws of New Jersey. Whatever McKetchney was bound to do, the Construction Company was bound to do also; and most undoubtedly, therefore, the Construction Company was bound to build, construct, and equip the road of the Short-Line, as marked out in the contract. It has no other power. After long and patient consideration, the court has not been enabled to discover any power in the assignees of this contract to change the nature or purpose of their undertaking. The original power and vitality of their contract sprang from the act of the general assembly of Georgia. This created a legal entity for one purpose only, and that to build, construct, and equip the railway. The contract with John McKetchney simply transferred the duty to execute this power to him. His conveyance to the Construction Company, of which Branch & Simmons obtained the control, did not and could not alter a jot or tittle the legal duty, its nature, extent, scope, or method of performance. In creating a charter to build the railway the legislature *ex vi termini* excludes the power in any person or corporation to suppress or defeat its construction. This is equally true of the contracts in evidence. Of course this result can be accomplished by the non-action of the holders of stock lawfully issued or lawfully obtained, and we presently reach this feature of the rights in issue.

James A. Simmons, the president of the Construction Company, which had now assumed by the transfer the duties devolving under the law upon the Short-Line Company, assuming for the present that his purposes were

honest, and in good faith, found it necessary, before he could obtain control of the contracts which were vested in McKetchney, to raise \$19,228.92, to pay off immediate demands against the road. To do this he applied to the plaintiffs Langdon, McNaughton, and Conwell. These parties, in consideration of the promise on his part for the Construction Company to pay to them a portion of the profits of the contract which had been made with the Short-Line, and now to be performed by him as its president, advanced the money in different amounts, and under the terms as set out in the contract annexed to this bill. It cannot be doubted that the Construction Company had the right to borrow this money, necessarily to be used in its undertaking; and it does not seem capable of fair doubt that the Construction Company would have the same right to pledge to its creditors a share of its profits as consideration and security for the loan. It was stipulated that it should be held or deemed a part of the construction fund. The plaintiffs, then, have a distinct equitable interest in the work which the Construction Company had undertaken. They look to its performance for their compensation, and they do so with clear equitable right. That company has assumed the twofold trust. It has undertaken, by transfer, the trust which John McKetchney assumed from the Short-Line, namely, to construct and equip its road. It has assumed, in consideration of the advances made to enable it to carry out that trust, to pay a share of its profits to those who made the advancements. Having obtained full control in this manner of the assets of the Short-Line, it is clear that, had the Construction Company gone forward and performed its trust with good faith, and in accordance with its terms, the plaintiffs would be entitled to have an accounting for any profits which were resulting from the building and equipment contracts. It could not be insisted with any degree of fairness that the Construction Company, after obtaining the money of outside parties, to be used for its purpose, could refuse to account in any manner. Nor would a court of equity tolerate the suggestion that under such obligations the Construction Company, or those who control it, could refuse to do anything, and yet retain the advancements which had been made. If it were capable of proof that the Construction Company, or those persons who were in its control, utterly refused to carry on the enterprise in which its creditors (the plaintiffs) now have an interest, the court, in that manner being debarred of any power of saying whether or not there were profits resulting, would, under the power for general relief, be authorized to grant a decree against the parties culpable for the full sum of which the creditors had been wronged, and such damage as could be clearly made to appear. It would have the further power to seize, if within its jurisdiction, the valuable assets of that company, and subject them to the payment of these advances. In the presence of such a trust, of such faithless trustees, and such fraud as is alleged and scarcely disputed, it would be in the domain of an ancient and clearly-defined province of equity jurisdiction, that the relief to the plaintiffs could be found; and this is the more clear where the trustee—the Construction Company—is insolvent.

This being true, how do the facts of the case present themselves to the chancellor? That the Construction Company had assets of the Short-Line Company for a valuable amount (how much, does not as yet plainly appear, but certainly worth, if we may judge from the price that was paid for them, \$100,000) is most apparent. And to these assets the equitable lien of the creditors will attach, if they are in the hands of the Construction Company, or elsewhere within the reach of the court. Where are they? According to the theory of the answers of Gen. Alexander and the Central Railroad & Banking Company they now belong to new stockholders of the same company. These stockholders are admitted to be the friends of the Central Railroad & Banking Company; they are in fact its president and several of its directors. It is not denied that the transfer of the assets was obtained by money which was the money of the Central Railroad & Banking Company. It is true that Gen. Alexander states in his answer that it was an individual transaction, but it is specifically charged in the bill, and specific interrogatories are put to him which would enable him to deny it if not true, that the money which bought the assets of the Construction Company was the money of the Central Railroad & Banking Company. Indeed, this was admitted in the argument.

Another step in the argument. It is charged in the bill, and not denied in the answers, and besides it is perfectly evident to every intelligent mind, that the Short-Line Railway Company runs parallel, in large measure, with the line of the Central Railroad & Banking Company, extending from Savannah toward Macon, which are important business and terminal points, and that this railroad, if completed, would be a competitive, and dangerously competitive, railway; and there can be no doubt, whatever may be the forms and ceremonies as to the purchase from the Construction Company of the control of the Short-Line Railway, that it was either to defeat its completion; or, when completed, to prevent by harmonious control its effective competition with the Central Railroad & Banking Company of Georgia, of which the present stockholders of the Construction Company are the president and many of the directors. The fundamental law of Georgia upon this subject is plain and emphatic, and was intended to defeat the precise transaction which, by the averments of the bill, the indisputable facts, and the admissions of the defendants, is so clearly made to appear to the court. Paragraph 4, § 2, art. 4, Const. Ga., is as follows:

"The general assembly of this state shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state, or elsewhere, or to make any contract or agreement whatever with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts or agreements shall be illegal and void." Code, § 5097.

This is the action of the sovereign people of Georgia in convention assembled. They chartered the Central Railroad & Banking Company. They chartered the Savannah, Dublin & Western Short-Line Railway

Company. They granted to these railways vast, valuable, and perpetual franchises. With these rights, thus granted, no power can interfere. They are perpetual; they are indefeasible. But with these rights are carried all the deterring and prohibitory effects of the constitutional inhibition just quoted, by which the people seek to defeat the aggregations of monopoly, and prevent the corporations which they permit to exist from aggrandizement of power to the injury, or destruction of public and private rights. The court has no official concern in the policy of this law. It is too plain and significant for intelligent controversy. Whatever may be the rules upon similar topics, prescribed in other states, the people of Georgia, with full power to act, with undeniable jurisdiction over the important parties here, have embodied in their fundamental law this comprehensive and vital clause, clearly intended to accomplish what they deemed the salutary and healthful result of competing lines for railway transportation. Contracts in violation of this clause are not permitted. When attempted they are utterly void. They have no binding force. They are nullities, and are to be disregarded and ignored whenever it concerns a party at interest to do so. Now, what may not be done directly may not be done by indirection. The Central Railroad & Banking Company could not purchase the control of a railroad running parallel with its line from the same terminal points. Such a contract would be absolutely void, and, being void, and an absolute nullity, no title would pass under it. This being true, Gen. Alexander, and those who acted with him for the Central Railroad & Banking Company, cannot accomplish the same result in any other manner whatever. They cannot make a purchase to defeat the Short-Line, or to control it. It is scarcely just to the intelligence of a court of equity to expect it to fail to perceive the real facts and the true purposes of the contracting parties in the transfer from T. P. Branch to E. P. Alexander, and the subsequent transfer from E. P. Alexander to other persons, themselves directors in the Central Railroad & Banking Company of Georgia, and the Fort Valley & Savannah Company, which is its creature, controlled by its board of directors, and under the same president. The sworn averments of the bill and the answers, and failures to answer by the defendants, under the equity rules sufficiently show to the court what is perfectly evident: that this whole transaction was for the benefit and interest of the Central Railroad & Banking Company of Georgia; that the practical and operative franchises of the Savannah, Dublin & Western Short-Line Railway Company, and the shares of stock of the Construction Company, while nominally owned by individuals, and by another corporation, are really under the control of the president and board of directors of the Central Railroad & Banking Company of Georgia, a control as complete and absolute and effective as any power it may exercise.

The technical defenses urged for the defendants are not considered as meritorious. It is insisted there is no privity between the plaintiffs; that the defendants were improperly joined; that there is an adequate remedy at law; that there is no equity in the bill; that the allegations of fraud are not sufficient; that the court has no jurisdiction over Simmons,

and that he is a necessary party; and that the effect of the answers is to disprove the bill. But the plaintiffs proceed upon identical titles to correct an identical wrong by the same wrong-doers, and with reference to the same subject-matter. The bill is therefore not multifarious. The defendants are likewise concerned in one transaction, and that is the effort to control in the interest of the Central Railroad & Banking Company the franchises of the Short-Line Company. The remedy at law cannot be so complete and adequate as that in equity, and besides, frauds and trusts are peculiarly the subjects of equity jurisdiction. While Simmons is eminently a proper party, since he is beyond the jurisdiction of the court, he is not such an indispensable party as will defeat the power of the court to proceed against those within the jurisdiction. The answers are altogether too evasive and partial to have any effect towards disproving the material averments of the bill. It is not denied that the funds of the Central Railroad were paid to Branch; that by such payment the assets of the Construction Company, deposited with that company to secure the completion of the Savannah, Dublin & Western Short-Line, were transferred to the control of individuals who are themselves the president and a number of the directors of the Central Railroad. It is not denied that the Fort Valley road is a branch of the Central, and under its control. There is no attempt to dispute any of the main facts of the bill, and such a reply as that in the answer of Gen. Alexander, and of the Central Railroad & Banking Company, that if the plaintiffs have been wronged it is by their own laches, does not commend itself to the court. The same reply might be urged to the complaint of any one who had become loser as the victim of misplaced confidence. As to the want of notice of the plaintiffs' claims, this defense is no reply to supplement a void contract, and the substantial merit of these claims is sufficiently proven by the undisputed affidavits of the plaintiffs, which were submitted to the court.

The contracts by which these unlawful results were attained are null and void; and, since the Central Railroad & Banking Company and the Fort Valley & Savannah Company, which are practically one and the same corporation, have control of the assets upon which the plaintiffs have an equitable lien for their advancements made towards the performance of the trust originally assumed by John McKetchney and the Construction Company, the plaintiffs are entitled to an accounting against the defendants to ascertain and subject any values which are in their possession, and which may be applied to the discharge of the complainant's demands. It must be understood that the great underlying trust, in this whole transaction, was to build, construct, and equip the Savannah, Dublin & Short-Line Railway. It was for this that the state granted the charter. It was for this that McKetchney was empowered and given, not the title, but the control of the stock and securities of the Short-Line Railway Company. It was for this that the Construction Company undertook the trust. And this trust is not to be defeated by the wrongs of individuals, or the illegal contracts of corporations; and since, for its performance, the plaintiffs have in good faith paid their money, they are

entitled to recover from the trustees, who refuse to act, what would be their lawful compensation if the trustees had acted. As to T. P. Branch,—who, with James A. Simmons, most wrongfully, if the allegations of the bill are true, sold out and betrayed the rights of which they came into control,—he holds \$100,000 in his proper person, to which he has no title whatever; and while the Central Railroad & Banking Company, and the parties who acted for it, may not be able to recover what they have wrongfully paid to him, he holds the sum he received as a trustee for the plaintiffs and other persons in interest who may be entitled to it, and who represent—in part, at least—the franchises and property of the Short-Line Company; and as the case now appears he should be compelled to make restitution of the sum which he has received for the benefit of the trust which he attempted to defeat, and for the legal beneficiaries of that trust. It would seem that the court has ample power to compel this; and the decision of the court is that the injunction prayed for against all the parties against whom it is prayed shall be granted, and that a receiver be appointed to take charge of the assets of the Savannah, Dublin & Short-Line Railway Company and of the United States Construction & Improvement Company, so far as they are within the control of either of the defendants, or otherwise in the jurisdiction of the court; and to recover, in such manner as may be deemed most effective, from T. P. Branch and the persons acting with him, the sum unlawfully paid to him by E. P. Alexander for the franchises, stocks, shares, and other property of the Savannah, Dublin & Western Railway Company, and that the case proceed regularly, as is usual in equity.

HIDDEN v. KRETZSCHMAR *et ux.*

(*Circuit Court, D. Minnesota. February 21, 1889.*)

MORTGAGES—ASSIGNMENT—PAROL WAIVER BY MORTGAGOR OF CONDITIONS.

It is competent for the mortgagor to waive by parol the conditions specified in a written agreement, limiting the use of a mortgage, given to secure advances, and to consent to its assignment as collateral security for a loan.

In Equity. Bill to foreclose mortgage. On final hearing.

Kerr & Richardson and *Pierce & Wilkinson*, for complainant.

Leo & George and *John M. Boyle*, for defendants.

NELSON, J. This suit is brought to foreclose a mortgage executed by the defendant Carl Kretzschmar to T. S. Coffin, to secure the payment of his note for the sum of \$10,000. The note and mortgage were assigned as collateral security for the payment of a note of \$5,000, executed on the 14th day of June, 1884, at Boston, Mass., by the Red Lake Milling & Lumber Company, a corporation of the state of Minnesota, to the complainant, Hidden, a citizen of the state of Maine, and payable

April 24, 1885. At the time of the execution of the note and mortgage for \$10,000, an agreement in writing was entered into between the defendant Carl Kretzschmar and T. S. Coffin, the mortgagee, specifying the conditions upon which it was executed, and the considerations influencing the mortgagor. This instrument was on record in the same office in which the mortgage was recorded, and, I think, was notice to the complainant of the exact facts therein stated, and for what purpose the mortgage was given. Although T. S. Coffin, the mortgagee, held this mortgage to secure any advances made by him to the corporation, and for services rendered in the past, and to be rendered in the future, the evidence is satisfactory that the defendant Carl Kretzschmar consented that T. S. Coffin might use it, as he did, to secure a loan of \$5,000 to the corporation,—at that time being in need of money, and in a very embarrassing financial condition. It was entirely competent for the mortgagor to waive by parol the conditions mentioned in the agreement upon which the mortgage was executed, and assent to the use of the mortgage for the purpose of meeting the pressing need for money. The assignment of the mortgage as collateral security for the loan of \$5,000 from the complainant appears from the evidence to have been made with the knowledge and consent of the defendant Carl Kretzschmar. True, in his testimony there are indications of remonstrance to such a use of the mortgage, and some suspicious circumstances are apparent, but no fair inference from the whole evidence would warrant me in denying the relief asked. The evidence of the witnesses introduced by the complainant, who are unimpeached, entitle him to a decree for a foreclosure to satisfy the amount due. No argument has been made or filed by the counsel of defendants, and they appear to have abandoned the case. The interest of defendant Anna Kretzschmar in the property accrued since the mortgage lien and the note for \$5,000. Decree will be entered in favor of complainant. Amount due: Principal, \$5,000; interest (6 per cent per annum) from June 14, 1884, to February 21, 1889, \$1,507; insurance paid, \$225; protest, \$2.04; attorneys' fees, \$100.

ARMSTRONG v. CHEMICAL NAT. BANK.

(Circuit Court, S. D. New York. February 11, 1889.)

1. EQUITY—ACCOUNTING—PLEADING—PLEDGE.

To a bill for an accounting for the surplus of securities pledged for advances thereafter to be made, averments in the answer of facts such as the prior state of the parties' accounts, are needless since these facts may be proved under any other averment.

2. SAME.

Averments referring to facts entitling defendant to affirmative relief are only proper for a cross-bill, and may be expunged from an answer.

In Equity. Bill by David Armstrong, as receiver of the Fidelity National Bank, against the Chemical National Bank, for an accounting. On motion to expunge certain paragraphs from the answer.

Stephen A. Walker, for the motion.

Jones & Roosevelt, contra.

LACOMBE, J. The claim of the complainant is that the deposit of a large quantity of commercial paper made on June 14, 1887, by the Fidelity National Bank, with the defendant, was a special one as security for advances thereafter to be made, and it is to obtain an accounting for the overplus of these pledged securities remaining after payment of such advances that the suit is brought. The defendant has not filed a cross-bill, but its answer sets out that at the time of the appointment of the receiver the Fidelity Bank was a debtor to the defendant in a large sum of money, in part advanced as loans at different times before and after June 14, 1887, and in part collected by said bank as defendant's agent. That as such creditor it is entitled to receive a dividend from the assets of the bank, and "asks that, if it be adjudged on the accounting in this suit that the defendant is not entitled to retain and have the proceeds of the collection of said securities applied to the payment of the indebtedness of the said bank to this defendant, the court then ascertain and determine the amount of the indebtedness of the said bank to the defendant, and the amount of the claim of the defendant against the said bank, as it existed at the time of the appointment of the receiver. (June 21, 1887,) and that said receiver be directed to pay defendant a dividend of 25 per cent.,"—the rate of dividend already paid to other creditors,—"and other dividends from time to time as the same shall hereafter be made," and asks that an account be taken of another lot of securities delivered to the defendant by the Fidelity Bank prior to June 14, 1887, and subsequently returned by the defendant to the complainant. To these paragraphs of the answer complainant excepts for impertinence, and moves that the same be expunged from the answer. So far as these averments refer to facts—such as the prior state of the accounts between the banks—bearing upon the issue tendered by the bill, viz., that the deposit referred to therein was special, and pledged solely as a security for future indebtedness, they are unnecessary. The facts may be proved under the other averments in the answer. So far as these averments excepted to refer to facts entitling the defendant to affirmative relief against the complainant, they are proper only in a cross-bill. The motion to expunge is granted.

UNITED STATES *v.* DAVIS.

(District Court, E. D. Missouri, E. D. February 8, 1889.)

INTERNAL REVENUE—SPECIAL TAX—PARTNERSHIP—RIGHT OF SUCCESSOR.

Rev. St. U. S. § 3234, authorizes a partnership to carry on the business of retailing liquors and cigars upon the payment of but one special tax. Section 3241 provides that upon the death of one who has paid the special tax his legal representatives may continue the business in the same place, and in the same manner, without the payment of an additional tax, and also that the licensee may, upon removal from the place mentioned in the license, continue the business at the place to which he removed without paying an additional tax. *Held*, that a member of a firm who has acquired all the interests of the other members in the firm assets, and succeeded to the business, may carry it on under a license issued to the firm, at a place other than the old place of business of the firm.

Information for Retailing Liquor and Tobacco without paying special tax.

Thomas P. Bashaw, U. S. Dist. Atty.

A. J. Davis, *in pro. per.*

THAYER, J. The only question to be determined in this case is whether a member of a firm who has acquired all the interest of the other members of the firm in the firm assets, and has succeeded to its business, is entitled to do business as a retailer of liquor and manufactured tobacco under a license or special tax receipt issued to the firm before its dissolution, at any other place than the old place of business of the firm. In the case of *U. S. v. Glab*, 99 U. S. 225, it was held that a partner who had succeeded by purchase to the business of the firm might continue to do business for the unexpired term of the license, at the old stand; but it was not expressly determined whether such license could be lawfully transferred, so as to authorize a continuation of the same business by the remaining partners at some other place in the same city or town. Following some intimations given in that decision, the practice has been, as I am informed, to refuse to allow such transfers, although it is conceded that a firm has the right, if no changes have taken place in its membership, to have its license transferred from one place to another, as its place of business is changed. I regard the limitation in the respect last noted, upon the right of a remaining partner of a firm who has succeeded to its business to have the firm license transferred, as unwarranted by anything contained in the decision above referred to, or by the statute regulating the collection of special taxes. Sections 3232–3242 inclusive.¹ If the remaining member of a firm, in case of dissolution, can use the

¹"Sec. 3234. Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax."

"Sec. 3241. When any person who has paid the special tax for any trade or business dies, his wife or child, or executors or administrators, or other legal representatives, may occupy the house or premises, and in like manner carry on for the residue of the term for which the tax is paid the same trade or business as the deceased before carried on, in the same house, and upon the same premises, without the payment of any

firm license at all, he should be permitted to use it in manner and form as the firm might have used it if no dissolution or change had taken place therein. In the case of *U. S. v. Glab*, the defendant had continued the firm business at the old stand, and his right to use the license at that place was the sole question involved in the decision. It is true that some allusion was made to possible difficulties that might arise in applying the law as therein construed, if the remaining partner should associate with him in business another person in place of the outgoing partner, or if a change should be made in the place of business; but I understand the allusion so made to possible difficulties that would occur in the event of a change in the place of business, to refer to difficulties that would be encountered in the event of a dissolution of the firm without any agreement between the partners as to the disposition of the firm assets, including therein its unexpired license. A firm might dissolve, and each partner thereafter assert the right to carry on the business at different places, under a license originally issued to the firm. In that case, as a license only protects a business at one place, the collector would either be compelled to recognize the right of the partner who remained at the old place of business to use the license, or to require each partner to take out a new license. No such difficulty, however, is encountered when, by agreement between the members of a firm, one or more of them retires, and the others are authorized to continue the business and use the old license. In all such cases where there is no controversy between the partners as to the right of the remaining member or members of the firm to use the firm license, and no new members are introduced into the firm to take the place of those who have retired, it is clear that the partner or partners who succeed to the business have the same right that the original firm had to transfer the license in case the place of business is changed to some other street or number in the same town or city.

As was remarked in the case of *U. S. v. Glab*, it is not the policy of the government to require honest dealers to pay a special tax twice, and I may further remark that it is not the policy of the law to place unnecessary restrictions upon the right of a dealer to change his business location. In the case under consideration, I understand that defendant had acquired all the interest of his copartner in the business formerly conducted by himself and William Dalton. He was therefore entitled to carry on the business in his own name as a retail dealer, until May 1, 1889, under the license issued to A. J. Davis and William Dalton, upon having the same duly transferred to No. 2,601 Chouteau avenue, where he proposed to conduct the business after the dissolution of the firm; and it was the duty of the collector to have transferred the license to that number, on a proper application therefor made by the defendant.

additional tax. And when any person removes from the house or premises for which any trade or business was taxed to any other place, he may carry on the trade or business specified in the collector's register at the place to which he removes, without the payment of any additional tax: provided, that all cases of death, change, or removal, as aforesaid, with the name of the successor to any person deceased, or of the person making such change or removal, shall be registered with the collector, under regulations to be prescribed by the commissioner of internal revenue."

ERWIN v. UNITED STATES.

(District Court, S. D. Georgia, E. D. January 17, 1889.)

1. COURTS—FEDERAL JURISDICTION—CLAIMS FOR FEES.

The act of 22d February, 1875, (18 St. at Large, 333,) which requires that the accounts of district attorneys, clerks, marshals, etc., shall be forwarded, "when approved," "to the proper accounting officers of the treasury," does not make presentation to such officers a condition precedent to a right of action, nor is rejection of a claim by the accounting officers of the treasury such a determination of a "commission or department authorized to hear and determine," in the meaning of the act of March 3, 1887, (24 St. at Large, 505,) as will bar an action in the proper courts.

2. CLERKS—FEES.

While the general rule is otherwise, when a statute is silent as to compensation, if additional labor is imposed upon a clerk, not in the line of the duties ordinarily appertaining to such an office, and if contemporaneous construction of the statute by the attorney general, and analogous provisions of other statutes subsequently passed, indicate an intention to pay for such services, the officer is entitled to compensation.

3. SAME—SERVICE AS JURY COMMISSIONER.

A clerk of a circuit or district court of the United States is entitled to compensation for revising the jury-box at the rate of five dollars per day for a period not exceeding three days for a term of the court. The clerk is entitled to charge 15 cents per folio for recording the names, residences, etc., of jurors, on a record which he is required to make by a rule of court.

4. SAME—ATTENDANCE—PER DIEM—ATTENDANCE OF DEPUTY.

Where his deputy attends a session of the court, the clerk is entitled to a *per diem* compensation for such attendance, even though the clerk has received a *per diem* for his personal attendance the same day at a session of the court at another place.

5. SAME—STATUTE—REPEAL.

The proviso relative to compensation for attendance of court officers, in the act of August 4, 1886, (24 St. at Large, 253,) was repealed by the proviso covering the same subject-matter in the act of March 3, 1887, (24 St. at Large, 541.) And since the passage of the latter act it is not necessary that business be transacted in court to entitle the clerk to his *per diem*; it is sufficient if the court be opened for business by the judge.

6. SAME—SERVICE AS COMMISSIONER.

The offices of clerk and commissioner are compatible. A person who holds two distinct compatible offices may receive the compensation of each. A clerk is given a *per diem* fee "for his attendance" at a session of the court; a commissioner is given a *per diem* fee "for hearing and deciding,"—services clearly distinct.

7. SAME—ATTACHMENT FOR CONTEMPT—DOCKET AND RECORD FEES.

An attachment against a defaulting witness or juror for contempt of court is an independent suit, and a "cause" for which a docket fee is chargeable under the fee-bill. The clerk is required to make a final record of the proceedings in such a case.

8. SAME—WARRANT FOR TRANSPORTATION—DOCKET FEES.

The clerk is entitled to a docket fee for a hearing by the court on application for a warrant for the transportation of a defendant to another district under the provisions of section 1014, Rev. St.

9. SAME—FILING PAPERS.

The clerk is entitled to charge for filing each separate paper sent up by commissioners after hearing in criminal cases, and for filing each separate account of deputy-marshals, being the vouchers to accounts current of the marshal.

10. SAME—APPROVING COURT OFFICIALS' ACCOUNTS.

The fees of the clerk for entering orders approving accounts of marshals, clerks, attorneys, commissioners, etc., as required by the act of February 22, 1875, (18 St. at Large, 833,) and for certified copies of such orders for the department, are properly chargeable against the United States.

11. SAME—ENTERING OFFICIAL PROCEEDINGS.

Where, by order of the court, the clerk enters upon the minutes, as memorial services in respect to the late vice-president, a proceeding in court of official character, the fee for entering is properly chargeable to the government.

12. SAME—REPORTING ACCOUNT OF WITNESS AND JURY FEES.

The statute requires that jurors and witnesses shall be paid upon the orders of the court. When the clerk states the accounts of jurors and witnesses, taking their affidavits as to travel and attendance, and presents the accounts stated in a report to the court for its approval, he is entitled to the fee prescribed by the statute "for making any report." The original orders signed by the judge should be entered of record, and placed upon file by the clerk, and he is entitled to a fee of 10 cents for filing each.

13. SAME—CRIMINAL PROCEDURE—COMMITMENT.

In a state where the use of local jails for United States prisoners is permitted, whenever a prisoner is committed to jail a copy of the writ of commitment showing grounds thereof should be left with the jailer. In case of a proceeding before a judge or commissioner, in which it is necessary to commit the defendant to jail to await a hearing or pending examination, a writ to commit is necessary, setting forth the cause of detention, and why examination is postponed. After hearing and order committing for trial, a final writ of commitment is necessary, reciting the hearing, finding of probable cause, and that prisoner is committed in default of bail to await trial. Where a defendant is arrested on bench-warrant, and brought before the court, and is committed in default of bail to await trial, the writ of commitment should state the cause of detention until a trial can be had. After conviction a final writ of commitment is necessary setting forth the fact of trial and conviction, and the term of imprisonment prescribed in the sentence. The copy commitment delivered to the jailer should, where practicable, be certified, and bear the seal of the court.

14. SAME—FINAL RECORD.

A state law, passed since 1789, cannot affect criminal procedure in the federal courts. Unless there be an express statute to the contrary, the federal courts are governed in criminal causes by the general common-law procedure. A final record was required to be made by the clerk at common law, and the general method of making the record prescribed by the common law should be followed now, subject to such changes as have been wrought by the character of our institutions, and the modifications made necessary by the enlarged bill of rights of the federal constitution.

15. SAME.

A criminal information must be founded on an affidavit charging a crime, and a preliminary hearing finding probable cause, and fixing reasonable bail by the committing magistrate; otherwise the proceeding is not in accordance with due process of law, and is contrary to the fourth, fifth, and eighth amendments to the constitution. The proceedings before the committing magistrate showing a compliance with these constitutional provisions, being a necessary part of the proceeding, should be entered upon the final record.

16. SAME—SUBPENAS—COPIES.

At common law the names of only four witnesses could be included in one writ of subpoena. The witness was served by leaving with him a copy of the subpoena, or a ticket which contained the substance of the writ. It was the duty of the party or his attorney to make the copy subpoenas or tickets, and furnish them, with the writ, to the officer for service. Section 829, Rev. St., requires that the clerk shall insert in each writ of subpoena the names of as many witnesses in a cause as convenience in serving will permit. Where the clerk makes the copy subpoenas or subpoena tickets, and furnishes them to the marshal for service, at the request or by the acquiescence of the district attorney, the clerk is entitled to charge the government for making such copies.

17. SAME—COUNTING RECORD—"FOLIO."

In determining the number of folios in a final record each separate and distinct order, notice, or other paper is to be counted separately, according to the rule prescribed in section 854, Rev. St., and the aggregate of the folios so found is the number of folios in the record.

(*Syllabus by the Court.*)

At Law. Action to recover fees.

Marion Erwin, *in propria persona*.

Du Pont Guerry, U. S. Atty.

FINDING OF FACTS.

SPEER, J. This suit was brought under the act of congress of March 3, 1887, which confers upon the district court of the United States concurrent jurisdiction with the court of claims of all demands against the government not sounding in tort, in amounts not exceeding \$1,000, and the same jurisdiction upon the circuit courts of demands exceeding \$1,000 and not exceeding \$10,000. The issues formed in these novel but salutary proceedings are triable by the court without the intervention of a jury. In the suit before the court the government was represented by the United States attorney, and the plaintiff appeared *in propria persona*. The claimant was appointed clerk of the district court of the United States for the Southern district of Georgia on the 17th day of March, 1883, and has continued to hold that office until the present time. He rendered, at various times, his accounts for fees claimed to be due by the government, which accounts were duly presented and approved by the court, as required by the Revised Statutes, § 846, and the act of February 22, 1875, (18 St. at Large, 333.) The accounting officers of the treasury department disallowed quite a large number of the items charged. The claimant made up an account for the aggregate amount of these disallowances running back to the date of his appointment, and included therein also similar items for services rendered which had not theretofore been included in the accounts rendered to the department because of the said adverse rulings on the legality of the charges. This account was presented and sworn to in open court in the presence of the district attorney, the claimant stating at the time that the account was for items disallowed in his accounts by the accounting officers of the treasury, and that it was his purpose to bring suit for the same in this court. Upon objection made by the district attorney the court held that it was not necessary or proper for the court to make any order in the premises at that time; that the legality of the charges would be passed upon when the account was sued and should come up for trial regularly. The claimant was not, however, to be deprived of any advantage which might accrue to him by reason of his having presented the account with all its items for the approval of the court, as prescribed by the act of February 22, 1875, (18 St. at Large, 333.) It is upon this account that the claimant sues. The petition contains also a count for work and labor, in the usual *indebitatus assumpsit* form. In the lengthy bill of particulars annexed to

the petition all the items of disallowances of a similar character have been collected and ranged under appropriate heads, making 20 different items to be passed upon. It will be found convenient to set out the facts bearing upon each item as each is taken up for consideration.

CONCLUSIONS OF LAW.

"The act of 22d February, 1875, (18 St. at Large, 333,) which requires that the accounts of district attorneys, marshals, clerks, etc., shall be forwarded 'when approved,' 'to the proper accounting officers of the treasury,' does not make presentation to the accounting officers a condition precedent to an action." *Ravesies v. U. S.*, 21 Ct. Cl. 243. It follows, therefore, that, the accounting officers of the treasury having ruled against the legality of charges of a certain class for services performed, on the presentation of a former account, it is unnecessary for the clerk to include in subsequent accounts charges for similar services as a prerequisite to his right to sue for the same. On the other hand, there are claims relative to which the department may be invested with such powers as will make a rejection by its officers final, even as against the courts. *Chorpenning v. U. S.*, 3 Ct. Cl. 140; *Meade v. U. S.*, 9 Wall. 691. But the rejection of a claim by the comptroller or the accounting officers of the treasury is not the determination of a "commission or department authorized to hear and determine," which will prevent the revision of such a finding by the proper courts. Section 191, Rev. St.; *Chorpenning v. U. S.*, *supra*; *U. S. v. Saunders*, 120 U. S. 126, 7 Sup. Ct. Rep. 467.

CONSIDERATION OF THE CLAIM BY ITEMS.

Item 1. Charge for necessary time required, (not exceeding three days for any one term of the court charged,) and services rendered in procuring and selecting the names of competent jurors from the body of the district, and revising the jury list and box under the orders of the court, at \$5 per day, \$75.

FINDING OF FACTS.

The services were performed as charged. The nature of the services,—the selection of competent jurors from the body of a district containing 79 counties, and covering two-thirds of the state of Georgia,—was such that it could not be conveniently performed during the sessions of the court, when the time of the clerk is occupied with court work, and the jury-boxes, for obvious reasons, cannot be revised. The selection of competent jurors requires much correspondence, the exercise of great care, and sound judgment. It has been the practice in this district, whenever in the judgment of the court the jury-box needed revision, to make an order before the close of one term of the court, requiring the revision to be made during vacation for the next term of the court. The *per diem* charges here made are not for days when there were charges by the clerk for attendance in court. The several charges aggregated by this item were disallowed by the comptroller as not warranted by law.

CONCLUSIONS OF LAW.

Jurors to serve in the courts of the United States were formerly selected in accordance with the laws of the several states. Section 800, Rev. St. By the act of June 30, 1879, a new and uniform method was established for all the federal courts. Jurors possessing the proper qualifications were thereafter required to be selected by the clerk and a jury commissioner, to be appointed by the judge, and the names so selected to be placed in a box, from which the juries were to be drawn as occasion required. 21 St. at Large, 43; 1 Supp. Rev. St. 497. Here was a new, important, and arduous duty placed upon the clerk, not contemplated at the time of the enactment of the clerk's fee-bill in 1853, (section 828, Rev. St.;) and yet the act is silent as to compensation to the clerk or to the jury commissioner. If the silence of the act in this particular be indicative of an intention to throw this additional labor upon the clerk without any compensation therefor, as congress had an undoubted right to do, it would be indicative also of an intention not to compensate the jury commissioner, whose appointment is provided for, also, and to make that office purely honorary. But the attorney general appears to have held otherwise. He allowed what he considered reasonable compensation to jury commissioners out of the fund appropriated for the miscellaneous expenses of the courts. Annual Report of Attorney General for 1883, p. 19. For weight to be given such opinion, see *U. S. v. Hill*, 120 U. S. 180, 7 Sup. Ct. Rep. 510, and cases cited. Besides, the appropriation bill of March 3, 1885, (23 St. at Large, 511,) had a provision for "compensation for jury commissioners, \$5 per day, not exceeding three days for any one term of the court." This is a legislative interpretation of the statute coinciding with the contention of the claimant. A similar provision is contained in each subsequent appropriation. The duties of the clerk in revising the jury-box are not those usually coming within the functions of the office of a clerk of court. In effect, the act creates two new officers,—the jury commissioners of the court,—one of these commissioners to be appointed by the court, and the clerk of the court *ex officio* to be the other. In point of fact the clerk is *ex officio* a jury commissioner, and it seems clear that he is entitled to compensation as such out of the appropriation for pay of jury commissioners at the rate of five dollars per day, as provided for by the several appropriation acts; or at least the intention to pay at that rate may be inferred from those acts, and whether the clerk is entitled to pay out of those appropriations or out of the regular appropriation for fees of clerks is immaterial. See *U. S. v. Brindle*, 110 U. S. 688, 4 Sup. Ct. Rep. 180.

Item 2. Charge for making record of names, residence, etc., of jurors on jury-list record, three dollars, and making copy of the names, etc., for the jury-box, two dollars.

FINDING OF FACTS.

It is not denied that the services were rendered, but the disallowance by the comptroller is stated in his report to be "because not authorized to a clerk; this is the work of the jury commissioner."

CONCLUSIONS OF LAW.

The statute does not make it the duty of the jury commissioner to make such a record, but the duty is imposed upon the clerk by rule 60 of this court,—a rule prescribed by the late Honorable W. B. Woods, when circuit judge. The importance of the record cannot be denied, and the clerk is entitled to charge for making any record at 15 cents per folio, and this is the amount charged. It is conceded that if the clerk is entitled to pay for revising the jury-box, that the charge of two dollars for making copy of names, etc., for the jury-box is erroneous, as being properly within the services for which the *per diem* is provided.

Item 3. Charge for necessary attendance under section 584, Rev. St., by deputy, at Savannah, on the opening day of the May term, 1884, and on the opening day of the November term, 1887, \$10.

FINDING OF FACTS.

These *per diem* charges were disallowed by the comptroller because the clerk charged for and received a *per diem* fee for his personal attendance at a session of the court at Macon on the same days; the comptroller holding that only one *per diem* can be charged by a clerk, even though the court is in session at two different places in the district at the same time, and even though the clerk is compelled to be at one place himself, and have a deputy in attendance at the other. It is not denied that the services were rendered as stated.

CONCLUSIONS OF LAW.

The first question that arises is: How far can a clerk be represented in the performance of his duties by deputy, and whether he is entitled to receive the usual fees for work done, when the service is performed by deputy? The powers and duties of deputy-clerks are not fixed by section 558, Rev. St., which provides for their appointment. But it is provided that their salaries must be paid by the clerks from the earnings of the clerk's office under the fee-bill. Sections 561, 839, Rev. St. And the clerk is responsible for the acts of his deputy. Section 796, Rev. St. For these reasons the right of the clerk to receive the fees earned by his deputy stand on the same footing as that of the marshal to receive the fees earned by his deputy, and the relations between the two cannot be satisfactorily illustrated by the relations between a district attorney and an assistant district attorney. The latter is paid a salary by the government, and the district attorney is not responsible for his acts. *Townsend v. U. S.*, 22 Ct. Cl. 214. "A deputy is said to be one who occupieth in right of another, and for whom regularly his superior shall answer." "A deputy has not any estate or interest in the office, but is as servant to the officer." "A deputy cannot regularly have less power than his principal." 7 Bac. Abr. 316, (L.) "Where the office of registrar to the bishop of Rochester was granted to J. S., who was an infant of twelve years of age, this was held a good grant, the office

being to be exercised by him or his deputy." Id. 312, (I.) As a matter of practice, it is as often the case as otherwise, that the duties of a clerk or marshal in the court-room are attended to by deputy, while the principal officer is engaged in the performance of other duties appertaining to his office elsewhere. This is particularly true in districts in which there are several places of holding court. Hon. William Lawrence, late first comptroller, in passing upon a similar question before the department, said:

"A usage so long continued as to make it law, if there ever could have been any doubt about it, permits a deputy marshal to attend the sittings of courts, and gives the marshal a right to the *per diem* fee of five dollars for this service." *Double per Diem Case*, 5 Lawr. Dec. 279.

The next question to be considered is, whether the clerk is entitled to two *per diem* fees on the same day,—one for his personal attendance at a session of the district court for the Western division of the district at Macon, and the other for the attendance of his deputy at a session of the district court for the Eastern division of the district at Savannah. The act of congress providing for the holding of courts in two places in the Southern district of Georgia, is entitled "An act to provide for circuit and district courts of the United States at Macon, Georgia." The act provides that "said Southern district shall be, and hereby is, divided into two divisions, to be known as the 'Eastern and Western divisions of the Southern district of Georgia.'" Act Jan. 29, 1880, (21 St. at Large, 62.) Careful consideration of the provisions of this act leads to the conclusion that separate, independent, and distinct courts were created in each division. In fact the "district court of the United States for the Eastern division of the Southern district of Georgia" is a tribunal as distinct from the district court of the United States for the Western division of the Southern district of Georgia, as was the "Fifth circuit court of the United States for the Northern district of Georgia" from the "Fifth circuit court of the United States for the Southern district of Georgia," before the passage of the act referred to. The terms of the courts in the two divisions were so fixed by the act that the sessions at Macon and Savannah frequently conflict. It often happens that while the judge and clerk are in attendance upon the district court in one division, the court in the other division must be opened and adjourned under the provisions of sections 583, 584, etc., of the Revised Statutes, and the clerk must have a deputy in attendance there. Section 828, Rev. St., contains the following provision in reference to the clerk's fee for attendance:

"For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going, and five cents for returning, and five dollars a day for his attendance on the court while actually in session."

"Court" is here used clearly in the sense of "term" or "session" of the court, corresponding to the second definition of the word given by Mr. Bouvier in his Law Dictionary, because it is the term or session of the court which is "required by law to be held" at a particular time and place. And "the court," referring to "any court," makes it the fair in-

tendment of the clause that the clerk shall be entitled to five dollars a day for his attendance on any term of any court required by law to be held at any particular place, while the court is actually in session. The fee is "for his attendance" at that particular place, and on that particular court, and "five dollars a day" is the measure of his compensation for that particular service. *Goodrich v. U. S.*, 35 Fed. Rep. 193. Therefore pay for his attendance on one court at a particular place cannot be pay for his attendance by deputy on a different court in a different place. And this is in accordance with the substantial justice of the case. The *per diem* of the clerk for his attendance in the one division is, under the law, justly and fully earned by his personal attendance on that court; and since he must, under the law, pay the expenses of maintaining and keeping a deputy in attendance at the court in the other division, and be responsible for his acts, it is but just that he should receive the fee for such attendance, so that he may pay the deputy from his earnings, and have a margin of compensation for his own supervisory care and responsibility. The Honorable William Lawrence, late first comptroller, passed upon a similar question in case of a marshal's account pending before the treasury department and reached the same conclusion. *Double per Diem Case*, 5 Lawr. Dec. 278.

Item 4. Charge for necessary attendance at May term, 1887, at Savannah, two days, May 25th and 28th, on which the court was opened for business by the judge in person, \$10.

FINDING OF FACTS.

The court was opened for business by the judge, but it is admitted that no business was transacted in court on those days other than the reading and approval of the minutes, the entry of the clerk of the names of the officers of court in attendance, and the making of the entries opening and adjourning court. The disallowance by the comptroller was "because no business was actually transacted on those days."

CONCLUSIONS OF LAW.

This disallowance is probably based upon the provision in the appropriation bill of August 4, 1886, providing as follows:

"Nor shall any part of the money appropriated by this act be used in the payment of a *per diem* compensation to any clerk or marshal for attendance in court except for days when business is actually transacted in court, and when they attend under sections 583, 584, 671, 672, and 2013 of the Revised Statutes." 24 St. at Large, 253.

But the appropriation bill of March 3, 1887, contained a clause covering the same subject-matter, and was not limited to that appropriation in its application. It provides that "hereafter" the clerk shall not charge a *per diem* fee, "except for days when the court is open by the judge for business, or business is actually transacted in court," and when the attendance is "under sections 583, 584, 671, 672, and 2013 of the Revised Statutes." 24 St. at Large, 541. "Where two acts are not in all respects repugnant, if the later covers the whole subject of the

earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal." *King v. Cornell*, 106 U. S. 396, 1 Sup. Ct. Rep. 312. *Speer*, Rem. Causes, 73. Therefore, when the court was opened for business by the judge on May 25 and 28, 1887, and the clerk was in attendance, he is entitled to his *per diem* whether business was transacted or not.

But, independently of the above considerations, the clerk is entitled to his judgment here for these charges. Under the provisions of the fee-bill, (section 828, Rev. St.,) the clerk was entitled to a *per diem* for his attendance on the court when actually in session even though "no suitors appeared, or for other reason the court, in its discretion, adjourned to a future day." *Jones v. U. S.*, 21 Ct. Cl. 1; *Bill v. U. S.*, (Ct. Cl. No. 15, 570,) (23 Ct. Cl. 142.) *Goodrich v. U. S.*, 35 Fed. Rep. 193. The limitation in the act of August 4, 1886, was expressly confined to the money appropriated by that act, and did not therefore repeal the general statute giving the clerk the right to his *per diem* for his attendance for each day when the court is actually in session. "A statute which fixes the annual salary of a public officer at a designated sum, without limitation as to time, is not abrogated or suspended by subsequent enactments appropriating a less amount for his services for a particular fiscal year, but containing no words which expressly or impliedly modify or repeal it." *U. S. v. Langston*, 118 U. S. 389, 6 Sup. Ct. Rep. 1185.

Item 5. Charge for necessary attendance in the district court at Macon at the October term, 1887,—October 10th, 17th, November 9th, 19th, 22d, and 26th,—six days, \$30.

FINDING OF FACTS.

It is not denied that the service was performed as charged, but the disallowance by the comptroller is "because the same days were charged and allowed him as commissioner of the circuit court."

CONCLUSIONS OF LAW.

It is not questioned that the office of clerk and United States commissioner are compatible offices. From the organization of the judicial machinery of the government it was found convenient to confer upon the clerk of the court the powers of circuit court commissioner, and most of the clerks have had those powers conferred upon them. The appointments have been made and recognized as valid by many of the most eminent of our federal judges, notably by the late Justice Woods, in this circuit. It is provided that "no marshal or deputy-marshal of any of the courts of the United States shall hold or exercise the duties of commissioner of any of the said courts." Section 628, Rev. St. But, notwithstanding the well-known practice of appointing clerks as commissioners, there has never been any legislation prohibiting such appointments. The late comptroller, William Lawrence, held that such offices were not incompatible, nor was that of collector of internal revenue, and commissioner. *Wade's Case*, 1 Lawr. Dec. 302, 27 Int. Rev. Rec. 16, Jan. 17, 1881. The regulations of the post-office department, in prohibiting certain em-

ployments to postmasters, makes an exception in the case of appointment as commissioners. It is safe to say that clerks holding that position have performed its duties with as much skill, honesty, and fairness as any other class of men who have been appointed to the position. A person who holds two distinct compatible offices may lawfully receive the salary or compensation of each. *U. S. v. Saunders*, 120 U. S. 127, 7 Sup. Ct. Rep. 467; *U. S. v. Brindle*, 110 U. S. 688, 4 Sup. Ct. Rep. 180; *Converse v. U. S.*, 21 How. 463. The idea of the accounting officers seems to be that, the claimant having been paid a *per diem* for hearing and deciding as commissioner on a day certain, that, even though he was not occupied in that service but a portion of the day, that his time was purchased by the government for all purposes during that 24 hours. The same reasoning would have prevented Saunders from receiving two salaries for the same month, but the supreme court held that as the offices were not incompatible, and as he had performed the work of each office, he was entitled to both salaries. The statute gives the clerk five dollars per day "for his attendance" on the court while actually in session. The court day may not last but 10 minutes, and yet the *per diem* for that court day will be fully earned at the expiration of that 10 minutes. *Bill v. U. S. supra*; *Goodrich v. U. S.*, 35 Fed. Rep. 193. On the other hand, the statute gives the commissioner five dollars per day "for hearing and deciding" on criminal charges "for the time necessarily employed." As to what constitutes a hearing and deciding, see *Harper v. U. S.*, 21 Ct. Cl. 56. The respective services, therefore, are entirely distinct, and for the performance of each the statute prescribes a fee.

Item 6. This item has been reconsidered and allowed by the comptroller since the institution of the suit, and has consequently been stricken out by amendment.

Item 7. Charge for making dockets and indexes in cases of attachment for contempt, for defaulting witnesses and jurors, \$7; and for making final record in such cases, \$3.75.

FINDING OF FACTS.

This item was disallowed by the comptroller "because these proceedings are not cases within the meaning of the fee-bill," and "complete records not necessary as to such proceedings."

CONCLUSIONS OF LAW.

It is unnecessary to go into the distinctions drawn by the courts, as to when proceedings to punish for contempt are to be regarded as on the civil or criminal side of the court. These particular proceedings were instituted by the government. The question raised is whether such proceedings are "causes" within the meaning of the fee-bill, for which a docket fee can be taxed. Mr. Bouvier defines a "cause" to be "any question, civil or criminal, contested before a court of justice." "Case" and "cause" are synonyms. *Blyew v. U. S.*, 13 Wall. 581. In proceedings for contempts for failure to obey the orders or writs of a court, the parties have the right to be heard, and to purge themselves of the

contempt if they can. Such a proceeding is commenced by a regular process of the court, and there is a question to be contested and decided. "When a court commits a party for contempt, their adjudication is a conviction, and their commitment in consequence is execution." *Ex parte Kearney*, 7 Wheat. 38. In that case, where a person imprisoned for contempt by the circuit court applied to the supreme court of the United States for a writ of *habeas corpus*, it was denied because "this court has no appellate jurisdiction in criminal cases." There is in such cases process, judgment, and execution under which the defendant may be imprisoned, and his property sold and title pass. The necessity, therefore, for a record is absolute. A proceeding for contempt is a distinct and independent suit. *Hayes v. Fischer*, 102 U. S. 121. Comptroller Lawrence held that district attorneys were entitled to docket fees in such cases. *Contempt Case*, 5 Lawr. Dec. 255.

Item 8. Charge for making dockets and indexes, in case of a hearing before the judge on application for a warrant for the transportation of a defendant from the Southern district of Georgia to the district of South Carolina, under the provisions of section 1014, Rev. St., three dollars.

FINDING OF FACTS.

This item was disallowed by the comptroller "because there was no case in the district court within the meaning of the fee-bill."

CONCLUSIONS OF LAW.

The use of a docket containing an abstract of the proceedings in a case for convenient reference, as well during the trial of the case as afterwards, is well recognized. While the proceedings under consideration are before the district judge, there are questions to be decided which are frequently stubbornly litigated. Even cases tried by a commissioner are properly entered upon a docket. The docket fee is not prescribed by the fee-bill simply for cases tried in court; the language is broad enough to apply as well to cases tried before the judge; and where the orderly conduct of the public business requires such a docket to be kept, the clerk is the proper person to keep it, and is entitled to a charge therefor.

Item 9. Charge for filing each separate paper sent up by commissioners after hearing in criminal cases, \$105.50.

FINDING OF FACTS.

This item was disallowed by the comptroller because he alleges that it is the duty of the clerk or the commissioner to fasten all the papers sent up by the commissioner together, and file them as one.

CONCLUSIONS OF LAW.

The rule of this court adopted on January 1, 1877, provides that after examination "all the papers in the case, including the affidavit and warrant to apprehend, and the recognizance, shall be forwarded at once by the commissioner to the clerk's office." Rules of Court, p. 36. There is no law or rule of court requiring the papers to be fastened together,

and, considering the use to which they are to be put in the further progress of the case, or in the examination of accounts of commissioners, such a practice would be exceedingly inconvenient. They must be separated necessarily; as, for instance, when the affidavit is used as a basis for an information, or the bond is forfeited. etc. Each paper should be filed for its permanent identification. The charge for filing each separate paper is authorized by the fee-bill. Section 828, Rev. St.; *Reed v. U. S.*, Ct. Cl. No. 14,980 (decided 1888); *Goodrich v. U. S.*, 35 Fed. Rep. 193.

Item 10. Charge for entering orders approving accounts of commissioners, marshals, clerks, attorneys, etc. and for certified copies of orders, as provided by 18 St. at Large, 333, \$79.80.

FINDING OF FACTS.

It is not denied that the services were rendered, and the charges in accordance with the fee-bill, but the disallowances were made by the comptroller for the following reason: "All charges connected with the verification and approval of accounts of attorneys, marshals, clerks, and commissioners are disallowed, as not properly chargeable to the United States," and because the charge "is payable by the officer individually."

CONCLUSIONS OF LAW.

By the terms of the act it is expressly provided that the accounts of clerks, marshals, and district attorneys shall be "rendered" to the court, and the officer shall prove the account in open court to the satisfaction of the court, by his own oath or that of other persons having knowledge of the fact. If the officer has done that, he has performed all that is required of him by the statute, and his account is fully rendered. There is something, however, for the court to do. It must cause to be entered of record an order approving or disapproving the account, as may be, "according to law, and just." The clerk is then required to file the duplicate accounts, and forward the originals to the proper accounting officers of the treasury. The officers having performed the services, the government is justly indebted to them to the full amount of the fees prescribed for the same without any deduction, and when they have presented their account in the manner prescribed by law they are not properly chargeable with the after-expenses incident to methods adopted by the government for its own convenience or protection. The injustice of adopting such a rule is particularly apparent in the case of the marshal, most of whose accounts rendered are not for fees, but for disbursements of funds intrusted to him for pay of witnesses, jurors, support of prisoners, and miscellaneous expenses of the courts; and in case of accounts rendered for actual expenses in the transportation of prisoners to the penitentiary, under section 5546, Rev. St., for which he gets no compensation whatever, and of which a separate account is required by the attorney general for each transportation, the performance of the duty would be an expense to the officer, which is clearly not contemplated by the statute. In the case of commissioners, the force of this reasoning is still more apparent, because

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the act provides that all they have to do is to forward their accounts, duly verified by oath, to the district attorney, and he must see to the other proceedings. The clerk being entitled to the charges, they are therefore properly payable by the United States. *Reed v. U. S.*, *supra*. Similar charges were considered by Comptroller Lawrence as properly chargeable to the government. *Commissioners' Oath-Fee Case*, 5 Lawr. Dec. 350.

Item 11. Charge for filing each separate account of deputy-marshals, being the vouchers to accounts current of the marshal, \$8.90.

FINDING OF FACTS.

This item was disallowed by the comptroller as "unnecessary and unauthorized."

CONCLUSIONS OF LAW.

The purpose of filing the duplicate accounts of officers of the court in the clerk's office is for ready reference. It is not practicable to fasten these vouchers together, and would make reference to them inconvenient. Besides, each separate voucher should be identified. The charge is authorized by the fee-bill. *Goodrich v. U. S.*, 35 Fed. Rep. 193.

Item 12. Charge for entering upon the minutes, by order of the court, proceedings in the court *in memoriam* on the death of the Honorable Thomas A. Hendricks, late vice-president of the United States, and for similar proceedings on the death of Justice W. B. Woods of the supreme court of the United States, \$4.50.

FINDING OF FACTS.

These charges were disallowed by the comptroller "as not payable by the United States."

CONCLUSIONS OF LAW.

It has been the custom of this government, and of all civilized governments, from time immemorial, to pay suitable respect to the memory of its distinguished citizens, who die while in the public service. The halls of the legislative and judicial departments are draped in mourning, public buildings are clothed in black, and ships of war carry their flags at half-mast. Such acts are regarded as the acts of the government, performed through its public servants, and such trivial expenses as the purchase of bunting, etc., for such occasions have been universally recognized as an expense properly chargeable to the government. Proceedings in court in memory of a distinguished associate justice, or of a vice-president, stand upon the same footing, and the government could as well refuse to pay the printer who sets up the type for some eulogistic speech delivered in congress on similar occasions as to refuse to pay the clerk for recording a memorial resolution, entered upon its permanent records by the orders of the court.

Item 13. Charge for making reports of the amount of fees due by the United States to jurors and witnesses for travel and attendance, for the

approval of the court, as required by sections 846, 855, Rev. St., and for filing the orders to pay the same, \$93.30.

FINDING OF FACTS.

The charges aggregated by this item cover a period of three years, and may be consolidated thus: "Drawing 223 reports, 2f. each, at 15c., \$66.90. Filing 264 orders to pay at 10c., \$26.40." The reason assigned by the comptroller for the disallowance in his report No. 92,163 is as follows: "All charges for filing orders to pay jurors and witnesses disallowed. After such orders are entered on record, they should be given to the marshal to accompany his account as authority to pay." This position was apparently abandoned in subsequent reports, and a new position taken, as stated in the letter of the first comptroller to the clerk of August 3, 1886, which is in evidence, as follows:

"In accounts hereafter rendered you will not be allowed for drawing reports of attendance of witnesses and filing orders to pay witnesses, in addition to entering order on minutes. It seems sufficient that the orders should be entered on the minutes, and a copy of each order furnished to the marshal."

The practice in this district in regard to the payment of the fees due by the United States to witnesses and jurors is as follows: When a case has been disposed of, and the witnesses are discharged by the district attorney from further attendance, they repair to the clerk's office. The clerk then ascertains the exact amount due them for attendance and mileage, by examination of their subpoenas, questioning them as to the place from which they have traveled, and comparing their statements with a table of distances kept in his office for that purpose, and the witness is sworn on a jurat drawn on his subpoena ticket to the correctness of his claim. If any doubtful question arises it is referred to the presiding judge for his decision. The days attended, mileage, and amounts due the respective witnesses are then entered on a report, which is signed by the clerk, and submitted to the court for its approval. This report is in the following form:

"To the honorable the presiding judge of the district court of the United States for the Eastern division of the Southern district of Georgia: I have to report that the following-named witnesses are entitled to the amount set opposite their names, for their *per diems* and mileage for attendance upon the said court at and during the ——— term, 188—, to the truth of which account they have been duly sworn. _____, Clerk."

Then follows the title of the case, and a list of the names of the witnesses, with the number of days attended and miles traveled, and the amounts due them respectively. This report is then submitted to the court, and, if adjudged correct, the following order is indorsed upon it:

"It is ordered that the marshal for this district pay to the above-named witnesses the amount set opposite their names for their *per diem* and mileage for attendance upon the court, as above stated.

"In open court, this ——— day of ———, 188—.

"_____, U. S. Judge."

A similar report and order is made where jurors are to be paid, except, of course, they do not attend in any particular case, while the fees of witnesses are properly taxed in the case in which they attend. The only question involved is whether these reports by the clerk are necessary for the convenient dispatch of the public business as incident to the method of payment of witnesses and jurors provided by the statutes.

CONCLUSIONS OF LAW.

"In cases where the United States are parties the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the treasury in his accounts." Section 855, Rev. St. "No accounts of fees or costs paid to any witness or juror upon the order of any judge or commissioner shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs." Section 846, Rev. St. The clerical work involved in the making up and stating the accounts of witnesses and jurors is very properly done by the clerk; the institution of the office is for the purpose of relieving the judge from clerical services. The judges could not perform these duties without serious interference with the dispatch of judicial business. That such accounts should be carefully made up and stated by some responsible ministerial officer of the court, is plain. The clerk cannot, under the statute, enter the order on the minutes, until the order is made; and no order fixing the exact amount to be paid, as is contemplated by the statute, can be made until the statement of the items of the account is presented to the court in proper form. The convenient dispatch of the business of the court makes it necessary that it should be presented to the court in such shape as to prevent the consumption of the time of the court unnecessarily in the consideration of details, and that is best accomplished by the report of the clerk to the court in proper form. It is true that in general the court may direct a clerk to enter upon the minutes an order not previously reduced to writing, but it is the universal practice where an order contains a number of details to write it out upon paper, and, after the signature of the judge is appended, it is handed to the clerk for entry on the minutes, the original being filed away in the clerk's office as a part of the files of the court. If the order is to be made by the court, the court must be first put in possession of its details. The reports being necessary, the clerk is entitled to 10 cents per folio for making the same. Section 828, Rev. St.; *Commissioners' Oath-Fee Case*, 5 Lawr. Dec. 350, note; *Singleton v. U. S.*, 22 Ct. Cl. 118. The fact that he is entitled to an additional fee for entering the order on the minutes, and for making a copy for the accounting officers of the treasury if they require it in the adjustment of the marshal's accounts, cannot affect the question. In regard to filing the orders to pay to which the signature of the judge is attached, such papers belong to the files of the court, and should be marked "Filed" by the clerk for identification. The charge of 10 cents for filing any paper is authorized by the fee-bill.

Item 14. Charge for issuing writs of commitments of defendants to jail to await trial, and for making certified copies for jailer, and entering marshal's returns, eight dollars.

FINDING OF FACTS.

In two of the cases in question the defendants had been committed to Richmond county jail, after a preliminary examination before a commissioner there. At the ensuing term of the court the defendants were brought to Savannah for trial, and as the trial could not be had on the day on which they were brought to court, the court directed that the defendants be committed to the Chatham county jail to await trial, that jail being in the vicinage of the court; and the clerk issued the commitments accordingly. In another one of the cases the defendant was charged with murder on the high seas, and, pending a hearing postponed to another day, the district judge directed the clerk to issue a writ of commitment to Chatham county jail. In the other cases the defendants were brought into court on bench-warrants, and, in default of bail, were, by the direction of the court, committed to jail to await trial. Writs of commitment were issued by the clerk accordingly. These charges were disallowed by the comptroller "because the defendants were in the custody of the marshal under process."

CONCLUSIONS OF LAW.

The point at issue turns upon the proper practice in such cases. "In a state where the use of jails, penitentiaries, or other houses is not allowed for the imprisonment of persons arrested or committed under the authority of the United States, any marshal in such state, under the direction of the judge of the district, may hire or otherwise procure, within the limits of such state, a convenient place to serve as a temporary jail." Section 5537, Rev. St. And in such cases no special process of commitment is necessary, the prisoners being already in the custody of the marshal, and their detention being still continued in his custody. *Turner v. U. S.*, 19 Ct. Cl. 629, No. 12,774; *In re Osterhaus*, (6th Circuit Mich.) 6 Amer. Law T. 519. But in a state, as in Georgia, (see section 359, Code 1882,) where the use of jails is allowed for United States prisoners, the statutes authorize their imprisonment there. *Ex parte Geary*, 2 Biss. 489. "And while so confined therein, shall be exclusively under the control of the officers having charge of the same, under the laws of such state or territory." Section 5539, Rev. St. The state jails are not under the control of the marshal, nor is the custody of the jailer the custody of the marshal in such cases, (*Randolph v. Donaldson*, 9 Cranch, 76;) and the statutes provide that "whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or *mittimus*, a copy thereof shall be delivered to such sheriff or jailer as his authority to hold the prisoner, and the original writ, warrant, or *mittimus* shall be returned to the proper court or officer, with the officer's return thereon." Section 1028, Rev. St. In regard to commitments to await trial, it has been held that it is proper for a commissioner to issue a writ of commitment on sending a prisoner

to jail pending an examination,—what is commonly called a “temporary commitment,”—provided the examination cannot be had at once; but examination should be held within 24 hours thereafter, unless special cause be shown. *U. S. v. Worms*, 4 Blatchf. 332. And it has been held that every writ of commitment must show sufficient cause on its face to justify the jailer in holding the prisoner. The copy of the commitment is the authority of the jailer to hold. *Ex parte Burford*, 3 Cranch, 448; *Ex parte Bennett*, 2 Cranch, C. C. 612; *U. S. v. Brown*, 4 Cranch, C. C. 333; *Ex parte Williams*, Id. 343; *U. S. v. Harden*, 10 Fed. Rep. 803. It follows, therefore, that in case of an examination before a judge or commissioner, in which it is necessary to commit the defendant to jail to await a hearing, or pending the examination, that a writ of commitment is necessary, setting forth the cause of his detention, and why the examination is postponed. After the hearing and finding of probable cause of defendant's guilt, a new writ of commitment is necessary, because, in order to justify the detention of the prisoner for months, as it sometimes happens, before he has been convicted of a crime, it should appear that he has had an examination before the committing magistrate, that probable cause of his guilt has been found, and that he is committed in default of bail. The same rule applies to proceedings before the court. If a prisoner is brought before the court in the custody of the marshal, on bench-warrant or otherwise, before trial, and it becomes necessary to commit him to the custody of any particular jailer for the first time, a writ of commitment is necessary, setting forth the cause of the detention. Again, after trial and conviction, when the court sentences a defendant to imprisonment for a term in any particular jail, a writ of commitment—commonly called the “final commitment”—is necessary, for the reason that the time and purpose of the imprisonment are entirely different. Nor is there anything in section 1030 of the Revised Statutes opposed to this procedure. That section must be construed with section 1028, because both sections are parts of the same act. Section 1030 provides that—

“No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal.”

The meaning of this section is obvious. Where a prisoner has once been committed to jail to await trial or pending a trial, he may be brought out to court, or carried back to jail, a dozen or more times, and for day after day during the progress of the trial; and for this purpose no writ is necessary, because, after the jailer in the first instance has taken custody of the prisoner, the copy of the writ on which the commitment was made remains with him as his authority to hold. The statute is expressly limited to prisoners or persons already in custody, and the further use of the expression “remanding” shows clearly that it applies only to cases where the person has already been committed properly under the provisions of section 1028, because “to remand” implies a previous custody. The district attorney is given no power under the stat-

utes to imprison, and his powers here are clearly limited to the bringing in and remanding persons already imprisoned by competent authority. "Where special reasons exist why a warrant of commitment should be issued to the marshal and the jailer for the purpose of having the prisoner actually committed to jail, as was the case in the trial of Aaron Burr, cited by the claimant, (1 Burr's Tr. 351, 358, 359,) and as is frequently the case where the marshal has no sufficient conveniences for the safe-keeping of the prisoner outside of a jail, and a commitment to prison is actually made, it would seem not to be a simple case of remanding, and for the service of such a warrant by actual commitment the marshal might charge his fee." *Turner v. U. S.*, *supra*.

Item 15. Charge for attaching seals to certified copies of commitments furnished for service on jailer when defendants are committed to jail, \$1.60.

FINDING OF FACTS.

These charges were disallowed by the comptroller "because the marshal and the jailer must take official cognizance of the signature of the clerk."

CONCLUSIONS OF LAW.

Even if that be true, the copy of the commitment is the authority of the jailer to hold the prisoner. Other courts and other persons have the right to inquire into the cause of the detention of a citizen, and there is certainly no rule by which they are required to take official cognizance of the signature of the clerk of this court unless the seal of the court is attached. But judicial notice is taken of the seals of a superior court. *Bouv. Law Dict.* "Seal." It is true that under the comity of courts such a copy not under seal might very properly be taken as sufficient notice of the character of the custody, as to require that the proper officer of the government be notified of any proceeding looking to the release of a prisoner; but that comity has not always been respected by the state courts exercising *habeas corpus* jurisdiction, even in this district. The proper practice is to attach the seal of the court to such copies.

Item 16. This item has been stricken by amendment, because allowed by the comptroller since the bringing of the suit.

Item 17. Charge, in criminal cases brought by information, for entering on the final record the following proceedings: Affidavit, warrant of arrest, marshal's return, and finding of commissioner of probable cause of defendant's guilt, upon which the information is founded; commitment to jail in default of bond; recognizance in cases where given, and justification of surety, and waiver of homestead exemption where it is waived; petition and order for subpoenas on part of defendant at expense of the United States; commitment under sentence, and marshal's return,—\$60.75.

FINDING OF FACTS.

These charges were disallowed by the comptroller "because it was not necessary to copy the same to make proper final record."

CONCLUSIONS OF LAW.

The clerk must record all the orders, decrees, judgments, and proceedings of the court. Section 794, Rev. St. "In its general acceptation 'proceeding' means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and of executing." "Ordinary proceedings intend the regular and usual mode of carrying on a suit by due course at common law." Bouv. Law Dict. There are no statutes prescribing what records the clerk shall keep, or how they shall be kept in criminal cases. "Congress has never enacted a code of criminal procedure, and the states have no power to prescribe either modes of proceeding or rules of evidence in prosecutions for federal offenses. In a general way the federal courts must be governed in these respects by the common law." *U. S. v. Maxwell*, 3 Dill. 278. "In the administration of criminal law, unless there be an express statute to the contrary, we are governed by the general common-law procedure. In the administration of criminal law, and in criminal jurisprudence, we go to the common law for the purpose of ascertaining the modes of practice, the modes of procedure, the rights of defendants, the rights of the government, the duty of the court, and the duty of the jury, and we administer it according to that." *U. S. v. Nye*, 4 Fed. Rep. 890. "No law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases." *U. S. v. Reid*, 12 How. 361. Passing now to the common-law authorities: "A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony. * * * The very creation of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record. A court not of record is the court of a private man whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow subjects." 3 Bl. Comm. 24. Proceedings for contempt are therefore especially the subject of record. "Records are not complete until delivered into court on parchment; therefore a minute book from which an entry of the proceedings at sessions is made and from which book the roll containing the record of such proceedings is subsequently made up is not a record." Archb. Crim. Pl. 127. "The record of judicial proceedings is always in the first instance taken down by the clerk of the court in the way of short entries made upon his dockets, or of the indorsements upon papers filed, and the like. It is not until after the term of the court closes that the extended record, or record proper, is made; and for the making up of this record resort is had to the docket entries, to the accompanying files of papers, and to the several indorsements upon them; these serve as *memoranda* to the clerk. In England the extended entry, or record proper, is written upon parchment; in the United States books made of stout paper are used." 1 Bish. Crim. Proc. § 905. Mr. Bishop, in his work on Criminal Procedure, treats very fully the subject of making up the final record in criminal causes brought by indictment. See 1 Bish.

Crim. Proc. § 913. The principles laid down there may be applied to proceedings by information, bearing in mind that the validity of the two proceedings rest upon very different foundations. And it must be borne in mind that the constitution of the United States has placed certain restrictions upon the criminal procedure at common law, which makes it necessary that a record which is liable to be reviewed in a court above, should speak as to a compliance with these provisions. Thus "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amend. 4, Const. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury; * * * nor be deprived of life, liberty, or property, without due process of law." Amend. 5, Const. "Excessive bail shall not be required." Amend. 8, Const. A criminal information must be founded on an affidavit charging a crime, and a preliminary hearing fixing bail, and finding of probable cause by the committing magistrate; otherwise the proceeding is not due process of law, and is contrary to the fourth and fifth and eighth amendments. *U. S. v. Shepard*, 1 Abb. (U. S.) 431; *U. S. v. Tureaud*, 20 Fed. Rep. 621; *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. Rep. 111. It is very essential, therefore, that the commitment proceedings should be regular, and that the record should show it. It is only necessary to add that the definition of a recognizance is "an obligation of record." The justification is a part of the recognizance. The statute provides that writs of commitment shall be returned to the proper court or officer, with the officer's return thereon." Section 1028, Rev. St. A fee is provided for entering the return, and it is clearly contemplated as a part of the record. "It is the mode of executing judgment," as described under the definition of "proceedings." The petition and order for subpoenas on part of the defendant at the expense of the United States is part of the proceedings of the case, and in some cases may form an essential part of the record to be reviewed.

Item 18. Charge for making copy subpoenas (subpoena tickets, one for each witness in a case) for service by the marshal on witnesses for the United States, one folio each, at 10 cents, \$199.40.

FINDING OF FACTS.

The charges aggregated by this item extend over a period of five years. They were disallowed by the comptroller "because these copies should be made by the marshal, and the charge therefor is * * * covered by his fee for service." It is in evidence that, because of this position taken by the comptroller, the clerk refused to continue furnishing the marshal subpoena tickets, as requested by the then district attorney, and the marshal refused to make them, and that the district attorney brought this disagreement between the officers informally before the court; his honor, the late Judge McCoy, presiding. Upon consideration, the court

directed the clerk to continue to make the tickets according to the practice which had always prevailed in the court. This was in 1883. The clerk has continued to make the tickets from that time, and his making them has been acquiesced in by the district attorneys, and even now the district attorney concedes that if it is not the marshal's duty to make them, they are very properly made by the clerk.

CONCLUSIONS OF LAW.

Unless the sheriff's fee for service at common law made it his duty to make the copies, and included that in the fee for service, it is clear that it is not included in the marshal's fee for service. The practice at common law was as follows: "In ordinary cases the common subpoena is sufficient process to compel the attendance of your witnesses. You may include the names of four witnesses in one writ. Take it, together with a *præcipe*, to the signer of the writs. Pay 1s. 8d. signing, 7d. sealing. Then, make out a copy of the subpoena for each witness, and serve it upon him personally, at the same time showing him the writ." 1 Archb. Crim. Pr. 170; 2 Russ. Crimes, 945; Archb. Crim. Pl. 157. "The witness must be personally served by leaving with him a copy of the subpoena, or a ticket which contains the substance of the writ." Rosc. Crim. Ev. 106; 3 Chit. Gen. Pr. 830. For form of subpoena ticket, see 1 Sel. Pr. 451. In like manner it is provided by the United States statutes fixing marshal's fees that "when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit." Section 829, Rev. St. It was not necessary, except in particular jurisdiction, for process in non-bailable actions at common law to be served by a sheriff's officer. If by the attorney or his clerk it is sufficient. 1 Sel. Pr. 88. But in bailable actions the *capias* must be executed by the sheriff, under-sheriff, or by some bailiff or officer deputized by the warrant of the sheriff for that purpose. *Id.* 120, 122. Mr. Chitty states "the practical proceedings upon issuing process in general" as follows: In case of an ordinary summons, after the sealing of the principal writ, "the attorney then fills up at least as many blank writs of summons, printed on paper, as there are defendants, and which must be exact copies of the principal sealed writ, and one very exact copy of which must be delivered to each defendant, immediately after the service of the writ of summons, or arrest on a *capias*." In service of *capias* in bailable action, after the sealing of the principal writ, "the attorney, having made perfect copies, then proceeds to the proper office of the under-sheriff." 3 Chit. Gen. Pr. 226; 1 Archb. Crim. Pr. 329, 332. It is very clear, therefore, that at common law it was the duty of the plaintiff or his attorney to furnish the officer with the necessary copies of writs for service, and that, too, whether it be a writ which might be served by a private person, or whether it be one which could be served

only by an officer. It remains to be shown that the clerk has the right to charge for making the copies when made by him, at the request of the government, either express or implied. It cannot be doubted but that the party or his attorney has still the right to make these copies, and that, when so made, the clerk is entitled to no fee for such copies. But it is well known that these officers keep a supply of carefully prepared blanks in their offices for use, which they prepare at their own expense, and this appears to have been the case from a very early time. 1 Sel. Pr. 69, 115. And because of that fact, and their recognized skill in preparing such papers, it is almost the universal practice in civil cases for the parties or their attorneys to have the clerk make these copy writs or subpoena tickets. It relieves the attorney from the necessity of performing clerical details which would otherwise frequently take his attention away from the more important duties devolving upon him in the conduct of his case. The district attorney would have the same right to call upon the clerk to perform these services in a case that the attorney of a private party would have, and the clerk's fee-bill provides a fee of 10 cents per folio for making copies, (section 828, Rev. St.,) and such copies may be taxed in the costs of the case, (see section 983, Rev. St.)

It is not questioned that the clerk is entitled to charge for copies of injunctions, commitments, and other processes for service when made by him, but it is claimed that the following provision in the marshal's fee-bill changes the rule in regard to subpoenas: "For serving a writ of subpoena on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons, or notice for a witness." Section 829, Rev. St. This limitation is not in the clerk's fee-bill, and applies only to the marshal. If it be contended that the statute reads by intendment, "and no further compensation shall be allowed to either the clerk or marshal for any copy, summons, or notice for a witness," the answer is that, under that construction, it could not by any means be held that that statute made it the duty of either the one officer or the other to make the copies, and since, as the law then stood, it was not the business of either, the duty would rest where it always did, upon the party or his attorney, and the contention that it was included in the marshal's fee for service could not stand. But this interpolation is not justified. The marshal is the executive officer of the court, and the affirmative right given by the clause is to charge for service of a writ of subpoena; and the limitation that "no further compensation shall be allowed for any copy, summons, or notice for a witness" means clearly that no additional charge shall be made for service of any notice, or the service of any summons, and *ejusdem generis*, for the service of any copy for a witness. It was intended to prevent the marshal from making any additional charge for serving the subpoena ticket, or for serving any notice or summons upon the witness when he is already under subpoena; it being provided in another clause that the marshal's *per diem* for attendance on court shall cover also the "bringing in and committing prisoners and witnesses during the term." But even if an interpolation be made so as to make the clause read, "and no further compensation shall be allowed for making any

copy summons or notice for a witness," the effect would be simply a re-assertion of the right of the parties to make such copies for themselves without fee to any one, as the statute would not even then make it the duty of the marshal to make such copies. The language is purely negative in its character,—a prohibition as to a charge; and, as we have seen, the making of such copies did not otherwise fall within the prescribed duties of the marshal. The purpose of the limitation would be construed to be similar to that of rule No. 28 of the circuit court for this district, which is as follows: "The waiver of process and of service by the defendant shall not deprive the clerk or marshal of their respective costs for process and service, but no fees for copies and mileage shall be taxed." This rule, adopted by the late Justice Woods, recognizes the right of the marshal to charge for a service not actually performed by him, if another person without his consent has put the machinery of his court in motion by an action which he is entitled to perform, and for which a fee is provided; but it is also an assertion that the making of copies of process by the clerk is not such a service, and that the parties have the right to make copies of process for themselves.

But whether it was the marshal's duty to make these copies or not, the validity of the copies did not depend upon who made them. The marshal refused to make them, and on motion, and by the acquiescence of the district attorney, they were made by the clerk. If it became the clerk's duty for any reason to perform that service for the government, he was entitled to the fee provided for such work. See *U. S. v. Macdaniel*, 7 Pet. 14, cited and applied in *Hartson v. U. S.*, 21 Ct. Cl. 455, 456.

Item 19. Charge for making final record in certain criminal cases, being for the number of folios recharged against the clerk by the comptroller on the report of an examiner of the department of justice as in excess of the actual count, \$34.50.

FINDING OF FACTS.

The difference in the count arises thus: The examiner claims that the number of folios in any case is ascertained by taking the aggregate number of words in the entire record, and dividing by 100. The clerk claims that each separate and distinct order or other paper is counted separately, and the number of folios is ascertained by the rule prescribed by section 854, Rev. St., and the aggregate of the folios so found is the number of folios in the record.

CONCLUSIONS OF LAW.

"The term 'folio,' in this chapter, shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted, except when the whole statute, notice, or order contains less than fifty words." Section 854, Rev. St. Here is express authority in the statute for the counting of each separate and distinct order or other separate proceeding in the record separately. If an order contained less than 50 words, how could it be counted a folio, unless it be counted separately? If an order contained 425 words, how

can it be counted as only 4 folios, unless it be counted separately? And the counting of each separate and distinct order, notice, or statute separately implies that the other independent proceedings should be counted separately also. This would follow from the sequence of the proceedings on the record. And this has been expressly decided. *Cavender v. Cavender*, 10 Fed. Rep. 828. To illustrate: Suppose a record was made up of the following proceedings:

Indictment,	-	-	-	-	1280 words,	-	-	-	13 folios.
Order for <i>capias</i> ,	-	-	-	-	25	"	-	-	1 "
<i>Capias</i> ,	-	-	-	-	483	"	-	-	5 "
Order fixing bail,	-	-	-	-	30	"	-	-	1 "
Recognizance,	-	-	-	-	442	"	-	-	4 "
Plea,	-	-	-	-	18	"	-	-	1 "
Order for jury,	-	-	-	-	15	"	-	-	1 "
Jury panel,	-	-	-	-	36	"	-	-	1 "
Verdict,	-	-	-	-	10	"	-	-	1 "
Sentence,	-	-	-	-	110	"	-	-	1 "
					<hr/>				
					2449		29		

In such a case there would be 29 folios in the record, not 24. And this appears to be the general rule for measuring work done by printers, clerks, and stenographers. The reason of the rule is found in the fact that the chirographist can copy one uniform and continuous piece of manuscript with much greater facility, and in less time, than he can copy any number of separate and distinct papers aggregating the same number of words, but which he has to handle, select, arrange, and appropriately head, as he concludes one and passes to another.

Item 20. Charge for making final record in certain criminal cases, recharged against the clerk by the comptroller on the report of an examiner of the department of justice, \$42.30.

FINDING OF FACTS.

The recharge was because the records were not completed at the time of the rendition of the account. It is in proof that the records were completed very shortly afterwards, and evidence of that fact submitted to the comptroller, but no action was taken thereon by him.

CONCLUSIONS OF LAW.

The final record is not ordinarily made up, or at least not completed until after judgment or decree. Archb. Crim. Pl. 127; 1 Bish. Crim. Proc. § 905. The cost of the final record is part of the costs of the case, and it therefore frequently becomes necessary, by reason of the fact that the court sentences a defendant to pay costs, that the costs of the case, including the cost of the record yet to be made, should be taxed as soon as judgment is rendered. The taxation of the costs of the record in such cases stand upon the same principle of necessity as the taxation and allowance of the fees of a witness for his mileage home before he has actually returned. For similar reasons it is usual to tax the cost of the final record in civil cases at the time of the rendition of the judgment, the

plaintiff paying costs, being entitled to have the amount paid included in his *fi. fa.* against the defendant. Under the laws of Georgia the costs of a case are payable to the officers on the rendition of the judgment. Code, §§ 3684, 3685. It frequently happens that the costs must be collected at that time, or the opportunity will be lost. Under the federal statutes it is provided that "the fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of the officers of the states, respectively, for like services, are recovered." Section 857, Rev. St. Whether this section provides a different rule for costs collected from the government it is not necessary to consider. The proof is that the records were completed before the bringing of this suit, and therefore the clerk is certainly entitled to his judgment for the service, now. *Ravesies v. U. S.*, 21 Ct. Cl. 243.

FINAL CONCLUSIONS.

The lengthy bill of particulars of the plaintiff which we have just reviewed has entailed upon the court an unusual amount of investigation into the details of the technical duties performed by the clerks and the commissioners of the United States courts, and not infrequently analogies have been drawn from the laws and decisions relating to the kindred duties of the marshal. While the labor has been very great, the court will be gratified if, by the conclusions reached, it has aided to make plain the procedure which should be followed by the clerks of our courts of record in the performance of the many and important duties which devolve upon them. These require, for their faithful and efficient performance, much technical knowledge and legal training. These officials are most inadequately compensated at best; and besides, the emolument provided by law, small as it is, is often frittered away by careless and irresponsible *dicta*, which nevertheless close effectually the avenues upon which they might lawfully proceed for the collection of the wages of their labor. It is wise and beneficial that the circuit and district courts have been given jurisdiction in such cases. It is true in every instance of disputed account in every item of the bill of particulars that the plaintiff is fully and incontrovertibly sustained by the undisputed evidence; always by the obvious construction of the statute, and generally by an ample array of precedents from the decisions of the courts or of the comptrollers, and frequently from both. It is impossible to doubt the merit of his demands, and the court finds that the facts hereinbefore set forth are true, and that the plaintiff have judgment against the United States of America for the sum of \$780.30 and costs accrued since the time when the United States put in issue his right to recover.

WILLIAMS v. THE WHISPER.

(Circuit Court, E. D. Louisiana. January 19, 1889.)

COLLISION—BETWEEN STEAMER AND MOORED BARGES—MUTUAL FAULT.

A steamer neglected to blow its whistle in time to have opened a bridge which it was approaching in the night, and about which barges were customarily moored; and in backing, while the bridge was being opened, collided with a barge moored in the channel, 75 to 100 feet below. The barge carried no white light, as required by Rev. St. U. S. § 4233, rule 12. *Held*, that both vessels were in fault,—the steamer in not seasonably blowing its whistle, or in approaching the bridge at too great speed, and the barge in not carrying the proper light, the evidence not showing that the omission of the light did not contribute to the collision,—and that the damages should therefore be divided.

In Admiralty. On appeal from district court. Libel for damages.

Libel by Charles C. Williams against the steam-boat Whisper, for a collision between the steam-boat and libelant's barge. The district court found the steam-boat alone in fault, and claimant appealed.

W. S. Benedict, for appellant.

C. E. Whittemore, for appellee.

PARDEE, J. The libel in this case is brought for a collision in the Bayou La Fourche, just below the railroad crossing, between the libelant's barge and the steam-boat Whisper. The Bayou La Fourche is a navigable stream in Louisiana, and at the place where the alleged collision occurred varies in width between high and low water from 120 to 250 feet. The railroad bridge crossing the bayou is a draw-bridge, and extending from the one side of the draw down the channel for a distance of 75 to 100 feet, is a piling evidently made to protect the bridge, and to guide vessels through the draw. On the side of the said piling the libelant has been in the habit for several years of mooring more or less of his barges; and at the time of the collision referred to he had no less than six barges, loaded and unloaded, lying at this place. Some were behind the piling, but the barge which collided with the Whisper, according to the evidence, was lying moored to the bank about 75 to 100 feet beyond and below the said piling. The barge had no lights aboard, and although it is said that there was a watchman in charge of the barges, he was not on any particular barge, and there was no light on any of them, except upon one, which lay above and behind the piling. The steamboat Whisper, at about half-past 8 o'clock on the night of the 20th of March, 1888, coming up the bayou, did not blow its whistle to open the bridge at the usual distance below, and in time for the bridge-tender to get the bridge open on its arrival there. The consequence was that the steam-boat was compelled to stop and back while the bridge was being opened. In backing its stern swung around, and the wheel struck the top of libelant's barge.

This statement of the case, which is a fair one from the evidence, shows that both the steam-boat and the barge were in fault for the col-

lision. The steam-boat, because it did not blow the whistle in sufficient time to get the bridge open, or else it came at a too high rate of speed, when it was known that it had to pass a known obstruction like the draw-bridge, particularly when the pilot of the steam-boat knew, or should have known, that barges were lying in and about the channel below the bridge. The barge was in fault because it did not carry one or more good white lights, as provided by law. Rule 12 of section 4233 of the Revised Statutes provides that—

“Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft, navigating any bay, harbor, or river, by hand-power, horse-power, and sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fair-way of any bay, harbor, or river, shall carry one or more good white lights, which shall be placed in such a manner as shall be prescribed by the board of supervising inspectors of steam-vessels.”

It has been contended in this case that it was immaterial whether the barge had the light required by law or not, as the omission thereof did not contribute to the collision. On this point, which I have carefully considered, I am not prepared to say, under the evidence, that the omission of the light on the barge did not contribute to the collision. The master of the *Whisper* says that he was looking out for a collision with a barge ahead, and did not, while giving orders to the pilot, see the barge actually collided with. In cases like this, when a light required by law has been omitted, it is nearly always impossible to say what the other party would have done if the required warning had been given. An examination of the authorities will show that the adjudged cases are conflicting, but that the best rule is to hold a vessel in fault where it has not complied with the requirements of the law in relation to lights, and a collision has resulted. For a case in point, where I have heretofore examined the question, see *Haimark v. Harris*, 29 Fed. Rep. 926. By the collision the steam-boat was damaged in the sum of \$37.95. The barge was damaged, as found by the district judge, in the sum of \$75. By the admiralty rule, damages in case of collision where both are in fault, must be divided; and a decree to that effect will be entered in this case.

STATE OF IOWA v. CHICAGO, B. & Q. R. Co.

*(Circuit Court, S. D. Iowa, C. D. January 22, 1889.)***1. REMOVAL OF CAUSES—CRIMINAL ACTIONS—RAILROAD COMPANIES—PENALTY FOR ILLEGAL RATES.**

Act Iowa, April 5, 1888, § 27, entitled "An act to regulate railroad corporations," provides "that any such railroad corporation guilty of extortion * * * shall forfeit and pay the state of Iowa not less than \$1,000 nor more than \$5,000, * * * to be recovered in a civil action by ordinary proceedings instituted in the name of the state." *Held*, that an action for such penalty, brought by the state, is one of a criminal nature, and not removable under act Cong. March 3, 1887, § 2, which provides "that any suit of a civil nature, at law or in equity, may be removed."

2. SAME.

It is not the form, but the nature, of the action, that determines the question of removal.

On Motion to Remand.

A. J. Baker, Atty. Gen., and *C. E. Nourse*, for plaintiff.

Dexter, Herrick & Allen and *J. W. Blythe*, for defendant.

Before BREWER, SHIRAS, and LOVE, JJ.

BREWER, J. This is one of several actions brought in the state court against the defendant and other railroad companies, to recover penalties alleged to have been incurred under section 27 of an act of the legislature of Iowa, entitled "An act to regulate railroad corporations," etc., approved April 5, 1888. The defendants filed answers, and at the same time filed petitions for removal to the circuit court of the United States, on the ground that the cases were cases arising under the constitution of the United States. Transcripts of the records were filed in this court in apt time, and a motion has been made by the plaintiff to remand the cases to the state court. In support of this motion it is contended: (1) That the cases are not "suits arising under the constitution of the United States," within the meaning of the act of congress; (2) that they are not suits "of a civil nature;" (3) that they are not cases of which the circuit court is "given original jurisdiction" by section 1 of the act, and are not, therefore, removable. Noticing the second question, it is provided by section 2 of the removal act of March 3, 1887, "that any suit of a civil nature, at law or in equity, etc., may be removed;" and it is insisted that this is not a suit of a civil nature. By the act of April 5th, *supra*, certain acts are declared to be extortion. Section 26 declares that "any such railroad corporation guilty of extortion * * * shall, upon conviction thereof, be fined in any sum not less than one thousand dollars nor more than five thousand dollars, * * * such fine to be imposed in a criminal prosecution by indictment; or shall be subject to the liability prescribed in the next succeeding section, to be recovered as therein provided." This next succeeding section provides:

"Sec. 27. Any such railroad corporation guilty of extortion * * * shall forfeit and pay the state of Iowa not less than one thousand dollars nor more

than five thousand dollars, * * * to be recovered in a civil action by ordinary proceedings instituted in the name of the state of Iowa."

It will be observed that section 27 defines the action as a civil action, and in fact the one before us is in the ordinary form of an action of debt. But while the form is civil, is it of a civil or criminal nature? For obviously not the form, but the nature, of the action determines the question. The right to remove is given by act of congress, which prescribed both the limits and the conditions, and it cannot be that, after congress has thus legislated, the right of removal can be defeated by any legislation of the state changing the mere form in which litigation is to be carried on; otherwise the will of congress could be defeated by any state. Would it for a moment be tolerated that litigation as to the collection of a note could be held in the state and withheld from the federal court by any act of the state legislature providing that such collection should be by indictment, instead of the usual form of a civil action? *Railroad Co. v. Jones*, 29 Fed. Rep. 193. The question, therefore, is, what is the nature of the action provided for by section 27? The distinction between matters of a civil and those of a criminal nature is clear, and of frequent mention in the books. Blackstone says, (volume 4, p. 5):

"The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of civil rights which belong to individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of public rights and duties due to the whole community, considered as a community, in its social aggregate capacity."

Rapalje and Lawrence, at page 21 of their Law Dictionary, say:

"An action is 'civil' when it lies to enforce a private right, or redress a private wrong. It is 'criminal' when instituted on behalf of the sovereign or commonwealth in order to vindicate the law by the punishment of a public offense."

Burrell, in his Law Dictionary, 294, says:

"A civil action is an action brought to recover some civil right, or to obtain redress for some wrong not being a crime or misdemeanor."

See 3 Bl. Comm. 2, 116. He also defines a civil right as—

"The right of a citizen; the right of an individual as a citizen; a right due from one citizen to another, the privation of which is a civil injury, for which redress may be sought by a civil action." Burr. Law Dict. 296.

Bouvier says a civil action is—

"A personal action, which is instituted to compel payment, or the doing of something which is purely civil." "At common law: An action which has for its object the recovery of private or civil rights or compensation for their infraction." Bouv. Law Dict. 317.

"Penal statutes or laws," say Rapalje and Lawrence, "are of three kinds: *Pœna pecuniaria*, *pœna corporalis*, *pœna exilii*." See, also, *Hussey v. More*, Cro. Jac. 415. The same authorities define "penal statutes" to be "those which impose penalties or punishment for offenses committed." Rap. & L. Law Dict. 945. And, further, "penalty" is a sum of money

payable as an equivalent or punishment for an injury. *Id.* Burrell defines "penalty" as—

"A punishment imposed by statute as the consequence of the commission of a certain specific offense; a pecuniary punishment; a sum of money imposed by statute to be paid as a punishment for the commission of a certain act." *Burr. Law Dict.* 286.

He defines a penal action as—

"An action upon a penal statute; an action for the recovery of a penalty given by statute."

In distinguishing between cases which are civil and those which are criminal in their nature, the supreme court of Maine, in *Beals v. Thurlow*, 63 Me. 9, says:

"The plaintiff does not sue to compel payment of any debt due to himself, or for the redress of any wrong done to himself, but simply to enforce a pecuniary penalty against a wrong-doer."

That a suit may be criminal in form and yet civil in its nature, or *vice versa*, is fully discussed by Mr. Justice HARLAN in *State v. Railroad Co.*, 33 Fed. Rep. 726-729. The action in that case was an information in the nature of *quo warranto*, instituted by the attorney general of Illinois, demanding of the Illinois Central Railroad by what warrant it claimed to have, use, and enjoy the powers, liberties, privileges, and franchises exercised by it in and over certain submerged portions of the lake front in the city of Chicago, and of constructing, operating, using, etc., docks, wharves, and piers in and upon said submerged lands. This action was commenced in the criminal court of Cook county, and was in form a criminal proceeding. In considering this, Mr. Justice HARLAN cites approvingly and quotes from *People v. Shaw*, 13 Ill. 581, and *Ensminger v. People*, 47 Ill. 387. *People v. Shaw* was an information in nature of *quo warranto* against certain persons for usurping the office of bridge commissioners, and the question arose upon the claim of right to a change of venue as provided for civil cases. CATON, J., speaking for the supreme court of Illinois, uses this language, as quoted by Mr. Justice HARLAN:

"In form this is a criminal proceeding, but it is only so in form. In substance it is for the protection of the private and individual rights of the relator and others in the precinct similarly situated. * * * It is the nature of the rights to be asserted and maintained to which we should look, rather than the form in which the party may be obliged to proceed to assert those rights, in giving a just interpretation to the statute."

The learned justice further cites and quotes from *Ensminger v. People*, *supra*; *People v. Holtz*, 92 Ill. 428; and from *Ames v. Kansas*, 111 U. S. 460, 4 Sup. Ct. Rep. 437,—to the effect that the information in *quo warranto* has long since ceased to be criminal in its nature, and concludes by saying:

"The decision in *Ames v. Kansas*, was distinctly to the effect that the nature of the right asserted and at issue * * * furnished the test whether a proceeding was of a civil or criminal nature."

That a case may partake something of the nature of both is as might be expected, and naturally it is not always clear which element predom-

inates. Thus, in a civil action for damages for a tort, punitive damages are sometimes awarded. There is therefore present the double element of a redress of a private injury and the punishment of a public wrong; but, inasmuch as the full recovery goes to the injured party, as he controls the whole proceeding, and the form of the action is civil, it may well be inferred that the civil element predominates, and the action be considered one of a civil nature. So there are *qui tam* actions brought to recover a penalty in which part of the recovery goes to the informer. In some of these actions the informer has suffered a private injury, which is compensated by the recovery, and sometimes his interest is only that of an informer. And there are actions in which the recovery is by direction of the legislature increased above the actual compensation, and the increase is by way of penalty. Obviously, in all these there are elements of a civil as well as a criminal nature. The case of *Herriman v. Railroad Co.*, 57 Iowa, 187, 9 N. W. Rep. 378, and 10 N. W. Rep. 340, is a good illustration. In that case the plaintiff had been overcharged, and brought his action against the company, under the statute, for five times the overcharge. The court held that this was a penal action, and barred by the statute of limitations applicable thereto. Commenting on the statute it uses this language:

"This, to our minds, shows very clearly that the essential object of the provisions was not to afford the aggrieved individual an adequate remedy, but to protect the public by deterring railroads from committing a misdemeanor, which a violation of the act was declared to be. The provision, then, is essentially criminal, rather than remedial. This is sufficient to enable us to determine to what the statute of limitation applies."

And it also contrasts this case with an earlier case under a different statute and a different penalty, in which the judgment of the court had been that the action was of a civil and remedial, rather than a criminal, nature. Another case which well illustrates this is the recent case of *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. Rep. 524. In this an information has been filed by the district attorney for the seizure of certain property under the revenue law. The statute provided for punishment by fine and imprisonment, and also for the forfeiture of the goods. The latter was all that was sought in this action, which in form was confessedly civil. Advantage was sought to be taken of a section of the federal statutes compelling the defendant in effect to furnish testimony. The court held that the proceeding could not be sustained, on the ground that the action was one of a criminal nature, and that under the fifth amendment no person in a criminal case could be compelled to be a witness against himself. Speaking for the court, Mr. Justice BRADLEY used this language:

"We are clearly of opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case the ground of forfeiture, as declared in the twelfth section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchan

dise, which are made criminal by the statute; and it is declared that the offender shall be fined not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned not exceeding two years, or both; and in addition to such fine, such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment has been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants, (that is, civil in form,) can he, by this device, take from the proceeding its criminal aspect, and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey v. U. S.*, 116 U. S. 436, 6 Sup. Ct. Rep. 437, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

And in a separate opinion MILLER, J., says:

"I am of opinion that this is a criminal case within the meaning of the fifth amendment to the constitution of the United States."

These cases and considerations disclose the difference between matters of a civil and of a criminal nature, and also affirm the proposition that not the form, but the nature, of the action, determines the question of removal. From them we pass to inquire, what is the nature of this action? The party plaintiff is the state. It controls the litigation. It receives all the proceeds. The action proceeds from no contractual obligation of the state. It is not to enforce any rights of it as an individual. It is purely governmental in its nature. Its aim is to punish for a violation of the criminal laws of the state. The act defines "extortion," and declares it to be a "misdemeanor." Both sections 26 and 27 provide simply for punishment. The form of the action prescribed in the two sections is different, but the purpose of each is the same,—to compel obedience to the laws of the state by punishment for a violation thereof. There is no individual right to be asserted; no private injury to be compensated or redressed. The proceeding under each section is by the state in its governmental capacity to compel obedience to its laws. The language in each section is, "the party guilty;" language apt for criminal purposes, and not for civil. The state, under section 27, sue not to recover for goods sold, for work done, on account of contract broken, or any private obligation of the defendant to the state, but simply and solely to impose punishment for violation of law. Can there be a doubt, under the distinctions heretofore adverted to, that this is an action of a criminal, rather than of a civil, nature? If it be said that many courts have held, and that the statutes of Iowa provide, that a civil action may be brought to

recover a penalty or forfeiture, it must also be observed that thereby only the form of the action is determined, but not its purpose or nature. I shall not attempt to notice the multitude of authorities which are cited, simply observing that many of them consider only the question of the form of the action, and not its nature, while those that do discuss the nature of the action must be considered as overruled by the latter enunciations of the supreme court. If congress had intended that the mere form of the action determined the right of removal, apt language would have been, "actions civil in form," or perhaps the more general expression, "civil actions;" but when the language is, "of a civil nature," it discloses an intent, as affirmed by the cases of *Ames v. Kansas*, 111 U. S. 460, 4 Sup. Ct. Rep. 437, and *State v. Railroad Co.*, 33 Fed. Rep. 726, that the court should always look beyond the matter of form to the purpose, object, nature of the action. Nor is it strange that this language was selected. While it may be within the power of congress to transfer to the federal court all actions to enforce the penal laws of the state in which questions of a federal nature may arise, yet a due regard for the dignity of the state, and a proper harmony between the state and federal governments, doubtless prompted congress to leave to the state courts the primary decision of all such actions, preferring that if a party thought any such rights were denied in the state courts he should seek relief through the appellate jurisdiction of the supreme court of the United States. That such is a fitting mode of procedure may be conceded, and that such was the intent of congress is indicated by the language that is used.

It is said that in the cases of *Mugler v. State*, and *Ziebold v. State*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, the supreme court impliedly recognized the right to remove a bill in equity filed to enjoin the operation of a brewery, which, though in form civil in its nature, was clearly an action to enforce the penal laws of the state. In reply to this it may be said that in *Schmidt v. Cobb*, 119 U. S. 286, 7 Sup. Ct. Rep. 1373, an order remanding a similar case was affirmed in the supreme court by a divided vote; that the *Cases of Mugler* and *Ziebold* were considered and decided together; that the *Mugler Case* was on appeal from the supreme court of Kansas; and that in the *Ziebold Case* counsel preferred to discuss and have determined the absolute rights of the parties, rather than any question of form or removal. So that the question of removal seems not to have been considered by the court.

And now it becomes necessary to notice the last utterance of the supreme court, in the case of *Wisconsin v. Insurance Co.*, 127 U. S. 265, 8 Sup. Ct. Rep. 1370. That case was this: The state of Wisconsin brought an action in one of her own courts against the defendant, to recover a penalty prescribed by the statutes for a transaction of insurance business in the state without a license. The action was a civil action in form, to-wit, an action of debt. The statutes provided that one-half the penalty should go to the state, and one-half to the insurance department, to cover expenses, etc. Judgment was recovered in that action for the amount of the penalty. The defendant was a citizen of the state of Lou-

isiana. Thereupon the state of Wisconsin brought an original action in the supreme court of the United States against the defendant, a citizen of another state, on that judgment. It will be seen that that action is somewhat removed from this in that, not being an original action to recover a penalty, it was to recover on a judgment in a civil action for a penalty. By the constitution of the United States the supreme court has original jurisdiction of controversies between a state and a citizen of another state. Yet notwithstanding this general jurisdiction of the supreme court, it held that it had no jurisdiction of this action. Several lines of argument were followed by the court in reaching its conclusion. It held that that grant of jurisdiction was of judicial power, and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state of such a nature that it could not, on the settled principle of public and international law, to be entertained by the judiciary of another state at all; that the enforcement of the criminal laws of a state was by such principles limited exclusively to the courts of the state whose laws were charged to have been violated; and that the form of the action prescribed was immaterial,—courts looking ever to the substance, nature, and purpose of the action; and that in the case at bar, although the form of the action was civil, being an action of debt, to recover on a judgment in an action of debt for a penalty, it was in substance of a criminal nature, and an effort upon the part of the state to enforce its criminal laws. The language of the court is as follows:

"The statute of Wisconsin under which the state recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another state doing business in the state of Wisconsin without having deposited with the proper officer of the state a full statement of its property and business during the previous year. Rev. St. Wis. § 1920. The cause of action was not any private injury, but solely the offense committed against the state by violation of her law. The prosecution was in the name of the state, and the whole penalty, when recovered, would accrue to the state, and be paid, one-half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. St. Wis. 1885, c. 395. The real nature of the case is not affected by the forms provided by the law of the state for the punishment of the offense. It is immaterial whether by the law of Wisconsin the prosecution must be by indictment or by action; or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias*, or by a new suit. In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end,—the compelling the offender to pay a pecuniary fine by way of punishment for the offense."

Though this case is not precisely in point, yet the thought underlying it, the principle which controlled the decision, is applicable here; and it must be adjudged that in the opinion of the supreme court of the United States—the ultimate authority on questions of this kind—an action to enforce a penalty, whatever may be its form, is one of a criminal nature. As such, within the removal act, it is not a removable case. My conclusion therefore is that this action is not one that can be removed to the federal courts, and the motion to remand must be sustained.

I have given this subject long and patient examination in view of the vast interests and the importance of the question, and, against my first impressions, I have been forced to the conclusion I have thus announced. I appreciate fully what counsel urge of the difficulties which, as they say, such a construction will place in the way of their reliance upon the protection of the federal constitution; but, notwithstanding these difficulties, back of all the statutes, and all the litigation in the state, stands that high tribunal, the federal supreme court, which will ultimately determine and fully protect all rights guarantied to the defendant by the federal constitution. The motion to remand will be sustained. The same order will be entered in all the cases of a similar nature now pending in this court.

Judge SHIRAS concurs in the foregoing opinion. Judge LOVE gives no opinion.

HUSKINS v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, N. D. Tennessee, E. D. January 21, 1889.)

1. REMOVAL OF CAUSES—CITIZENSHIP—TIME OF APPLICATION.

Under the removal act of March 3, 1887, authorizing the defendant to file his application on the ground of diverse citizenship in the state court at any time before he is required to plead or answer the complaint, where, on the last day of the term of the state court, and after the time to answer or plead, the complaint is amended, demanding \$10,000, instead of \$2,000, a petition for removal to the federal court before the next term of the state court is filed in time.¹

2. SAME—LOCAL PREJUDICE—APPLICATION.

Under the clause relating to removal for "local prejudice or influence," the application must be made to the federal court, and may be made at any time before final hearing in the state court.¹

3. SAME—EXISTENCE OF PREJUDICE.

The existence of "local prejudice or influence" is not a jurisdictional fact, so as to entitle the adverse party to put it in issue for formal trial, and it is sufficient if it is made to appear to the federal court by petition and affidavit.¹

On Motion to Remand.

Action by W. G. Huskins against the Cincinnati, New Orleans & Texas Pacific Railway Company for personal injuries.

Washburn & Templeton, for plaintiff.

Lewis Shepherd, for defendant.

KEY, J. The plaintiff began an action in the state court for personal injuries against the defendant. The cause was removed to this court,

¹ Concerning the proper time for filing an application for removal of a cause from a state to a federal court, see *Kennedy v. Ehlen*, (W. Va.) 8 S. E. Rep. 398, and cases cited; *Wedekind v. Southern Pac. Co.*, 86 Fed. Rep. 279.

² As to how prejudice or local influence warranting removal of a cause from a state to a federal court must be made to appear, see *Malone v. Railroad Co.*, 35 Fed. Rep. 625, and note; *Southworth v. Reid*, 36 Fed. Rep. 451.

and, while the judge was charging the jury upon its trial, plaintiff's counsel were permitted to take a nonsuit. Soon thereafter plaintiff instituted another suit against the defendant in the state court for the same cause of action. In this last suit he laid his damages at \$2,000. The cause was returnable to the April term, 1888, at which time, under the laws of the state, the pleadings should be made up and issue joined. The first trial term of the cause was August, 1888. At that term the defendant had permission to file an additional plea. After this was done, and on the last day of the term, plaintiff, by permission of the court, increased his claim for damages to \$10,000, and continued the cause to the next term. Before the next term of the court the defendant filed its petition for the removal of the cause to this court, and presented it for action to the state court, at its next session, December, 1888. This petition asked for removal upon two grounds: (1) The diverse citizenship of the parties; (2) upon the existence of local prejudice and influence. The state court ordered the removal upon the first ground, and has made no reference to the second ground. The defendant, upon the first day of the present term of this court, presented its petition, and along with it an affidavit in its support, both averring in positive terms that "from prejudice or local influence defendant will not be able to obtain justice in the state court, or in any other state court to which the defendant might remove the cause under the laws of the state, because of prejudice or local influence." Defendant asks the court to remove the cause from the state court to this court, under the provisions of the fourth clause, section 2, of the act of March 3, 1887. Plaintiff has filed an answer to this petition, denying the truth of its allegations and averments as to local prejudice, and has accompanied this answer with a considerable number of affidavits of intelligent and respectable persons strongly sustaining this answer. Plaintiff moves to remand the suit to the state court,—*First*, because the application for removal upon the ground of diverse citizenship came too late; and, *second*, because it is shown that the local prejudice or influence on account of which a removal is asked does not exist.

There is no question but that the application for removal came after the term of the court at which by the state law and rule of the court the defendant was required to answer or plead to the declaration or complaint of the plaintiff. Up to the close of the term at which the cause could first have been tried, the defendant had no right or power to remove the cause for diverse citizenship, because the plaintiff did not claim more than \$2,000. The question is, can a plaintiff prevent, under the law, the jurisdiction of the circuit court of the United States by commencing his suit, claiming \$2,000 or less, joining issue at the return term with his adversary, and at the trial term, or some later period, amend his writ by increasing his claim to a sum within the jurisdiction of the federal court? The plaintiff is a citizen of this state; the defendant, of Ohio. The language of the act of 1887 is clear in regard to the time when the removal must be made for this character of citizenship. "He may make and file a petition in such suit in such state court at the time or any time before the defendant is required by the laws of the state or the rule of the state

court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." There is no room for construction here. All is clear and unambiguous. But what was the suit in this case? The damages—the money plaintiff seeks to recover—is the *gravamen*, the heart, the soul of his suit. The suit he began was a suit for \$2,000, and such a suit it remained until the closing hour of the first term at which it could have been tried when the plaintiff went into court and converted his suit for \$2,000 into a suit for \$10,000. The \$2,000 suit disappeared. It merged into and was swallowed up by a suit for \$10,000. The life of the new suit began at the moment the first suit expired. Plaintiff's complaint was no longer for \$2,000, but it became a complaint for five times that sum. Under the laws of Tennessee process issued upon a suit instituted must be executed at least five days before the time for the meeting of the court, so as to be issuable at that term. If such process be executed at a later day it is not issuable until the next succeeding term. The suit for \$10,000 did not begin until the last day of the August term, 1888, of the court, and the suit, according to the letter and spirit of the act of 1887, would not be returnable at the shortest before the next term of the court, and defendant's petition was filed before that time. In general phrase, and in most respects, the amendment increasing the damages did not create a new suit, but so far as the jurisdiction of this court is concerned it was new, and a liberal interpretation will be allowed to prevent the flagrant and intentional defeat of its jurisdiction. "If the defendant have a right to the removal, he cannot be deprived of it by the allowance by the state court of an amendment reducing the sum claimed after the right of removal is complete." Speer, Rem. Causes, 81. *Kanouse v. Martin*, 15 How. 198. This being true, is not the converse of the proposition true; that is, that a person not entitled to a removal who becomes entitled to it, so far as the jurisdictional amount is concerned, by reason of an amendment allowed by the state court after the time had elapsed within which his removal of the suit might have been made, shall not be deprived of his right to remove the suit? The reasons why the removal of the cause should not be defeated in one case apply with equal cogency to the other. Had the defendant filed its petition and bond for removal the moment after the amendment was made increasing the damages claimed, his attitude in the case would have been in nowise changed from that which it occupies.

But suppose the position taken in regard to the removal ordered by the state court be wrong, how stands the case with regard to the application made to this court for removal on account of local prejudice or influence? In *Lookout Mountain Co. v. Houston*, 32 Fed. Rep. 711, in which there was an application for removal because of local prejudice or influence, it was held that an application in such case must be filed at the return-term of the cause, or before. If that be correct, the application in this suit would be in time, if the positions assumed upon the first ground of removal be tenable. The weight of opinion, however, so far as cases have been adjudged, is that such removal may be made at any time before the final hearing of the case. Judge DEADY, an excellent

authority, so holds in *Fisk v. Henarie*, 32 Fed. Rep. 417. And so does that eminent jurist, Judge JACKSON, of this circuit, in *Whelan v. Railroad Co.*, 35 Fed. Rep. 849-866. A very able, clear, and well-considered opinion has been rendered by him in this case; and the case decided by Judge JACKSON is identical with the case in hand in most of the points of contention raised for determination. The opinion of the circuit judge will be accepted as the law of this case, not only because of the authority of the decision as a judicial exposition, but also for the sake of the harmony and agreement that should prevail, if practicable, in the administration of the law by different judges presiding over the same court.

In passing, it may be observed that the words "local prejudice or influence" are used. They are connected disjunctively. If there be local prejudice, the cause may be removed, or if no local prejudice exists, and there be local influence so powerful and operative as to prevent the defendant from obtaining justice, he may remove. If there be prejudice against the defendant, or if the influence and power of the plaintiff or any other local influence dominate the public mind at the place where the suit is instituted, so that he cannot have justice, the cause may be removed.

The fourth clause of section 2, act of March 3, 1887, is wide-reaching in its changes of the law previously existing. It enlarges its scope in almost every direction but one. It does not allow a plaintiff to remove his suit. It embraces all controversies between citizens of different states without regard to amount. It permits or authorizes removal, though some of the defendants may be residents, or citizens rather, of the state in which the plaintiff resides. Any defendant, being a non-resident, may remove the suit. "It extends to all controversies, without regard to amount; to all suits, whether they can be estimated in dollars and cents." Speer, Rem. Causes, 62; *Fales v. Railroad*, 32 Fed. Rep. 673; *Whelan v. Railroad Co.*, *supra*. The act under consideration provides for the removal of the cause by this court, instead of by the state court. It must be made to appear to this court that the cause is removable, and it removes it. How it shall be made to appear that it is removable is, to some extent, an unsettled question. In *Short v. Railway*, 33 Fed. Rep. 114, Judge BREWER held that a petition and affidavit such as have been filed by the defendant in this case are not such steps as will authorize a removal; that it must appear to the court in some method that may enable it to determine the fact as to whether there is prejudice. If this be a correct decision of the law, this case should not be removed. The decision of Judge JACKSON in the *Whelan Case*, *supra*, however, makes a different determination, and his conclusions have been reached after a wide range of examination, and after deliberate and careful consideration, and it has already been announced that this opinion will be followed in this case. Judge JACKSON says:

"In conferring upon the circuit court of the United States the authority to act upon the application for removal of suits from state courts, congress certainly never intended to make the question as to the existence or non-existence of prejudice or local influence, which would prevent a non-resident citi-

zen defendant from obtaining justice in the local courts, a jurisdictional fact, such as would entitle the side opposing the removal to dispute its truth and put the matter in issue for formal trial." 35 Fed. Rep. 862.

In the same connection it is held that a petition and affidavit such as have been made in this case made it appear that the cause should be removed. This decision on this point concurs with that of Judge DEADY in *Fisk v. Henarie*, 32 Fed. Rep. 417-421, and is sustained in *Speer*, Rem. Causes, 63. Judge SPEER in his work on Removals under the act of March 3, 1887, page 62, says:

"It is quite possible that in this far reaching statute congress intended to correct the mischief pointed out in *Kurtz v. Moffitt*, 115 U. S. 498, 6 Sup. Ct. Rep. 148. There it was held that before the suit could be removed it must have the money value fixed by the statute. Now, if local prejudice is a ground of removal from the local court in any controversy between citizens of different states, there is no reason why it should not have the same effect in all controversies. Undeniably there is often much local excitement and prejudice on the trial of proceedings for divorce, *habeas corpus*, or other suits where the matter in dispute cannot be estimated and ascertained in money. The federal courts are not courts where non-residents have an undue advantage, and it is no injustice to residents to require them to litigate therein their controversies with citizens of other states."

If this suit has not already been removed to this court by the order made by the state court, it should be removed under the application to this court. The order for removal is made, and plaintiff's motion to remand is overruled.

WINTERS v. ARMSTRONG. ARMSTRONG v. STANAGE. SAME v. WOOD.

(Circuit Court, S. D. Ohio, W. D. January 28, 1889.)

1. BANKS—NATIONAL BANKS—INCREASE IN CAPITAL—LIABILITY OF SUBSCRIBER.

National banks have no authority to increase their capital stock except as provided by Rev. St. U. S. § 5142, and act Cong. May 6, 1886; and where an increase is attempted to be made without obtaining the consent of two-thirds of the stock, the payment in full of the amount of such increase, and the certificate and approval of the comptroller of the currency, as required by those statutes, the proceedings are invalid, and preliminary subscriptions to such increase cannot be enforced.

2. SAME.

Such a subscription is impliedly conditioned on the subscription of the whole amount of the proposed increase, and on the compliance by the corporation with all the requirements of the statute necessary to make the increase stock valid. And in case of non-compliance with such requirements there is a failure of consideration.

3. SAME—ESTOPPEL.

In an action by the receiver of a national bank to enforce subscriptions to a proposed increase of its capital stock, an allegation that the bank, subsequent to defendants' subscriptions, and with their knowledge, represented to the public by means of circulars, letter-heads, etc., that its capital stock had been so increased, and that defendants allowed their names to remain "upon the list of those subscribing for and entitled to such new or increase of stock," but without alleging that the public gave credit to the bank on the faith that defendants were part owners of such increase of stock, or that they

allowed themselves to be held out as actual stockholders, does not show that they are estopped to plead the failure of the bank to comply with the statutory requirements in perfecting such increase.

4. SAME—INSOLVENCY—RECEIVER.

The receiver stands in the shoes of the bank, and can assert no rights against the subscribers which the bank could not have asserted.

5. SAME—MONEY PAID ON SUBSCRIPTION.

A subscriber who has made payments on his subscription to the proposed increase, believing that the statutory requirements would be complied with, is entitled to have the amount thereof allowed as a claim against the assets of the bank in the receiver's hands.

In Equity. On demurrer and exceptions.

In the first of these three actions J. H. Winters is plaintiff, and David Armstrong, receiver of the Fidelity National Bank, is defendant, and in the two others the receiver is plaintiff, and W. H. Stanage and William Wood, respectively, are defendants.

E. W. Kittredge and *W. B. Burnet*, for the receiver.

Paxton & Warrington, for J. H. Winters and W. H. Stanage.

Jordan & Jordan, for William Woods.

JACKSON, J. These three cases, standing on exceptions to the answer of the receiver in the first, and demurrers to his replies in the second and third of the above-entitled causes, present substantially the same questions, and, having been heard together, will be considered and determined together. The material facts disclosed in the pleadings, and on which the legal questions arise, are the following, viz.: The Fidelity National Bank of Cincinnati was organized in February, 1886, with a capital stock of \$1,000,000, which "its articles of association" provided might be increased, according to the provisions of section 5142, Rev. St., to any sum not exceeding \$3,000,000. Said section 5142, in force when the bank was organized, provides that "any association formed under this title may, by its articles of association, provide for an increase of its capital, from time to time, as may be deemed expedient, subject to the limitations of this title, but the maximum of such increase to be provided in the articles of association shall be determined by the comptroller of the currency, and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the comptroller of the currency, and his certificate obtained, specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association." By an act of congress approved May 6, 1886, it is provided that "any national banking association may, with the approval of the comptroller of the currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock in accordance with existing laws to any sum approved by said comptroller, and no increase of the capital stock of any national banking association, either within or beyond the limit fixed in its original article of association, shall be made except in the manner herein provided." After this act of May, 1886, went into operation, the directors of the Fidelity National Bank, in March, 1887, passed a resolu-

tion that the capital stock of said bank be increased \$1,000,000; that said increase of stock be furnished to the shareholders in like proportion to the amount of their holdings of original stock, at the rate of \$135 per share of \$100; and that shareholders should be notified of the board's action, so as to give them the opportunity and prior right to subscribe for such increased stock. Thereafter, in April and May, 1887, the plaintiff, Winters, and the defendants, Stanage and Woods, as holders of original stock of the bank, subscribed for such proposed increase of its capital stock, in proportion to their respective holdings of the old stock. Winters paid in his subscription in two cash installments made in April and May, 1887, taking from the bank a receipt or receipts therefor, specifying the number of shares of the new stock which were to be issued to him by the bank when the increase was made. Woods and Stanage each executed notes to the bank for the amounts of their respective subscriptions to the proposed increase of stock payable at four months and ninety days from April 7, 1887, but neither paid in any money on their subscriptions or their notes. No certificates of stock on the proposed increase were issued to Woods or Winters, but one was issued to Stanage; but it does not appear that either of them ever voted such stock, or accepted any dividends thereunder. The bank was in fact insolvent when this increase of the stock was proposed by the directors, and the subscriptions were made in the belief that the bank was solvent, and that the new stock was or would be worth what the subscribers agreed to pay for it.

It does not appear from the answers and replies of the receiver, which are excepted and demurred to, that this proposed increase of the capital stock of the bank was sanctioned or authorized by the vote or approval of shareholders owning two-thirds of the stock of the association; and it is conceded that no steps were taken by the bank to perfect the proposed increase of stock in conformity with the provisions of the national banking laws. No notice of the proposed increase of its capital stock was given, either by the association, its directors, or stockholders, to the comptroller of the currency; nor was such proposed increase of stock ever assented to or approved by said comptroller; nor was any certificate ever issued by or obtained from the comptroller, specifying the amount of such increase of the bank's capital stock, or that it had been duly paid in as part of the bank's capital. It is conceded in the pleadings of the receiver, and by his counsel in argument, that no valid increase of the capital stock of the bank was ever in fact made in conformity with the requirements of the national banking laws. This is manifestly so under the admitted facts. Corporations have no power to increase or diminish their stock unless expressly authorized so to do. It is also well settled that the directors of a corporation cannot, in the absence of power expressly conferred, make any valid increase of its capital stock. In *Railway Co. v. Allerton*, 18 Wall. 233, the charter of the corporation provided that its capital stock should be a designated sum, "and may be increased from time to time, at the pleasure of the said corporation." It was held that the directors alone could make no valid increase of the stock of the

corporation. Directors of national banks have no authority under the law to increase the capital stock of such associations; nor can the assent of individual shareholders or subscribers for such new stock to their action in attempting so to do confer the requisite authority, or make such increased stock valid, under the provisions of section 5142, Rev. St., or of the act of May, 1886, above quoted. It is not material to determine how far, or to what extent, the latter act either modifies or repeals the provisions of section 5142, Rev. St., for under neither can it be properly claimed that the proposed or attempted increase of the capital stock of the Fidelity National Bank was made in a way to give it any legal validity, or to confer upon the subscribers therefor any rights as actual stockholders of the association. In *Delano v. Butler*, 118 U. S. 649, 7 Sup. Ct. Rep. 44, Mr. Justice MATTHEWS, speaking for the court, says that, under section 5142 of the Revised Statutes, three things must concur to constitute a valid increase of the capital stock of a national banking association, viz.:

"(1) That the association, in the mode pointed out in its articles, and not in excess of the maximum provided for by them, shall assent to an increased amount; (2) that the whole amount of the proposed increase shall be paid in as part of the capital of such association; and (3) that the comptroller of the currency, by his certificate specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment."

These several requirements were not complied with by the Fidelity National Bank. There was no formal or proper assent of the association to the proposed increase. The whole amount of such increase was not paid in as a part of the capital of the association. No notice of the proposed increase was given to the comptroller of the currency. The comptroller never approved such increase, and never issued any certificate specifying the amount of such increase, with his approval thereof, nor certified to the fact of its payment. It is equally clear that there was no compliance with the provisions of the act of May, 1886. Under that act an increase of the capital stock of any national banking association, either within or beyond the limit fixed in its original articles of association, can only be legally and validly made with the approval of the comptroller of the currency, and with the assent or by the vote of shareholders owning two-thirds of the stock of such association; and such increase must also be made "in accordance with existing laws to any sum approved by said comptroller;" and, except in the manner thus provided and prescribed, the act declares that no increase "shall be made." As repeals by implication are not favored, and as the act of 1886 is not in conflict or inconsistent with the second and third requirements under section 5142, Rev. St., "that the whole amount of the proposed increase shall be paid in, and that the comptroller, by his certificate specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment," it follows, as we think, that such payment and certification by the comptroller are still required under the act of 1886, in order to make the increase of capital stock "in accordance with existing laws." These acts of congress constitute the charter

powers of national banking associations in respect to an increase of their capital stock. The act of 1886 makes the matter or subject of an increase in their capital stock conform to that of a reduction of such capital stock, as provided for by section 5143, Rev. St. The general government, under whose laws national banking associations are created, and their powers defined, has, in and by these provisions of the law, reserved to itself to say, through its designated agent or officer intrusted with the supervision of such matters, when and to what extent such associations shall be allowed to increase or diminish their capital stock, and thus effect radical and fundamental changes in their organization. In and of themselves national banking associations are invested with no power or authority to increase or diminish their capital stock. No such increase or diminution of their capital stock can be legally made by them without first obtaining the direct and positive sanction of the government, expressed and certified by the approval of its comptroller of the currency. Every application for such an increase or diminution of their capital stock is equivalent to a request for an amendment of their charter powers in that respect; and all attempts upon their part to effect an increase of their stock without the sanction or approval of the sovereign, signified in the mode and manner provided by law, are destitute of authority, and wholly wanting in legal validity.

New subscribers to the capital stock of national banks, whether at their original organization or subsequently, upon a contemplated increase of their capital stock, clearly enter into an agreement or undertaking based upon the charter powers of such associations; and the rights and obligations of such subscribers rest and must be determined upon the conditions and law of the charter, as embodied in the banking legislation of congress. Whatever conditions are imposed by the law upon such associations as a prerequisite or condition precedent to the acquisition of the power and authority necessary to the issuance or creation of valid stock must be performed before the subscription contract can be enforced either on behalf of the association or of those claiming through or under it. The general principle is well settled that subscriptions to the capital stock of corporations are made upon the implied condition that valid stock, such as will confer upon the subscriber all the rights and privileges of a stockholder, is to be issued. The subscription promise rests upon this condition and understanding on the part of the corporation, and until the corporation is in position to comply with this condition there is no enforceable liability against the subscribers for its stock. In the present case, so far as disclosed by the pleadings, the subscriptions made by Winters, Stanage, and Woods to the proposed increase of the capital stock of Fidelity National Bank conferred no right, and imposed no duties upon them or either of them, except to become stockholders to the extent of their respective subscriptions, when the increase became valid, and imposed no obligation upon the bank except to admit them as stockholders when the proceeding was complete, and the bank was in position, invested with the requisite power, to issue them valid stock. The subscriptions, the payment or execution of notes for the amount thereof, the

taking of receipts or certificates therefor, and the entry of their names upon the stock-books or ledger for the amounts respectively subscribed for, which they proposed to take, were merely preparatory or preliminary steps taken in anticipation of becoming actual stockholders when the whole amount of the proposed increase should be subscribed, and the approval and certificate of the comptroller obtained. Before completing the proceeding, and before obtaining the approval and certificate of the comptroller, which was requisite and essential to confer the power and authority to make the proposed increase, the association, which was actually insolvent when the initial step looking to an increase was first taken, was closed on June 21, 1887, by the officers of the government, and its assets soon thereafter placed in the hands of a receiver, and its franchises forfeited. So that the association has not complied, and cannot comply, with its obligation to issue to those subscribers any valid stock on their several subscriptions. It never was in a position to do so from the time the subscriptions were made until its corporate existence and franchises ceased and determined by insolvency and forfeiture. Not only was no valid stock either issued or capable of being issued by the association to those subscribers, but it is not alleged or averred in the receiver's pleadings, which are demurred and excepted to, that the whole amount of the proposed increase of capital stock was ever in fact subscribed for. In the pleadings of Winters, Stanage, and Wood it is alleged that it was not. As a necessary sequence from the general principle that subscriptions for stock in a corporation are to be governed by the terms and conditions contained in the charter which confers the corporate existence, and defines its powers, it is settled that where the amount of the capital stock is fixed by the charter, or by the agreement of the subscribers, or by the directors, where the law or charter confers upon them the authority to fix it, a contract to subscribe for stock so fixed is impliedly conditioned on the subscription of the whole amount, and until this condition precedent is complied with, subscribers cannot be legally called upon to pay, or respond to calls or assessments upon their subscriptions. In such cases the subscription contract has imported into it, as fully as though recited in the subscription paper itself, the condition that the several subscribers are to be admitted to the character of shareholders when the whole amount should be subscribed. This rule applies to increases of capital stock as well as to the original subscriptions in cases where the proposed increase is fixed and designated. Subscribers may, however, waive performance of this condition; and in some of the cases it is held to be waived when the subscriber, knowing that the whole amount of such capital stock has never been subscribed for, nevertheless participates in the affairs of the corporation in a manner which would have been proper only on the assumption that the shareholders intended to carry on business with the stock but partially subscribed.

On one branch of the case, *Delano v. Butler*, 118 U. S. 647-651, 7 Sup. Ct. Rep. 39, is an illustration of such a waiver by the subscribers. In that case the proposed increase of the capital stock was \$500,000. The increase actually made and approved by the comptroller of the currency

was \$461,300, the amount actually paid in. After this increase was regularly made, the subscriber acted as a stockholder of the reduced amount, was affected with a knowledge of the change, and participated in meetings of the stockholders, and in the affairs of the association, in a way to show or satisfy the court that he had acquiesced in the reduction of the proposed increase from \$500,000 to \$461,300, and was accordingly held as a stockholder on his subscription, which was paid in, and formed a part of the actual increase approved by the comptroller. The decision of the court in the case of *Delano v. Butler* is not in conflict with the case of *Eaton v. Bank*, 144 Mass. 260, 10 N. E. Rep. 844, where the court held the subscriber for stock discharged by a change in the amount of the proposed increase, made without his knowledge or consent thereto, express or implied. In this latter case the court say:

"The vote of the directors of September 13, 1881, was, we think, in the nature of a proposal to the stockholders to subscribe for five thousand shares of new stock, and to pay in for it \$500,000. It was necessary that the stock should all be taken, and the money all paid in, before the new stock could be created. It was a condition precedent to the issue of the new stock under this vote that both those things should be done and that the comptroller should certify that they had been done, and approve the increase."

The rule here laid down is directly applicable to the present case. The proposed increase to which Winters, Stanage, and Woods made their respective subscriptions was \$1,000,000. To render their subscriptions binding upon them it was necessary that the whole of the proposed amount should be taken and paid in before the new stock could be created. Those requirements, together with the comptroller's approval of said increase, and his certificate thereof, and of the fact of its payment, were conditions precedent to any legal liability on the part of said subscribers; for until they were performed there was not, and could not be, any legal or valid increase of the stock which was to constitute the consideration moving from the bank for the subscriptions made, whether the same were paid or only promised to be paid. There is no claim made by the receiver, in his pleadings, that these conditions—all or any of them—have been waived by these subscribers, so as to bring this case within the rule laid down in *Delano v. Butler*, and kindred authorities. Until there had been an approval by the comptroller of the currency of such increase, or of some portion thereof, it is difficult to see how there could have been any waiver on the part of these subscribers which would render them liable as stockholders before they had acquired, or could possibly acquire, the new valid stock, in whole or in part, for which they subscribed.

Woods and Stanage are sued by the receiver on their notes executed to the bank for the amounts of their respective subscriptions, and pleaded want or failure of consideration, because no valid stock under the proposal made to them by the bank has been or can be issued and delivered to them. Winters seeks to recover the amount of his deposit made on his subscription, or to have the amount thereof recognized as a legal claim against the bank and its assets in the hands of the receiver. Against

this claim of Winters, and the defense relied on by Stanage and Woods, the receiver sets up an estoppel, based upon the ground that, although the Fidelity Bank did not comply with the conditions on which the subscriptions were made, or take any steps towards securing the right and power to issue the new stock, and never in fact acquired the necessary authority to make the proposed increase, nevertheless it held itself out to the public, with the knowledge of said parties, as having in fact increased its stock \$1,000,000, and that by such representation said subscribers are now precluded from disputing their position and liability as actual stockholders. The estoppel set up and relied on is pleaded as follows:

"That thereafter, on and after the said 7th day of April, 1887, the said Fidelity National Bank proceeded to announce, and did announce and publish, to the public, and to the creditors and others dealing with, or about to have dealings with, said Fidelity National Bank, by means of circulars, and statements upon the letter-heads and other stationery of the said Fidelity National Bank, that the said capital stock of the said Fidelity National Bank was at such time or times two millions of dollars, (\$2,000,000,) which was the amount to which it was proposed to increase the stock, and to the increase of which, and as part thereof, the said defendant had theretofore subscribed; and the said bank at such times as aforesaid, by advertisement in each and all of the daily newspapers published in Cincinnati, and otherwise, held itself out to the said public and said persons as above described, as having then and there a capital stock of two millions dollars (\$2,000,000) with full knowledge thereof on the part of said defendant; all of which matters and things were well known to the defendant, who thereafter, and with such knowledge, remained and allowed his name to remain, and his name did remain, upon the list of those subscribing for and entitled to such new or increase of stock; and defendant remained and was the owner of said receipt, and of said share of stock, and so remained at the time the said Fidelity Bank failed and passed into the hands of the receiver as alleged in the said answer herein."

This plea, setting up acts and representations of the association, whose officers and agents were the trustees and representatives of the rights and interests not only of the bank, but of both actual shareholders and creditors, is wanting in several essential particulars necessary to create or raise an estoppel *in pais*, such as will conclude subscribers for stock, who were not and could not be represented by the bank or its officers in any sense until they became and were entitled to the rights and privileges of actual stockholders. Estoppels are allowed for the prevention of fraud and damage to innocent parties when it is shown that the person against whom they are invoked has done acts or made declarations or representations intended or calculated to influence the conduct of others to whom they are made, and when they have in fact and truth influenced the conduct of others in such manner as will prejudice them, if the party doing the acts or making the representations is allowed to dispute their correctness. These circumstances must concur in order to create an estoppel *in pais*. As stated by a learned judge: "The declarations or representations by which a party is to be concluded must be made either with a knowledge of the facts upon which any right he may have depends, or with intent to deceive the other party; and they must have, in truth,

influenced the conduct of such other party in a manner that will result in loss or damage or prejudice to him, if the party making them is permitted to retract." The receiver's plea does not aver that the public or creditors or those dealing with the bank were in any manner misled or deceived by its representations as to the amount of its capital stock. It is not averred that the public or creditors dealt with or trusted the association on the faith that Winters, Stanage, and Woods were part owners of such increased capital; there were no such representations. Nor is it alleged that any representation was made to the effect that the controller of the currency had approved and certified to the increase, as required by law, in order to give it validity. The public and all parties dealing with said bank are chargeable with notice of the bank's want of power to increase its capital stock at will, and by its own action; and the means were open to ascertain the fact. The officers of the bank, who made such representations as to the increase of its capital stock, would no doubt be liable to any and all parties who acted upon them in good faith, and trusted the bank or dealt with it, to their prejudice and damage, under the belief thus created that its capital stock was \$2,000,000; but the liability of such officers would rest upon the ground of fraud committed by them in making statements that were intended or calculated to mislead and deceive, and which influenced the conduct of those who trusted the bank upon the faith of such statements, and were thereby injured. This liability of the officers making the false representations would in no way depend upon their relation to the bank as stockholders, or be measured by the amount of their holdings of stock; nor would it in anywise be affected by the fact that they were subscribers for the new stock. It is not averred in the plea that the subscribers for the increased stock, whose contract with the association amounted to nothing more than a proposition or proposal to take certain amounts of such new stock when it could be and was lawfully issued by the association, were ever held out to the public or to those dealing with the bank as actual stockholders; it is merely alleged that said subscribers allowed their names to remain, and that they did remain, "upon the list of those subscribing for and entitled to such new or increase of stock." Upon what principle can the wrongful act of the association in falsely representing that it had increased its capital stock \$1,000,000 convert the subscriber for a portion of such new stock into an actual stockholder, so as to impose upon him the burdens, and subject him to the same liability as would have arisen if the association had fully performed its agreement by issuing to him valid stock? How is the association's undertaking, obligation, and duty to issue valid stock under the subscription contract dispensed with by its action in fraudulently representing to the public that its capital stock was increased to \$2,000,000? Does such a false representation, made in respect to a matter not lying within the power of the association, operate in favor of the public or those thereafter dealing with the bank, so far as the subscribers for such new stock are concerned, as a performance by the association of the conditions on which alone such subscribers could ever become actual stock-

holders, and subject to the liability attaching to that relation? There can be but one answer to such a proposition. The fact that the subscribers interested in these suits were original stockholders of the association is not at all material. In respect to the new stock for which they subscribed they stand upon the same footing as entire strangers to the bank. In respect to their subscriptions for the proposed increase of stock they sustain merely contractual relations to and with the association. The reciprocal duties and obligations arising from these contract relations it was not in the power of the bank by fraudulent representations or otherwise to affect; and until valid new stock was properly and lawfully issued to such subscribers they did not become stockholders, either as to the association or as to those dealing with it, nor did the association act as their agent, or have authority to make representations binding upon them or operative to conclude them from showing that they were never in fact stockholders. While occupying the position of mere subscribers for new stock, they could not have restrained or controlled the action or representations of the association. If they actively participated with the officers of the association in making false and fraudulent representations about the bank, which deceived others, and led them to treat or deal with it to their injury, they could be held liable for such fraud wholly independent of any character of stockholders. No such question is here presented. These subscribers are sought to be held liable, or denied relief, on the theory that under the operation of some rule of estoppel growing out of the acts of the association their relation to the bank has been changed from that of subscribers for new stock to that of actual shareholders of such new stock.

The cases cited and relied on by counsel for the receiver do not sustain the position for which they contend. The cases referred to undoubtedly support the general proposition that a stockholder is estopped from denying that the corporation has been legally organized, and from setting up and relying upon irregularities and informalities on the part of the corporation in making an increase of its capital stock, where it was invested with the power to issue or create new or additional stock. What are known as the *Upton Cases*, viz., *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, Id. 56; *Webster v. Upton*, Id. 65; *Chubb v. Upton*, 95 U. S. 665, and *Pullman v. Upton*, 96 U. S. 328,—deal only with the cases of subscriptions obtained by fraud, or stock which the corporation had the right or power to issue, but issued irregularly, or stock *de facto* in corporations irregularly organized. They establish the rule that in the organization of corporations, and in the exercise or execution of admitted powers, irregularities and informalities occurring in the corporate action will not avail stockholders as a defense against creditors or receivers representing the rights of all concerned. But these cases do not meet the questions here presented, for the reason that national banking associations do not possess the power of increasing their capital stock, and because, in respect to the subscriptions in question, irregularities or informalities in the execution of an existing authority are not relied on as a defense, but the want or absence of power on the part of the association to com-

plete in a lawful and valid way the increase which its directors proposed to make. The distinction between the want or lack of power to do the contemplated act and irregularities in the exercise of an admitted authority or actual power is clearly pointed out in the case of *Scovill v. Thayer*, 105 U. S. 143, where it was held that stock issued in excess of the corporation's power was void, and conferred no right and imposed no obligation or liability on the holder of such stock, who was not estopped by receiving certificates for such unauthorized stock, by attending corporate meetings, or by the fact that the corporation had held itself out as having increased its capital, and thus obtained increased credit. Upon the questions under consideration the supreme court, speaking by Mr. Justice Woods, say:

"We think that he (the subscriber) is not estopped to set up the nullity of the unauthorized stock. It is true that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create. *Upton v. Tribilcock*, 91 U. S. 45; *Chubb v. Upton*, 95 U. S. 665; *Pullman v. Upton*, 96 U. S. 328. But those were cases where the increase of the stock was authorized by law. The increase itself was legal, and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These it was held were cured by the acts and acquiescence of defendant; but here, the corporation being absolutely without power to increase its stock above a certain limit, no acquiescence of the shareholder can give it validity or bind him or the corporation."

While the question presented in *Scovill v. Thayer* did not arise under the national banking laws, so as to make that decision directly in point, and conclusive of the present case, the principle there announced, and the distinction there drawn between informalities in steps taken by the corporation which do not invalidate, and the want of power which does invalidate, an increase of its capital stock, is applicable to the case at bar, which involves the question of power on the part of the association to make the proposed increase by any action of its own. In the *Scovill Case* the corporation had authority of law by its own act to increase its capital stock, but was restricted and limited as to the amount of such increase. When it passed that limit, and issued stock in excess of its prescribed authority, such excess of stock was wholly wanting in legal validity; and no action on the part of the corporation, or acquiescence of the subscriber, could operate to give it validity, by way of estoppel or otherwise, even in favor of creditors. National banking associations have no authority of law by their own action to increase their capital stock to any amount whatever. They can make no increase to any extent, without the approval of the comptroller as the representative of the government. His approval confers the right to make and fixes the limit or the amount of such increase. Within its own power and by its own action a national bank can make no increase of its capital stock. It might and would doubtless be true that with or after the comptroller's approval of an increase, which involves the exercise of discretion, supervisory on his part, and wholly beyond the control and independent of the action or wish of the association or of its stockholders, the steps

taken or mode of procedure adopted by the bank might not strictly conform to the requirements of the law; that for want of such conformity the action on the part of the association might be illegal; and that the stockholders or subscribers for such stock, who had accepted an allotment of shares thereunder, and acquiesced in the steps taken and the proceedings had by the association in the preliminaries to be performed on its part, would be bound. In effecting an increase of its capital stock the association may, so far as relates to its own action, proceed in an irregular or informal manner, which a stockholder who has acquiesced therein may not, as against either the corporation or its creditors, take advantage of or insist upon as invalidating his subscription, or the stock issued to him thereunder. But in regard to the sovereign's consent to such increase, to be expressed in and by the approval of its comptroller of the currency, that is an essential prerequisite or condition precedent, like a special enabling act, in conferring the power and authority to make the proposed increase valid. Such approval involves the grant of power to complete and perfect the proceedings commenced by the association looking to an increase of its capital stock. It is something lying beyond the action or control of the association and its stockholders seeking to effect an organic and fundamental change in the constitution of the bank; and in respect to this essential thing, in no wise involved in the action or steps taken by the association, the question of irregularity or informality in its own mode of procedure, and the consequences thence resulting, do not apply.

The case of *Veeder v. Mudgett*, 95 N. Y. 295, cited and relied on by counsel for the receiver, bears a close resemblance to the present, but when carefully examined it is distinguishable, and not in conflict with the distinction taken in *Scovill v. Thayer*, between irregularities and informalities which do not invalidate, and the want of power which does render void, attempted increases of stock, and which, as we think, is applicable to the case under consideration upon the facts disclosed in and by the pleadings. In *Veeder v. Mudgett*, as the court asserts and as the statute shows, "the abstract power did exist" on the part of the corporation to make the increase of its capital stock, and there was a way in which the increase could lawfully be made by the corporation's own action, independent of the sanction or approval of any state official. The New York statute under which the corporation acted was substantially like that of the Illinois statute under which the *Upton Cases*, above referred to, arose, and which the supreme court held conferred upon the corporation the power to make the increase of its stock, in the execution of which the irregularities and informalities occurred which were held not to invalidate the stock. In the *Veeder Case*, as in the *Upton Cases*, there was color of compliance with the statutory requirements, which came within the power and the legitimate action of the corporation. The want of conformity to the provisions of the law, relied on as rendering the stock void, were defects committed entirely by the corporation in respect to matters within its own control, and as to which it was invested with full authority. They do not reach the question here presented, where the infirm-

ity does not lie in defective or irregular proceedings on the part of the association in respect to a matter or matters coming within the scope of its own proper action, under the laws, but consists in the want of power to make the proposed increase without the approval of the comptroller. It further appears in the *Veeder v. Mudgett* case that the defendants had not only voted for the increase, but accepted their proportions of the increase stock thereunder, took dividends upon it, and held it out to those dealing with the corporation as an actual component of its capital. It was found by the referee that each of the defendants had himself done some act which brought him and them within the range of the estoppel relied on by the creditors, who were directly seeking relief in that suit. In the estoppel set up by the receiver in the present case it is not claimed that Winters, Stanage, and Woods have themselves or either of them done any such acts, nor that any creditor of the association was misled or deceived and thereby injured by what the bank did in representing that its capital stock was \$2,000,000, so as to bring the case within the decision in *Veeder v. Mudgett*, even conceding its application to the question here involved. In the case at bar the position of the parties is in many respects different from that in the *Veeder v. Mudgett* case. Here the relation of the subscribers for the new stock to the association, so far as appears by the pleadings, was not that of actual or even of *de facto* stockholders claiming and asserting the rights and participating in the management of the corporation as such, so as to make or constitute the bank their agent in any proper or even qualified sense. Under and by virtue of their subscriptions they sustained only contractual relations to and with the association, until the bank acquired the authority or power to issue valid stock in compliance with its agreement and undertaking so to do, and allotted to them their respective shares. The association never secured the authority to issue the stock subscribed for, never performed its part of the contract by placing itself in position to issue or by issuing valid stock, but in lieu thereof falsely represents to the public that it has increased its stock to \$2,000,000; and this misrepresentation is relied on, not only to effect a change in the relation of the subscribers to the association, but to impose upon them the burdens and obligations of actual stockholders. The authorities brought to our attention do not support such an extension of the doctrine of estoppel, which is never invoked to confer corporate powers. No estoppel can properly arise in any case where the party's direct and affirmative act could not have made the transaction valid. What the Fidelity Bank did in misrepresenting what did not lie within its power or that of its stockholders to do by their own action, cannot, upon any sound principle, be taken and accepted as the equivalent of, or the substitute for, the power it did not possess. Parties deceived or misled to their damage by such misrepresentations must seek relief against those making or responsible for the false statement, as individuals, but cannot look to them in the character of stockholders created under the operation of an estoppel, in the absence of power on their part or that of the association to establish that relation. This conclusion is sound in principle, and is, as we think, supported by the au-

thorities. See *Scovill v. Thayer*, 105 U. S. 143; *Charleston v. Bank*, 5 Rich. Law, (N. S.) 103; *Page v. Austin*, 10 Can. Sup. Ct. 140-170; *Schieronburg v. Stephens*, St. Louis Ct. App. (MS. opinion,) decided in November, 1888; *Tube Works v. Machine Co.*, 139 Mass. 5-11. The above case of *Schieronburg v. Stephens* covers the questions presented in this case, and the facts relied on to create the estoppel and defeat the relief sought were much stronger and fuller than those set up by the receiver in the present suits.

The claim made by one of the counsel for the receiver, that his position as the representative of creditors is better than that of the Fidelity National Bank, and that he can enforce rights on behalf of creditors which would not exist in favor of the association, is not sound, as applied to a case like the present. When the conclusion is reached that Winters, Stanage, and Woods are only to be regarded and treated as subscribers for valid stock which has not been and cannot be issued to them by the association, the receiver cannot, in behalf of either the bank, stockholders, or creditors, enforce against them any right which the association could not itself have asserted. A receiver cannot enforce the payment of subscriptions to stock which the corporation could not have enforced at the time of his appointment. *Cutting v. Damerel*, 88 N. Y. 410. In respect to contracts of this character the receiver occupies no position superior to that of the bank, for the reason that the corporate management, while in charge of its business, just as much as a receiver after his appointment, represents the interests of all persons, creditors as well as shareholders. When the corporation is insolvent, the rights of creditors in respect to the corporate assets become most prominent, and a receiver appointed to administer or collect such assets is regarded as more directly the representative of creditors. In a certain class of cases a receiver may assert rights which the corporation could not. Thus he may disaffirm illegal and fraudulent transfers of corporate property, and may recover its funds and securities which have been misapplied. The governing officers of a corporation cannot, for example, release a stockholder or a subscriber for its stock from his obligation to pay, to the prejudice of creditors. They cannot return to stockholders the capital stock of the corporation, which constitutes a trust fund for the benefit of creditors, to the injury of such creditors. They can make no fraudulent disposition of the corporate property for their private benefit, or for the benefit of the stockholders, leaving creditors unprovided for. These and like transactions involving the misapplication or fraudulent disposition of corporate property a receiver may disaffirm, and recover such assets for the benefit of creditors, when the corporation might not be in position to do so. *Wood v. Dummer*, 3 Mason, 308; *Curran v. Arkansas*, 15 How. 304; *Burke v. Smith*, 16 Wall. 390; *New Albany v. Burke*, 11 Wall. 96, and *Sawyer v. Hoag*, 17 Wall. 619,—afford illustrations of the cases in which receivers may assert rights which the corporation or corporate management could not enforce. But the present case involves no such principle. Subscribers to the new stock, which they have not and cannot obtain, are in no sense the recipients of the corporate property or as-

sets which have been fraudulently or wrongfully divested, misapplied, or disposed of, to the prejudice or creditors. The rights and obligations growing out of these subscriptions rest upon contract, and in respect to such matters the receiver stands precisely in the shoes of the association, and can only enforce what it could have enforced at the date of his appointment, and is subject, so far as the assets of the bank are concerned, to the same obligations as the bank would have been under had it continued in existence, and never passed into the hands of the receiver. The Fidelity National Bank could not, under the facts stated, have enforced the payment of the notes executed by Woods and Stanage; neither can the receiver do so. Winters could have recovered his deposit made on his subscription as against the association, and he is entitled to its allowance as a valid claim against the assets of the bank in the hands of the receiver, so far as anything disclosed by the pleadings appears. Subscribers may not in every case recover back deposits paid on subscribing for shares in contemplated corporations, or proposed increases of capital, where the scheme of incorporation or the proposed change proves a failure. In some cases the right of recovery will depend on the meaning and intention of the parties as expressed in the subscription agreement. If, for instance, it appears to have been the intention or understanding of the parties that the deposit made on the subscription should be used and applied towards the furtherance or accomplishment of the scheme, and it is so applied, the subscriber may not be able to recover it upon the failure of the enterprise. When, however, such deposits are made in order to comply with some statutory requirement, and without any intention on the part of the subscribers or right on the part of the corporation to otherwise apply the same, then, upon failure of the scheme, the subscribers are entitled to have their entire deposits returned. The deposit made by Winters on his subscription clearly falls within this latter category, inasmuch as it was made in compliance with the statutory requirement that the money should be paid in before the new stock could be legally issued, and there is no fact or circumstance disclosed in the case to show that he intended to make such deposit with any other intention or for any other purpose.

Our conclusions are, therefore, that the exceptions taken by Winters to the answer of the receiver should be allowed; that the demurrer of Wood to the reply of the receiver in his case is well taken, and should be sustained, and that the demurrer of Stanage to the first paragraph of the receiver's reply to his answer is well taken, and should be sustained. The second paragraph of the receiver's reply to Stanage's answer denies that the note he executed to the Fidelity National Bank, and which is sued on, was delivered to said bank in payment of his subscription to the proposed increase of capital stock, as alleged in his answer. This denial presents a proper, issuable fact, which the court does not understand as being demurred to. Excluding this second paragraph of the reply to Stanage's answer, the exceptions taken by Winters and the demurrers interposed by Woods and Stanage are sustained, and judgments will be entered accordingly in each of the cases, with costs.

WESTERN LAND & EMIGRATION CO. v. GUINAULT *et al.*

(Circuit Court, E. D. Louisiana. January 24, 1889.)

EQUITY—MULTIFARIOUSNESS.

Where the same relief is asked against several defendants, and all based on the same transaction, and it appears that, unless they can be joined in one bill, 70 or 80 suits, all growing out of the same character of transactions, will have to be brought, the bill will not be held bad for multifariousness.

In Equity. On motion for injunction *pendente lite*.

E. Howard McCaleb and W. H. Smith, for complainant.

S. L. Gilmore and Wynn Rogers, for defendants.

PARDEE, J. This cause has been submitted on a motion for an injunction *pendente lite*. The defendant's main objection is that the bill is multifarious. The general rule with regard to multifariousness is clearly stated in Coop. Eq. Pl. 182, as follows:

"The court will not permit several plaintiffs to demand by one bill several matters perfectly distinct and unconnected against one defendant, nor one plaintiff to demand several matters of distinct natures against several defendants."

But Mr. Cooper, in commenting on this rule, allows that there are many exceptions, mainly for the purpose of preventing a multiplicity of suits, and where the rights claimed grow out of the same transaction. Justice Story, in commenting upon the same question, says:

"A bill is not to be treated as multifarious because it joins two good causes of complaint growing out of the same transaction, where all the defendants are interested in the same claim of right, and where the relief asked in relation to each is of the same general character. * * * Indeed, the objection of multifariousness, and the circumstances under which it will be allowed to prevail or not, is in many cases, as we shall hereafter see, a matter of discretion, and no general rule can be laid down on the subject." See Story, Eq. Pl. § 284.

In this case the same relief is asked against the several defendants, and all based upon the same transactions. Unless they can be joined in one bill, a multiplicity of suits,—70 or 80,—all growing out of the same character of transactions, would have to be brought. Therefore the objection of multifariousness, in my opinion, ought not to be allowed. On the other grounds of opposition to the injunction *pendente* as prayed for, in order that the question may be presented fully, and the *status quo* maintained, (without committing myself to a fixed opinion,) I am inclined to think that the injunction should issue, and it is so ordered.

NUSSBAUM *et al.* v. NORTHERN INS. CO. *et al.*

(Circuit Court, S. D. Georgia, W. D. January 3, 1889.)

1. INSURANCE—ALIENATION OF PROPERTY—STATUTES—CONSTRUCTION.

Where the state statute provides that "an alienation of property insured, and a transfer of the policy without the consent of the insurer, voids the insurance, but the hypothecation or creation of a lien thereon does not void it," *held*, that a deed to a creditor, to secure a debt, with reservation of balance, and the right to redeem all by payment, is not such alienation.

2. SAME—CONDITION IN POLICY.

Where the policy stipulates as follows: "If the property be sold or transferred, or any change takes place in title or possession, the policy shall be void,"—*held* that, in the absence of precise stipulations identifying and forbidding the transaction, the deed pledging the property to secure a debt, coupled with retention of possession by the maker, and the right to sell in usual course of his business, and to redeem entirely by payment, is not such change of title as will avoid the insurance.

3. SAME—INSURABLE INTEREST.

Where the destruction of the property pledged to secure a debt would leave the debt still unpaid, the debtor in possession of the property pledged has an insurable interest therein, and the measure of his loss would be the value of the property burned, and which otherwise would have gone to reduce his indebtedness.

(Syllabus by the Court.)

At Law.

Actions upon insurance policies, by M. Nussbaum & Co. against the Northern Insurance Company of London and Aberdeen and others.

Bacon & Rutherford and *Hill & Harris*, for plaintiffs.

Lyon & Estes and *Du Pont Guerry*, for defendants.

SPEER, J. The plaintiff has brought seven actions upon as many insurance policies against the companies issuing them. The actions are on trial (the issues in each case being the same) before the same jury. Before submitting evidence, the plaintiff has made a motion to strike certain pleas of the defendants, which are as follows:

"And for further plea the defendants say they are not indebted, etc., because the insured, Fried & Hecht, without the consent of defendants, alienated the property insured on the 27th day of November, 1886; for that on that day the said Fried & Hecht signed, sealed, and delivered to M. Nussbaum & Co. a deed, a copy of which is hereto attached, by which they conveyed to M. Nussbaum & Co. the title to said property, and thereby voided the said policy of insurance."

The plaintiff moves that the third ground of the plea be stricken also, because, as therein stated, it is conditioned in the policy that, if any change takes place in the title of the property insured without the consent of the defendant, "whether by sale, transfer, or conveyance," said policy shall be void, and that such change in the title did take place by the deed before mentioned. The deed referred to is set out in full as an exhibit to the plea, and is in the following language:

"*State of Georgia, Bibb County.* This indenture, made the 27th day of November, 1886, between Fried & Hecht, a firm composed of Joseph Fried and Robert Hecht, of the county of Bibb, of the one part, and M. Nussbaum

& Co., a firm composed of M. Nussbaum and Jacob R. Fried, of the county of Bibb, of the other part: Witnesseth that the said Fried & Hecht, for and in consideration of the sum of eight thousand dollars in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, convey, and confirm, unto the said M. Nussbaum & Co., their heirs and assigns, all that stock of merchandise contained in the store-house Number 103 Cherry street, in the city of Macon, said state and county, now occupied by said Fried & Hecht, said stock of merchandise consisting principally of fancy goods, crockery, glassware, tinware, wood and willow ware, notions, toys, etc., and every other species of personal property in said store-house, including furniture and office fixtures; also all property that may be hereafter placed in said store-house, whether differing specifically from said stock now on hand or not, and to which this deed is to attach. This deed is to attach on said stock for what is now due to the said M. Nussbaum & Co., and for all future purchases and advances, and any other indebtedness which may be incurred by said Fried & Hecht. This deed is to follow said stock of goods to any building to which they may be removed; also all notes, books, and accounts now on hand, and all future notes and accounts made by customers of said Fried & Hecht. This conveyance is intended to operate as provided in sections 1969, 1970, and 1971 of the Code of 1882, in regard to the sales of property to secure debts and to pass the title of the property described into the said M. Nussbaum & Co., the debt hereby secured being one note, dated Macon, Ga., November 27, 1886, and due one day after date, for the sum of eight thousand dollars; and the said Fried & Hecht hereby agrees that if the debt to secure which this deed is made is not promptly paid at maturity, according to the tenor and effect of the said note made at the execution hereof, then the said M. Nussbaum & Co., his agent or legal representative, may, and by these presents are authorized to, sell at public outcry, before the court-house door in the county of Bibb, to the highest bidder for cash, all of said property, or a sufficiency thereof to pay said indebtedness, with the interest thereon, and the expenses of the proceeding, including fees of attorneys, if incurred, not to exceed ten per cent., after advertising the time, place, and terms of sale in the Telegraph, a newspaper published in Macon, Ga., once a week for four weeks; and the said M. Nussbaum & Co., his agent or legal representative, may make to the purchaser or purchasers of said property good and sufficient titles in fee-simple to the same, thereby divesting out of the said Fried & Hecht all right and equity that they may have in and to said property, and vesting the same in the purchaser or purchasers aforesaid. The proceeds of said sale are to be applied, first, to the payment of the said debt and interest, and the expenses of this proceeding; the remainder, if any, paid to the said Fried & Hecht. The said M. Nussbaum & Co., his agent or legal representative, shall be authorized to proceed immediately to put the purchaser or purchasers in possession; the said Fried & Hecht covenanting and agreeing to surrender the same without let or hindrance of any kind.

"In witness whereof, the said Fried & Hecht, and their wives, who hereby consent to the execution of this deed, have hereunto set their hands, and affixed their seals, and delivered these presents, the day and year first above written.

JOSEPH FRIED. [L. s.]
 "ROBERT HECHT. [L. s.]
 "FRIED & HECHT. [L. s.]

"Signed, sealed, and delivered in the presence of

"T. W. GLOVER.

"J. T. RODGERS, Not. Pub. Bibb Co., Ga.

"Recorded, Dec. 1, 1887."

The clause of the insurance policy upon which defendant relies is as follows:

"Or if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, this policy shall be void, any custom or usage of trade or manufacture to the contrary notwithstanding."

The defendant insists—*First*, that the deed was an alienation of the property insured; *second*, that, even if it should not be such an "alienation" as would void the policy, it is, under the peculiar terms of the policy, such a change in the title, by voluntary transfer and conveyance as will have that effect. The question presented by the motion has been debated by the counsel for either party with unusual clearness, brevity, and precision of statement. It is of vital importance, for if the pleas are sustained the actions will of course be defeated. It will be conducive, perhaps, to logical method, on account of the character of the pleas, to consider first, the argument of defendant's counsel, for in fact they assume the initiative, although formal motion was made by plaintiffs. It is insisted that the deed set out in the plea is a distinct and undeniable violation of section 2807 of the Code of Georgia. This provides that "an alienation of the property insured, and a transfer of the policy, without the consent of the insurer, voids it; but the mere hypothecation of the policy or creating a lien on the property does not void." It is insisted that, since the deed in express terms conforms to section 1969 of the Code of Georgia, that it passed the legal title, and was an absolute conveyance. The section last quoted is a statute, intended to give a prime and first right to the debt-paying value of the property so conveyed, to the grantee of the instrument executed under its provisions. Section 1969a provides:

"Whenever any person in this state conveys any real property by deed to secure any debt to any person loaning or advancing said vendor any money, or to secure any other debt, and shall take a bond for titles back to said vendor upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale, and take an obligation binding the person to whom said property was conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass the title of said property to the vendee, and shall be held by the courts of this state to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured agreeable to the terms of the contract, and not a mortgage."

It is important, also, to consider another part of the same act—section 1971 of the Code. It is as follows:

"The vendor's right to a reconveyance of the property upon his complying with the contract shall not be affected by any liens, incumbrances, or rights which would otherwise attach to the property by virtue of the title being in the vendee, but the right of the vendor to a reconveyance shall be absolute and permanent upon his complying with his contract with the vendee, according to the terms."

It is urged for the defendant with great earnestness that the instrument is called a "deed;" that it "grants, bargains, aliens, conveys, and confirms;" that it gives an absolute right to sell; that it confers absolute seizin upon Nussbaum; and that the statute, and repeated decisions of the supreme appellate court of the state leave it no longer open to dispute that under such a conveyance the title absolutely passes. In support of this proposition, among many others, the following cases are cited: *Roland v. Coleman*, 76 Ga. 652; *Biggers v. Bird*, 55 Ga. 650; *Carswell v. Hartidge*, Id. 412; *Johnson v. Trust Co.*, Id. 691; *Behn v. Phillips*, 18 Ga. 466. In reply to the contention of the defendant's counsel the plaintiff's make the broad assertion that, if the deed, or other instrument to alienate or change the title is given to secure a debt, with the right existing either by operation of law, or by express reservation to redeem the property pledged, it is neither an alienation nor, in the absence of an express stipulation, identifying the conveyance and forbidding it, such a change of the title as will avoid the insurance. In the maintenance of this proposition great reliance is placed upon the decision of the supreme court of Georgia in *Insurance Co. v. Feagin*, 62 Ga. 515. In that case the policy made the insurance void in case of "any sale, transfer, or change of title in the property without the company's consent, indorsed on the policy." It was pleaded there that the insured had no title at the time of insurance. They had simply an interest under a bond for titles. The property had been previously transferred to one Ogden, as trustee, to secure a debt due to a trust association, and the trustee had in the same conveyance bound himself to reconvey to the assured on the payment of the debt. In that case, also, there was the same language of conveyance as in the deed before the court. There, as here, possession was left to the grantor, the assured. There, as here, the grantee had the power, upon default, to take possession of the property, to bargain and sell at public or private sale, to execute titles, and give possession to the purchaser, to apply the proceeds—*First*, to the payment of the note; and, *second*, to account for any balance to the parties insured. There is this difference: In that case there was an indorsement on the policy that the loss, if any, is made payable to the trust association, viz., the debtor intended to be secured; and this was done with the consent of the insurance company. The jury found for the plaintiff, and a motion for new trial was made upon the following ground, among others: Because the court charged that the deed to Ogden, trustee, was only a lien, and did not, without more, invalidate the policy; that it did not amount to a sale, there being no change of possession, or steps towards that end.

Upon these facts the appellate court held "that, while the legal title passed, it passed to a trustee, partly for the use of the assured, in fact to secure a debt of his, and with the express feature to account to him for the balance. While ejectment might have been maintained upon the deed, still the equitable title, the real title, and the possession with rents and profits remained in the assured, who still held an insurable interest. "The spirit and reason of the law in respect to insurance," said the court,

"is that the assured must not so alienate the property as to make the insurer trust to another to take charge of the property, instead of the man with whom he bargained, and whom he was willing to trust." This would seem a practical and acceptable statement of the philosophy of this rule. How does the case at bar differ from the decision just quoted? In nothing, save that there the instrument of conveyance did not expressly refer to section 1969 of the Code. But that section was then of force, and in substance and in operative language the deed was as perfectly conformable to the statute as the deed here. In truth, the language of the instruments is substantially identical; neither conveyed an indefeasible title. The law, as we have seen from section 1971, Code Ga., *supra*, then and now provided that "the right of the vendor to a reconveyance shall be absolute and permanent upon his complying with his contract with the vendee according to the terms."

Can it be doubted that Fried & Hecht had the right to redeem these goods by the payment of their debt to Nussbaums. The converse, indeed, in the absence of special stipulations as to what alienations or changes in the title shall invalidate the policy, so long as any interest remains in the assured; that is, so long as he retains an insurable interest therein the policy is operative to protect that interest. 1 Wood, Ins. 701, and authorities cited. Again, it is evident that the destruction by fire of the property transferred to Nussbaum would in no sense release Fried & Hecht from the payment of the debt which it had been transferred to secure; and since, in that event, they would be deprived of the right to credit its value upon their debt, the measure of their loss would have been the value of the property itself; otherwise it would have gone to his credit. 1 Wood, Ins. 701. Certainly this was an insurable interest. Insurance being a contract of personal indemnity, no person can either enter or remain in a contract to insure property in which he personally has no interest; but as long as his interest, legal or equitable, is of a character that, in case of injury, he would sustain a pecuniary loss, the contract is valid. In the case of a pledge to a creditor the assured's rights are not lost until the full title vests in the purchaser, without any right of redemption on the part of the assured or his creditors. *Strong v. Insurance Co.*, 10 Pick. 40; *Bragg v. Insurance Co.*, 25 N. H. 289. Here the title passed, but the right of redemption is not only expressly reserved by the conveyance, but by operation of law. We hold, therefore, that there was no such alienation as avoided the insurance.

Now, does the stipulation of the policy against any change in title or transfer have that effect? Many cases were cited by counsel for the defendant to show that it had. In *Iron Co. v. Assurance Co.*, 46 Wis. 23, 1 N. W. Rep. 9, it was held that a conveyance of the fee and taking back a mortgage for the purchase money is sufficient to put an end to the policy. In *Insurance Co. v. Allen*, 43 N. Y. 389, where the assured was simply a mortgagee, the transfer of the property mortgaged avoided the insurance. In *Savage v. Insurance Co.*, 52 N. Y. 502, the insured sold and took back a mortgage for the purchase money. In *Adams v. Insurance Co.*, 3 Benn. Fire Ins. Cas. 30, a case from Maine, it was held,

in 1849, that where the insured made an absolute deed, and took back an unsealed promise to reconvey, that it voided the insurance, but the unsealed promise to reconvey was of no effect as title, and so the conveyance was absolute. The court besides expressly held that the conveyance had none of the equitable incidents of a mortgage, and, besides, the agreement to reconvey had been canceled by the erasure of the name of its maker. The conveyance being absolute upon the face of the deed, "it cannot," says the court, "be assumed that the title was defeasible." *Edmunds v. Insurance Co.*, (Mass.) 4 Benn. Fire Ins. Cas. 540, where the voiding language was, "all alterations in the ownership, situation, or state of the property" in any material particular, is a strong case for the defendants. But the court says plainly that the provision in the policy was different from any that has been contained in any other policy that has come before the court for interpretation. In *Insurance Co. v. Ricker*, 10 Mich. 279, the conveyance was absolute on its face, with nothing whatever to show a reservation of any character to the insured, and it was attempted to show this reservation by parol. Here the reservation is in the face of the deed as well as in the statute. In *McIntire v. Insurance Co.*, 5 Benn. Fire Ins. Cas. 251, there was a special provision that the entry of a foreclosure of a mortgage would void the insurance. This was a special identification of a forbidden act, and the court say that the "defendants might well be unwilling to continue to insure property which is so situated that its destruction by fire might be the easiest or only way to make it beneficial to the assured." That is not true in this case. The court has with care compared and considered every case cited by the defendant's counsel in their able and exhaustive argument, and has been unable to find a case where, under the general terms, "any change or transfer of title," it has been held that a transfer to secure a debt with express reservation of interest in the property or its proceeds avoided the insurance. On the other hand, the decision in *Insurance Co. v. Feagin*, 62 Ga., *supra*, is a reliable precedent to the contrary; and while the court, in a general question of commercial jurisprudence like this, might not be bound to adopt the conclusions of the state courts implicitly, if it differs therewith, yet it is always happy to do so whenever possible. The reasoning of the court in that case is clear and strong, and its effect upon the judicial mind throughout the country will be largely enhanced when it is noted that the lamented Chief Justice JACKSON pronounced the decision, and that the austere, rigorous, and penetrating intelligence of WARNER assented to its conclusions.

It is the duty of the court, wherever proper, to assist and protect the great and beneficent mission of insurance. On the other hand, forfeitures are not favored by the law, and in the language of the supreme court of Georgia, in *Insurance Co. v. Coleman*, 58 Ga. 254, "insurance is business, and not elaborate and expensive trifling. Of course, what is in any degree material should be allowed its due effect, but the absolutely immaterial should count for nothing." In conclusion it would seem that if a debtor was debarred from making a lawful pledge of his assets to secure a creditor by a threatened avoidance of insurance, it might have a

most injurious effect upon commercial confidence; and if the companies desire to accomplish this result, they must make their provisions express, and leave nothing of ambiguity for construction and interpretation. The motion to strike the pleas is sustained.

INGERSOLL *et al.* v. MISSOURI VAL. LIFE INS. CO. *et al.*

(Circuit Court, D. Kansas. February 22, 1889.)

1. INSURANCE—COMPANY RETIRING FROM BUSINESS—EQUITY—JURISDICTION.

Where a life insurance company has for 10 years practically done no new business, and the premium receipts do not pay its running expenses, and its corporate existence is only maintained to wind up its business, though the assets, according to insurance tables, are sufficient to pay policies in force as they are likely to mature, equity will entertain a bill by policy-holders to enforce the termination of their contracts, and the payment of the present value of their policies.

2. SAME.

As the obligation of the company to pay arises only on the death of the insured, and as the company is not technically insolvent so that a receivership could be had, complainants have no adequate remedy at law.

In Equity. Bill by policy-holders of a life insurance company to enforce the termination of their contracts, and payment of the value of their policies.

H. H. Ingersoll, for complainants.

T. A. Hurd, for defendant.

BREWER, C. This case, in its facts and in the relief sought, is of a novel character. It is before me for final hearing on the pleadings and proofs. The complainants are policy-holders in the insurance company defendant, which was both a mutual and stock company. Their policies were taken out in the years 1872 and 1873, and they are all of the class known as "Registered Tontine Policies, Class A." At that time the company had a capital stock of \$500,000, and was doing, for a company of its years, a large and prosperous business. Pamphlets and circulars were issued by it, picturing in glowing colors its prosperity, and the advantages of insuring with it. Some of these came into the hands of the complainants prior to their application for policies. As a matter of fact only \$115,000 of the capital stock had been paid in. The financial panic of 1873 impaired the business of the company, and subsequent financial troubles in Kansas continued to interfere with it, so that about the close of 1877 the company withdrew all its agents from the field, and ceased to solicit insurance. Its capital stock was reduced from \$500,000 to \$100,000, and the effort of the company has since been to wind up its business. The effect of this has been that through lapses, purchases of policies, and settlements with parties, the number of policies—at one time over 6,000—has been so reduced that

on December 31, 1887, there were only 410 in force, and of these only 29 were premium-paying. These 410 policies amount to \$316,213.94. The total premiums received in the year 1886 were \$3,779.25; for the year 1887, \$2,665.07. The total expense of the company in 1886 was \$6,442.77. The following table will show how the policies have diminished:

Jan. 1, 1873,	\$7,562,360 00	Dec. 31, 1881,	\$734,192 00
Dec. 31, 1874,	6,566,785 00	Dec. 31, 1882,	648,551 80
Dec. 31, 1875,	5,207,771 00	Dec. 31, 1883,	501,913 16
Dec. 31, 1876,	4,397,137 00	Dec. 31, 1884,	446,713 21
Dec. 31, 1877,	2,332,250 00	Dec. 31, 1885,	405,761 16
Dec. 31, 1878,	1,387,309 66	Dec. 31, 1886,	370,941 89
Dec. 31, 1879,	1,030,642 00	Dec. 31, 1887,	317,212 86
Dec. 31, 1880,	823,716 00		

The receipts have diminished in something like the same proportion, so that now the premium receipts do not pay the running expenses of the defendant. Since 1877 it has practically done no new business. It is in no just sense a going concern. While its corporate existence has been maintained, it has been simply maintained for the purpose of winding up its business. It is true that its assets, according to insurance tables, are sufficient to pay the policies in force, as according to the laws of mortality they are likely to mature, so that it cannot be held that the company is actually insolvent. Now upon these facts I remark that, confessedly, the complainants have no remedy at law. The obligation of the company to pay arises only on the death of the insured, and that event has not transpired. And again, as the company is not technically insolvent, it is at least doubtful whether proceedings could be sustained looking to a receivership and the immediate winding up of the affairs of the company; so that the complainants' remedy, if any they have, is, in a case like the present, in a court of equity to enforce the termination of their contracts, and the payment to them of the present value of their policies. It is, I think, one of the settled propositions of law that when an insurance company becomes insolvent, and its assets are taken possession of by the court for distribution among its creditors, that policies not yet matured will be adjusted at their surrender value, and to that amount established as present obligations against the company. Is the right to do this limited to cases of insolvency, or may it be extended to those cases in which the situation of the respective parties renders it inequitable to compel the further continuance of the contractual relation? I think the answer to this must be that when the situation of the parties, even without any wrong on the part of either, becomes so changed that the continued enforcement of the contractual relation works peril to the one party without benefit to the other, a court of equity may interfere, and declare the contract at an end. There is underlying every contract of insurance between the insured and the insurance company a just expectation that the company will continue the insurance business, adding to its assets by new insurance, and from the premiums thus received diminishing the *pro rata* of expense upon each policy-holder. True, nothing of the

kind is expressed in the contract, but that is the expectation upon which all contracts of insurance are entered into; and whenever that expectation fails,—fails for a series of years, and so far fails that the premiums received do not pay the expenses of carrying on a corporate existence,—then it would be gross inequity to compel the insured to continue his payments with the constantly vanishing expectation of receiving anything at the maturity of his policy. For 10 years this insurance company has been moribund. It is not yet quite a corpse, but its steady and sure progress is towards dissolution and death; and there must come a time—and it seems to me it has in this case—when it would be unjust to compel these complainants to remain bound to this dying corporation. It is not necessary to impute misconduct or fraud to the officers of this corporation; indeed, while this is charged in the bill, I think the testimony fails to show anything of the kind. The truth is, that, finding the insurance business unprofitable, in good faith the company has proceeded to wind up its business, seeking, as was of course legitimate, to save to the stockholders their investment; so that I deem it unnecessary to enter into any consideration of the facts presented as to the alleged misappropriation of funds or other misconduct by the officers. I think they have acted honestly, and according to their best judgment; but notwithstanding this I cannot avoid the conviction that the complainants are entitled to a release for the reasons I have above indicated. As my conclusions are in favor of the equities of the complainants, it follows that their failures to pay premiums since the filing of this bill have worked no forfeiture. I might criticise in some respects the action of the company in respect to attempted payments, but as that is a minor matter, not affecting the substantial rights of the parties, I shall waste no time upon it. I think the complainants are entitled to a decree declaring the contracts at an end, and giving to them an allowance against the company for the amount of the surrender value of their policies. If the parties can agree upon this amount, it will be inserted in the decree; if not, I will refer the matter to some actuary, to state the amount of such surrender value.

RICHARDSON *et al.* v. THE CHARLES P. CHOUTEAU.

(Circuit Court, E. D. Louisiana. January 29, 1889.)

CARRIERS—OF GOODS—CONNECTING CARRIERS—LIABILITY FOR LOSS.

Each of several connecting carriers is liable to the owner on a through bill of lading issued by the first, for damages to goods shipped, with recourse against the one in fault.

In Admiralty. Appeal from the district court.

Libel by Richardson & May for injuries to certain cotton. Decree for libelants. Claimants appeal.

O. B. Sansum, for appellants.

Bayne & Denegre, for appellees.

PARDEE, J. A libel is brought by consignees to recover damages on certain consignments of cotton delivered in New Orleans by the steamer Chouteau. It appears that shipments of various lots of cotton from points in the state of Arkansas were made on through bills of lading by the steam-boats *Ida Darragh* and *E. W. Cole*; that the cotton was carried to Terrent, Miss., and there reshipped on the *Chouteau*, which delivered the cotton at New Orleans. The *Darragh* and *Cole* gave clean bills of lading as to the condition of the cotton, and made through freight. The *Chouteau* took the cotton at Terrent, without executing independent bills of lading. The evidence shows that the cotton when received by the *Chouteau* was in about the same damaged condition as it was when delivered in New Orleans. The case seems to be on all fours with the case of *Harp v. The Grand Era*, decided in this court in 1871, by the late Justice Woods, and reported in 1 Woods, 184, where it was held: "When several carriers unite to complete a line of transportation, and receive goods for one freight, they are each liable for damages, subject to reclamation against the party by whose act the damage occurred;" and it was well said by the learned justice that, "any other rule which subjects shippers and consignees to such great inconvenience and uncertainty is to amount to a denial of a remedy. It sometimes occurs that in the course of the transportation freight passes into the custody of four or five different steamers or railroads, all forming one line, and giving through bills of lading. To require the owner to ascertain to which one the damage is attributable before he brings his action, is putting a burden upon him which makes relief almost impossible. Each carrier is the agent of all the others to accomplish and complete the carriage and delivery of the goods, when a through bill of lading is given, and freight charged." The evidence, however, in this case is not sufficiently definite and certain as to the amount of damage, and the case should go to a commissioner to report, unless the respondents are satisfied that the amount claimed is the proper amount.

FRANKFORT WHISKY PROCESS CO. v. MILL CREEK DISTILLING CO. *et al.*

(Circuit Court, S. D. New York. February 6, 1889.)

1. PATENTS FOR INVENTIONS—NOVELTY—PROCESS FOR MAKING WHISKY.

Letters patent No. 263,087, August 22, 1882, to M. J. Allen and W. E. Bradley, are for a process of making whisky, consisting in the utilization of the small particles of sugar, starch, and yeast contained in the slop, in the subsequent operations of whisky-making, by straining the slop of chaff and other large particles, and cooling it quickly to prevent the accumulation of acid. The slop in a sweet condition, with the small particles in suspension, is added to the liquid in the mash tub at the end of the mashing. *Held*, that though the utilization of the slop from which the fine particles were lost, and the use of straining and cooling apparatus were old, yet, the utilization of the small particles being new, the patented process is a novel one.

2. SAME.

The patent is not for the same invention as that described in the patent of July 6, 1880, to the same patentees for the process of freeing the slop, and introducing the liquid obtained in place of water in the succeeding processes of fermentation, the latter not contemplating any straining or cooling of the slop.

3. SAME—PRIOR USE.

With reference to the defense of prior use, the original application and subsequent applications for divisional patents are to be treated as the same continuous proceeding.

4. SAME—NOVELTY—BURDEN OF PROOF.

The grant of letters patent creates a presumption of novelty, which the defendant in a suit for infringement must disprove, and where the evidence leaves the question of the production of a new result in doubt, the validity of the patent will be sustained, and the question of its value will be left for litigation on the accounting, especially where defendant has abandoned the use of the invention.

In Equity.

Bill by the Frankfort Whisky Process Company against the Mill Creek Distilling Company and others for the infringement of a patent.

E. N. Dickerson and E. N. Dickerson, Jr., for complainant.

Bristow, Peet & Opdyke and Parkinson & Parkinson, for defendants.

WALLACE, J. This suit is founded upon letters patent No. 263,087, granted August 22, 1882, to Marshall J. Allen and William E. Bradley, upon an application filed April 29, 1882, for "process of making whisky." The complainant alleges that the defendants infringe the first, second, and fourth claims of the patent. The defendants interpose nearly all the statutory defenses. The patent in suit is one of three patents granted to the same patentees for improvements in the process of making whisky. A proper understanding of the case requires some consideration of each of these patents. The first was granted July 6, 1880, and the invention therein as stated in the specification, consists "in freeing the slop or spent beer of bran and other solid particles, and employing the remaining liquid portion in place of water in the succeeding operations with the fresh grain." The succeeding operations are "thinning down the mash, mashing the grain, and filling up the fermenting vats." The advantages of using the liquid of the slop after the solid particles have been eliminated are stated in the specification as follows:

"The starch and sugar in the slop or spent beer, which it is the object of this process to save, are nearly all retained in the liquid portion after separation. As only this liquid portion is used in this process, there is obtained by the separation of the bran, chaff, and coarse particles of grain a greatly reduced bulk of material, thus making it possible to get into the fermenting vats with the mash the maximum quantity of the starch and sugar contained in the slop or spent beer. It would be impossible to use the slop or spent beer with the bran, chaff, and coarse particles of grain in it in sufficient quantity to obtain the results reached by this process, viz., the saving of the starch and sugar in the slop, and their conversion into alcohol, for the reason that a few repetitions of the process would cause such an accumulation of bran, chaff, and coarse particles of grain in the fermenting vats, that the beer will become thick, and it would be impossible to work it. By this process, there-

fore, the starch and sugar in the slop or spent beer which were not converted into alcohol by the first fermentation, are introduced into the fermenting vats with the mixed mash, and thus are subjected to a second fermentation, producing a large percentage of alcohol which has heretofore been lost."

No mode of treatment of the slop in order to effect a separation of the liquid from the solid particles, or to use it in the subsequent processes, is pointed out in the patent; and the claim is broadly for the process of freeing the slop and introducing the liquid obtained in place of water in the succeeding processes of fermentation. This patent was worthless. There was no novelty in the broad process described and claimed. This sufficiently appears by a reference to the treatise of Dubruffaut on the Art of Distillation, published in Paris in 1824. He says:

"In a continuous operation the spent liquor or swill which is drawn from the still ought to be stored in hogsheads, or in a cistern constructed for the purpose. There the solid matter is deposited and the clear liquid floats above. This liquor may be profitably employed in succeeding operations to dilute the mash. It is found that this practice has the advantage of bringing to the fermentation a liquor which still contains fermentable matters which have escaped in the previous separation. This course may be continued through many successive operations. * * * We should cease to use the clear portion of the spent liquor when, after many operations, it has become so acid as to injure, rather than support, the vinous fermentation."

The material parts of the specification of the patent in suit are as follows:

"The object of our invention is to increase the yield of whisky from a given amount of grain by utilizing in subsequent processes the refuse product of previous processes; and this we do by first preparing the refuse product, and bringing it into a condition in which it may be advantageously used, and secondly by introducing such prepared product into the subsequent processes of whisky-making. By our improvement we separate from the slop or spent beer the bran, chaff, and refuse particles by mechanical means, and then so operate with the strained slop as to preserve it from acetic, lactic, or putrid fermentation, and utilize it in the process of making whisky, returning with it all the useful bodies which it contains. It is well known that the spent beer contains, in suspension, in the first place, a considerable amount of refuse material of comparatively large size, such as the chaff, bran, and larger particles of grain, and in the second place, minute particles of sugar or glucose, starch, and yeast. This second class of particles it is very important to preserve and introduce into the subsequent operations of whisky-making. This class of particles are so minute as that they will pass through the meshes of a fine sieve, and yet are sufficiently solid and separate from the liquid to form a deposit in any vessel in which the liquid may remain at rest. The purpose of our invention is to retain these fine or valuable particles in the liquid which is to be returned, and to separate from this liquid the coarse or refuse particles, while at the same time the liquid is maintained in a sweet condition. In carrying out our process practically the slop or spent beer as it is blown from the still is run through a straining apparatus similar to the bolting machine in a flour-mill, provided with a copper wire straining cloth of about thirty wires to the inch. The thick portion strained out is rejected, and may be used as food for cattle, and the liquid portion is run through a coil in a tank of cold water, or some equivalent apparatus. In this way it is rapidly cooled from a temperature near the boiling point down to a point as low as the water will produce. It should be below 80 deg. This cool liquid slop is

then stored ready for use in a tank supplied with suitable agitators to keep the small particles which it may contain in suspension, or to stir them up previous to the further utilization of the slop. It is absolutely necessary for the best results of our process that all of the sugar, starch, and yeast particles be returned with the spent beer, and utilized in the subsequent operation of making whisky. Having so mechanically strained or filtered and cooled our spent beer, we add this cold slop to the liquid in the mash-tub at the end of the mashing, for the purpose of cooling and thinning down the mash, and when the mash is run into the fermenting vats we also use the cold, thin slop or spent beer to complete the filling up of the fermenters, instead of water. We find as the result of this process a greatly increased yield, which we cannot obtain in any other way known to us. The special points to be observed in carrying out our process successfully are—*First*, the sieving or separation by mechanical means—preferably an ordinary sieve—of the coarse or refuse particles; *secondly*, the cooling of the slop or spent beer quickly, by suitable means, in order to prevent the increase and accumulation of acid in the same; and, *thirdly*, the returning of this slop, together with the valuable particles which it contains, and its utilization in the subsequent processes of whisky-making.”

The application points out that the broad idea of utilizing the spent beer is old, but as used previously the spent beer has been allowed to stand and settle and deposit without attempting to return the sugar, yeast, and starch particles which have been deposited. The specification contains the following disclaimer:

“We do not here claim the saving of the sugar, starch, and yeast of spent beer by first freeing the latter of its coarser particles by mechanical means, maintaining the useful particles in suspension, and then using this slop with its suspended ingredients in a fresh mash, as this forms the subject of a separate application for letters patent of which this is a division.”

The claims in controversy are as follows:

“(1) In the manufacture of whisky, the process described, consisting in rapidly cooling spent beer, and then mixing the slop with fresh material for subsequent fermentation, substantially as set forth. (2) In the manufacture of whisky, the process of saving the sugar, starch, and yeast contained in spent beer, which consists in freeing such spent beer, before permitting it to cool, by mechanical means,—such as sieving off the bran, chaff, and other coarse waste particles,—rapidly cooling the thin slop, and then adding the same to, and mixing it with, fresh material for subsequent fermentation, substantially as set forth. * * * (4) In the manufacture of whisky, the mode of saving the sugar, starch, and yeast contained in spent beer, and in using the same, which consists in freeing the spent beer of coarse particles by mechanical means,—such as a sieve,—of rapidly cooling this thin slop, of causing such an agitation of the slop as will hold the particles of sugar, starch, and yeast in suspension, and then mixing the thin slop so treated with fresh grain, substantially as set forth.”

The patent in suit originates in an application for a patent for an improvement in the process of making whisky, filed by the patentees in June, 1881. That application described the process above set forth in the specification. That application was amended by another in the nature of an application for a divisional patent, filed by the patentees October 29, 1881. The latter application described two of the three steps of the process described in the first application: (1) The separation of

the coarse particles from the minute ones by mechanical means; and (2) the agitation of the liquid, to keep the fine particles in suspension; and stated that the liquid was to be used in the way pointed out in the first application,—that is, at the end of the mashing and subsequently. But it contained two claims for the use of strained slop in a manner apparently not contemplated by the first application, to-wit, for the use of the strained slop while hot, during the process of steeping the malt before the end of the mashing. It also contained this disclaimer:

“When the slop is not to be used immediately it should be cooled to prevent injurious fermentation; but the cooling is not made the subject of this application, but of another division thereof.”

In April, 1882, the patentees filed another amendment to their application of June, 1881, in the nature of an application for a divisional patent, which is the basis of the patent in suit. This application described the process of the specification, and contained the disclaimer which is a part of the specification. Thereafter the first divisional application was declared by the patent-office to be in interference with the claim of a pending application of one Taylor, and the subject-matter involved in the interference was stated by the office to be as follows:

“In the manufacture of whisky, the process which consists in screening, straining, or otherwise mechanically separating the bran and other coarse matter from the spent beer, and then mixing it, before it is permitted to become cold, with fresh material for subsequent fermentation.”

While that application was in interference the patent in suit was issued; the application of April, 1882, for a divisional patent being treated by the office as a new application. October 23, 1883, a patent was granted upon the application of October 29, 1881; that application for a divisional patent being also treated by the office as a new application. The patent-office had theretofore treated the patents as divisional patents, by requiring cross-disclaimers to be filed. The specifications in each follow the terms of the divisional application, but each patent contains claims, the language of which is appropriate to specify the invention described in the other. This circumstance has complicated the question of construction of the patent in suit. It is obvious that both patents must be read and considered together, in order to ascertain the true construction of the claims of either. Each patent contains a disclaimer in the terms used in the divisional application. It is apparent that it was the intention of the patentees when they filed their application of October 29, 1881, to reserve as the subject of a second divisional patent everything described in the application of June, 1881, which did not relate to the use of hot strained slop in the processes of whisky-making. That the patent-office understood this to be the meaning of the disclaimer in that application is plain from the language of the declaration of interference. The disclaimer in the patent in suit is carefully expressed to reserve all the subject-matter of the application of June, 1881, which was not transferred by the application of October 29, 1881, to the patent granted in 1883. The scope of each patent can be ascertained by a reference to the processes to which it relates.

In the process of manufacturing whisky the first step to which reference is necessary consists in boiling the ground grain, in order to soften and rupture the soft granules, and dissolve the starch. The second is the infusion of malt, and steeping at a high temperature, for the purpose of converting the starch into sugar by the action of the diastase in the malt, which is an operation known as "mashing," and produces what is known as "wort," or "wash." The third step consists in rapidly cooling this wort or wash from a temperature somewhere above 140 deg. down to one of 75 or 80 deg., the temperature required for fermentation,—an operation which is effected rapidly in order to prevent the development of acetic, lactic, and other injurious ferments. The fourth consists in the addition of yeast and fermentation to convert the sugar into spirits, the product being known as "beer," or "wash." The fifth is the distillation of the wash or beer, the products being spirits and spent wash, otherwise known as "slop." Liquid is used with the grain during the operations of cooking and mashing, and for diluting the wort or wash when the latter is too dense for successful fermentation. The patent in suit and the patent of October 23, 1883, each describes a method for treating the slop, which is one of the products of the fifth step mentioned, and using it again in the operations of whisky-making. In the patent in suit the method requires, among other things, the rapid cooling of the slop after the alcohol has been driven off in the distilling operation. The patent of 1883 does not require the rapid cooling of the slop. The patent in suit, in view of the disclaimer, must be construed to relate exclusively to a process for using the treated slop in the operations of whisky-making which takes place after the mashing,—at the end of the mashing. In this use of the slop cooling is essential. The patent of 1883 must be construed to relate exclusively to a process for using the treated slop before the end of the mashing operation. In this use of the slop cooling is unnecessary, because it is employed as a hot liquid, in steps which are conducted at a high temperature. This interpretation is the only rational one, although each patent contains one or more claims the language of which does not permit them to apply to such a use of the slop as is contemplated by the description and the disclaimer. The seventh claim of the patent of 1883 is plainly in conflict with the disclaimer, and the third claim of the patent in suit is open to the same criticism.

Two of the defenses insisted on by the defendants may now be disposed of. There is no substance in the defense that the patent in suit is for the same invention as that described in the patent of July 6, 1880. It cannot fairly be urged that the patent in suit would be valid as a reissue of the first patent. The patent in suit is doubtless for a narrower invention than that claimed in the earlier patent, but the invention of the first patent did not contemplate any straining or cooling of the slop, both of which are indispensable in the present process. The defense that the process of the patent has been publicly used by the patentees for more than two years prior to their application rests upon evidence that the patentees used the process in their own distillery in November, 1879. As they applied for the patent in suit in June, 1881, this use of the process

was within the two years authorized by law. The application of June, 1881, and the applications for the divisional patents, are all to be treated as the same continuous proceeding. *Godfrey v. Eames*, 1 Wall. 317; *Smith v. Goodyear Co.*, 93 U. S. 500.

The consideration of the other defenses requires a further interpretation of the patent. The process of the patent embraces (1) the separation of the minute from the coarser particles of the slop by mechanical means; (2) the cooling quickly of the slop by any means suitable, to prevent the accumulation of acid; and (3) the use of the cooled slop with the minute particles which remain after separation from the refuse in those operations of whisky-making which begin at the end of the mashing. It is essential to the process that the minute particles be held in suspension, so as to be returned with the liquid slop; and it is also essential that the liquid slop be returned in a sweet condition. If the slop is to be used immediately after being cooled, and the cooling apparatus is such as to keep the minute particles in suspension by agitation, the treatment with any special agitation devices is unnecessary; but if the slop is to be stored long enough to endanger the particles to loss by deposition it must be treated with agitating devices to keep the particles in suspension. With this understanding of the process of the patent the defenses of anticipation and want of novelty may be briefly disposed of. Nothing is disclosed in the prior state of the art which suggests the use of slop or spent wash for fermentation in whisky-making, or any analogous art in which the minute solid particles have been preserved. On the contrary, so far as appears by the patents and publications which have been introduced, the previous treatment of the slop was such as to eliminate these particles from the liquid by deposition or by filtration. Thus in "The Complete Practical Distiller," of M. Lafayette Byrn, published in 1877, the author says:

"In a continuous work the spent wash left in the still should be deposited in vats or cisterns constructed for the purpose. There the solid substances will fall to the bottom, and the liquid will remain uppermost. This liquid may be successfully used in a subsequent operation to dilute the grain after it has been mashed. In this practice is found the advantage of bringing again to fermentation a liquid containing some fermentable substances which have escaped decomposition."

The use of slop in subsequent fermentation, clarified by deposition or filtration, was old in making beet alcohol, in yeast-making, and in whisky-making. It was also previously well known in the art how to cool the slop to the requisite temperature for successful fermentation, and how to cool it so as to protect it against the inroads of acetic or putrid ferment. But this does not detract from the novelty of a process which proceeds upon the discovery that the fine solid particles of the slop which previously were lost are to be carefully saved, and protected for use again in fermentation. The process requires the operations of separation and cooling and subsequent use of the liquid to be carried out so as to utilize these particles, and thus realize the discovery. This is the essential novelty of the patent. The mechanical separation of the

coarse particles from the fine could have been done with apparatus like that shown in the Springnel & Bernard patent, or with modifications of that apparatus requiring only the ordinary skill of the calling. So, also, the cooling operation could have been performed with apparatus which was well known in the art, and the slop brought to the proper temperature, and conveyed to the fermenter in proper condition for successful use; and the specification does not describe anything essentially new in these respects. Both of those operations, however, are indispensable to the proper treatment of the slop, and must be so performed that the fine particles which have been separated and cooled will be returned with the slop for subsequent fermentation. The use of straining devices and cooling devices, or a mode of carrying out the straining and cooling operations, which is so conducted as to entail the loss of these particles, is not the method of the patent. The two operations are incidental to the last, the return of the saved particles for subsequent fermentation; and it is this which was unknown in the prior art, and impresses upon the whole process the character of the novelty. It is immaterial that a process is capable of being carried on by a variety of apparatus which was well known in the art if the process is new and produces a new result. *Fermentation Co. v. Maus*, 39 O. G. 14,191, 7 Sup. Ct. Rep. 1304. It follows that the patent cannot be invalidated by the prior publications or patents which have been introduced, although they may show that every independent operation of the process, except the last, was destitute of novelty, and that competent apparatus adapted to carry out all the mechanical operations of the process was also well known in the art.

It remains to consider whether a novel result ensues by the saving of these particles, and their use in subsequent fermentation. If their use increases the yield obtained, or improves the quality of the product, or introduces any economy or other advantage in whisky-making, a novel result is shown. If nothing is gained by using these particles in subsequent fermentation, not only is there no utility in the process, but the circumstance negatives any presumption of inventive novelty. The specification of the patent states that these particles contain sugar and glucose, starch, and yeast. The argument for the complainant is that valuable properties of these particles do not pass into solution with clarified slop, and are lost when the particles are not preserved. On the other hand, the defendants insist that this theory is purely imaginary, and that there is no advantage whatever in straining the slop, except that the mechanical operation is a quicker and more convenient one in distilleries than that of clarifying by deposition. If this is the only advantage—as it is not one which arises from the process of the patent, but arises only from the use of straining devices—it is to be disregarded in considering the question of patentability. The principal expert for the defendants gives his opinion that where slop is clarified by settling less lactic ferments remain in it than when it is clarified by straining, consequently that in this respect straining is disadvantageous; and that by either treatment all the valuable properties of the particles pass into the liquid by solution. His theory is that the yeast-cells, if any, which survive in

the slop after it has passed through the heat of the still, do not deposit, if they are alive, and only the dead cells, which he deems worthless for all subsequent purposes of fermentation, are lost by deposition; and that the sugar and glucose are all practically dissolved in the slop while passing through the still. He concedes that unconverted starch remains; but he asserts that this is nothing but starch cellulose, which is practically unconvertible, and will again pass unconverted through subsequent fermentation, while the other starch constituent, starch granulose, would have been already converted into liquid slop. It is obvious that if the yeast-cells, which deposit when the slop is clarified by settling, but remain in the liquid when the process of the patent is followed, are useful for further fermentation, and if the starch particles which remain after the slop has passed through the still contain glucose which has not previously undergone such chemical changes as to be no longer useful for further fermentation, the rationale of the process is vindicated. The complainant has not introduced any expert testimony to controvert the opinion of the expert for the defendants, or to support the chemical theory that valuable properties of either glucose or yeast remain in the minute particles, and do not pass into solution with the clarified slop. It appears by the cross-examination of the expert for the defendants that there are few subjects in organic chemistry about which there is so much dispute and doubt as the constitution of the starch granule, and its composition and reaction; and great emphasis is placed upon this statement in the argument for the complainant. Testimony has been given for the complainant to the effect that since the introduction of the process of the patent an extraordinarily active fermentation takes place in the fermenters. If it is true, as the testimony seems to show, that by the use of the process a yeast-cap is produced in the fermenters from two to two and one-half feet high, instead of six inches high, as previously, this fact is irreconcilable with the theory that there is no virtue left in the yeast-cells which are saved by the process of the patent. Evidence has also been given for the complainant for the purpose of showing that a larger yield of whisky has been obtained by the use of the process than was produced when the previously known processes were employed. The real question upon this branch of the case is whether increased yield is shown in consequence of using cold liquid slop, in the operations succeeding the mashing, when strained instead of settled slop is employed. The only advance in the art secured by the patent is the substitution of mechanically strained slop for slop clarified by deposition. The comparison between the yield of the Hermitage, Old Crow, and Saffel distilleries before and since the process of the patent was used does not throw any light upon this question, because in neither of these distilleries was the former process one which affords a proper basis of comparison. The only evidence of any real value upon the question is that which shows the increased yield of the Barber distillery since the patented process has been used there. Without attempting any detailed consideration of the evidence which bears upon the question whether an increased yield of whisky is obtained by using the process of the patent, or whether any new re-

sult is effected by saving the minute particles of the liquid slop, it suffices to say that, although it is doubtful whether the patent could be sustained if the affirmative were with the complainant, the doubts which have been engendered by the proofs ought to be resolved in favor of the validity of the patent. This conclusion is reached with hesitation, because it was within the power of the complainant to remove these doubts by convincing proof, if its contention is true. Not only has the complainant failed to produce a single expert witness in support of the chemistry of the process, but it has not seen fit to make tests in its own distilleries, under the observation of competent experts, of the relative advantages of the use of strained slop and settled slop. It would seem that such tests could have been made, and the results proved. Very possibly, however, the omission is attributable to a conception of the prior state of the art, and an interpretation of the patent by counsel when the proofs were taken differing somewhat from the view which has been reached by the court.

The presumption of novelty created by the grant of letters patent is entitled to weight, and the burden of disproving it is upon those who avail themselves of the invention. This rule certainly ought not to be relaxed in the present case, where, since the suit was brought, the defendants have abandoned the use of the patented process, and consequently an injunction will not interfere with their convenience. Upon an accounting the question whether any increased yield can be obtained by the use of the patented process instead of the processes open to the public will not be concluded by the present decision, and can be fully litigated. For the present it can only be said that the evidence leaves the question in doubt, and that the testimony for the defendants does not satisfactorily establish their contention. Their evidence, introduced to show that there was no increased yield at the distilleries of the Storr Company and the Rosville distillery when the strained slop was used in lieu of settled slop, relates only to the yield of high wines; and, in the absence of further details, is unreliable for the reasons given in the testimony of Edson Bradley, Jr.

If the first claim of the patent specifies a process in which straining the slop is not one of the operations, it cannot be upheld. If the second claim specifies a process in which such an agitation of the slop during the interval between the cooling operation and the use of the slop in the fermenters is not to be maintained as to keep the minute particles in suspension, that claim cannot be upheld. Neither claim, if it stood alone, would necessarily require such an interpretation as would invalidate it. The fourth claim seems to embody the most accurate statement of the invention. The proofs establish infringement of this claim. The several defenses of prior public use of the process of the patent have not been argued by counsel for the defendants, and, in view of the evidence, may be disposed of with the observation that such use by others than the patentees is not satisfactorily established. An interlocutory decree for an injunction and an accounting will be entered.

THE WYOMING. THE DACOTAH. *In re* JACKSON. *In re* LEWIS.

(District Court, E. D. Missouri, E. D. February 19, 1889.)

1. MARITIME LIENS—DISTRIBUTION OF SURPLUS—NON-LIEN CLAIMANTS.

The surplus after payment of maritime lien claims cannot be awarded as against mortgagees to a general creditor, who has no lien recognizable in any court.

2. SAME—PARTNERSHIP—FIRM CREDITORS—DISSOLUTION BEFORE SEIZURE.

Neither are such creditors entitled to the surplus because the mortgagees were members of the firm which owned the vessel when the debts were contracted, and the other member insisted on payment out of the proceeds, where the latter became sole owner, and the firm was dissolved before seizure.

In Admiralty. Petitions by John Jackson and T. T. Lewis against the surplus and remnants. For former opinions, see 35 Fed. Rep. 548, 36 Fed. Rep. 493.

Campbell & Ryan, for petitioners.

C. G. B. Drummond and *James P. Dawson*, for mortgagees.

THAYER, J. The intervening libels filed by the petitioners against the steam-boats Dacotah and Wyoming, were dismissed for reasons heretofore stated. 36 Fed. Rep. 494. A surplus remains in the registry after the payment of all admiralty liens. Petitioners have filed claims for the surplus, and it becomes necessary to determine the question that was left undecided on the former hearing, whether they are entitled to the surplus in preference to the mortgagees. The facts are that petitioners advanced money to "Hunter Ben Jenkins, Manager of the Steamers Dacotah and Wyoming." The steamers belonged at the time to Jenkins, and to the mortgagees Sallie B. and Sanford B. Coulson. Jenkins had control of them for the benefit of himself and his co-owners, and borrowed and used the money in question for his own and their benefit. Subsequently Jenkins purchased the interest of the Coulsons in the steamers, and to secure the purchase money agreed to be paid therefor executed the mortgages under which the Coulsons, as mortgagees, now claim the surplus in the registry. It must be confessed that the facts developed predispose the court to award the money to the petitioners, if such a decree can be justified on legal grounds. When a surplus remains in the registry after all maritime lien claims are discharged, no disposition can be made of it without determining who is entitled to it. In determining that question, courts of admiralty (as is often said) act on equitable principles. By that expression no more is meant than that they will recognize the rights of those who had at the time of the seizure a vested interest in the *res*, such as a legal or equitable lien other than of a maritime nature, and that they will determine as between such lien claimants, and as between them and the owner, who has the superior right to the surplus, and in what order it ought to be distributed. *The Lottawanna*, 21 Wall. 582, 20 Wall. 223; *The Edith*, 94 U. S. 523. A mere general creditor of the owner has no lien, legal

or equitable, on his debtor's property, and has not therefore such a vested interest in the *res* as an admiralty court can recognize. They are not courts of bankruptcy or of insolvency, nor are they invested with any jurisdiction to distribute the owner's property among his creditors, as was said in *The Lottawanna Case*, 20 Wall. 221. The cases cited for petitioners establish no other doctrine than that above stated, that admiralty courts, after admiralty liens are paid, will entertain a petition against remnants and surplus, when the petitioner shows that he has a lien on the *res*, acquired by contract with the owner, or under a local statute; and that in such cases questions of priority, as between such lien claimants, will be adjudicated, if necessary, although the liens are not maritime. *The Guiding Star*, 18 Fed. Rep. 263; *The E. V. Mundy*, 22 Fed. Rep. 173, 174; *The Wexford*, 7 Fed. Rep. 671; *The O. A. Carrigan*, Id. 507. I am informed that my predecessor, Judge TREAT, has on several occasions, when an admiralty claim was adjudged stale, nevertheless allowed the same against remnants and surplus. Such action, in effect, amounted to no more than giving other admiralty claims that were considered more meritorious, a preference over the stale demand. Neither the practice last referred to, nor the case cited for petitioners, establishes a rule that will warrant the court in awarding the fund in controversy to petitioners, rather than to the mortgagees. The former, as has been heretofore held, had no maritime lien on the steamers *Dacotah* and *Wyoming* at the time of the seizure. Neither did they have a lien which a court of law or equity would recognize or enforce as against the *res*. They were merely general creditors of the owners of the steam-boats for money loaned. The fact that the mortgagees, under the testimony, are clearly liable to the petitioners at law for the money so loaned, gives the court no right to appropriate the fund now in the registry to the payment of such debt, in opposition to the wishes of the mortgagees. I was at first somewhat inclined to the view that petitioners' claims might be allowed on the ground that the mortgagees were members of the firm to which the money was loaned, and that petitioners had an equitable right to have the debt paid out of the proceeds of the steam-boats, because they were firm property, and because Jenkins, who was one of the firm, insisted on such payment. The objection to that view is that the steam-boats ceased to be firm property when the mortgagees sold their interest to Jenkins, and such sale took place some time prior to the seizure. After such sale they were the sole property of Jenkins, and no longer firm assets. *Dimon v. Hazard*, 32 N. Y. 65; *Howe v. Lawrence*, 9 Cush. 555; *Kelly v. Scott*, 49 N. Y. 598. Petitioners' claims derive no support, therefore, from the law applicable to the administration of partnership estates, as the fund in court is not partnership assets. The petitions must accordingly be dismissed, and the fund awarded to the mortgagees.

TENNESSEE COAL, LUMBER & TAN-BARK Co. *et al.* v. WALLER.

(Circuit Court, E. D. Tennessee. February 4, 1889.)

1. REMOVAL OF CAUSES—APPLICATION—TIME OF MAKING.

Under the act of March 3, 1887, § 3, requiring the application for removal to be made at the time, or at any time before, the defendant is required to answer or plead, it is not too late to make the application after a motion to take the bill from the files and a demurrer to the bill have been disposed of.¹

2. SAME.

By the rules of the state court judgment *pro confesso* might be entered if defendant did not plead, answer, or demur by the June rules. Prior thereto, defendant's counsel filed a motion to take the bill from the files, and at the next term, in September, filed a demurrer. *Held*, that an application, filed after the motion had been disallowed and the demurrer overruled, was filed after the time in which the defendant was required to plead or answer, and was too late.¹

Motion to Remand.

Action by the Tennessee Coal, Lumber & Tan-Bark Company *et al.* against George B. Waller.

Washburn & Templeton, for complainants.

Andrews & Thornburgh and *W. L. Welcker*, for respondent.

KEY, J. Defendant's counsel argue, and refer to many authorities to show, that the bill in this case is an original bill, and not merely incidental or supplementary to the cause it seeks to review. Complainants' solicitors make no point against removal on this ground, and it will therefore not be considered.

The reason urged for remanding this cause is that the application for removal came too late. The matter is by no means free from difficulty. The bill was filed March 15, 1888. The defendant therein is a non-resident, and there was no service of process upon him. Under the laws of the state, publication was made requiring the appearance of the defendant. By the same authority the first Monday of each month is made a rule-day, and it is stated that a rule of the court in which the bill was filed provides that defendants shall appear at the next rule-day after service of process, and plead, demur, or answer, or judgment *pro confesso* may be taken. The first rule-day after the bill was filed, and to which it was returnable, was the first Monday in May, 1888. The next term of the court after the bill was filed met second Monday in September, 1888. The rule of chancery court as to non-resident defendants requires them to appear at a rule-day, and the defendant shall plead, answer, or demur before the first rule-day after the one named for his appearance. The publication herein required Waller to appear on the first Monday in May; and, by the rule mentioned, should he not appear then or before the following rule-day,—first Monday in June, 1888,—and plead, demur, or

¹As to what is the proper time for filing an application for removal of cause from a state to a federal court, see *Whelan v. Railroad Co.*, 35 Fed. Rep. 849; *Huskins v. Railway Co.*, 37 Fed. Rep. 504, and cases cited.

answer, judgment *pro confesso* might be taken. Before the June rule-day defendant's counsel filed a written motion "to take from the files the bill purporting to be a bill of review," for various reasons therein stated. This was an appearance on the part of the defendant under the order of publication. This motion prevented a judgment *pro confesso*, and was not and could not be disposed of, perhaps, until the court met in regular session in September. At the September term the motion was disallowed, whereupon a demurrer was interposed and overruled, and immediately thereafter, and during the term, an application for removal was made, and the removal ordered. Complainants' solicitors insist—*First*, that after a motion to take the bill from the files, and after demurrer, both of which were disposed of, it is too late to remove; *second*, if this be not so, it was too late to have a removal, unless the application therefor was made at or before the rule-day in June, 1888. Section 3, act March 3, 1887, makes provision that in cases like this the party desiring to remove his suit "may make and file a petition in such suit in such state court at the time or any time before the defendant is required by the laws of the state or the rules of the state court in which such suit is brought to answer or plead to the declaration or complaint." The act of 1875 required the petition for removal to be filed "at or before the term at which said cause could be first tried, and before the trial thereof." It might be filed at any time during the first trial term, unless there was a trial. In case of trial, the application must be made before trial. The supreme court of the United States, in construing this provision of the act of 1875, have held that the trial of a demurrer which goes to the merits of a cause is a trial in the sense of the clause referred to in the law of 1875, and that a petition for removal, made after the action of the court on the demurrer, came too late. *Alley v. Nott*, 111 U. S. 472-477, 4 Sup. Ct. Rep. 495; *Laidly v. Huntington*, 121 U. S. 180-182, 7 Sup. Ct. Rep. 855. The act of March 3, 1887, does not provide that the petition for removal shall be filed before trial, or even before the party answers or pleads, but it must be made at the time (or before) the defendant is required to answer or plead. This means, obviously, at the term at which he is required to answer or plead, if the cause be returnable to such term, notwithstanding motions and demurrers have been disposed of during such term. There is nothing to prevent a removal in this cause under complainants' first objection.

Complainants' second objection has greater strength. The act of March 3, 1887, is and was intended to be restrictive in its character. It was designed to curtail the jurisdiction of the federal courts, and diminish their business. The law of 1875 required application for removal in cases such as this to be filed "at or before the term" at which they could be tried, and before trial. This act of March 3, 1887, requires them to be made at the time, not term, or at any time before the defendant is required by the laws of the state, or the rules of the court in which the suit is brought, to plead or answer. The word "time" is substituted in the last act for "term" in the first, evidently because the time to plead or answer might, by law or rule, be different from that of a term of the

court, and that removal should be applied for at or before such time. Now, when was the time for the defendant to answer or plead? The order of publication and the publication required him to appear and plead, answer, or demur on the first Monday in May, 1888, but the rule of the court provided that judgment *pro confesso* might be entered against him if he did not plead, demur, or answer by the first Monday in June. What might have been the state of the case, had the defendant entered no appearance on or before the first Monday in June, it is not necessary to consider. Defendant did appear on the 28th day of May. He might have then filed his petition for removal, but he entered a motion to dismiss. Clearly the "time" fixed by rule of the court for him to answer or plead was the first Monday in June. He had all that day, and all the time from the 28th of May, to file his petition for removal. His motion did not preclude the application. It would have been removed, too, or he need not have made his motion until after the cause should be removed. The defendant insists that the term "required" to plead or answer means "compelled" to do so, and that, as no *pro confesso* was taken or asked for before removal was applied for, therefore defendant had not yet been "required" to plead or answer. This position seems to be supported by *McKeen v. Ives*, 35 Fed. Rep. 803, in which it is said:

"The right to make the motion (for removal) is not restricted by the act of March 3, 1887, to the time of appearance, or to the time when a default for want of appearance might be taken, but by the terms of the act the petition may be presented 'at the time, or any time before, the defendant is required by the laws of the state or the rule of the state court in which the suit is brought to answer or plead to the declaration or complaint of the plaintiff.'"

The primary definition of "require" is "to demand, to insist, to ask as a favor, to request;" and it is no less a requirement because no coercion or compulsion may follow. The learned judge gives us no reasoning to sustain his view, but seems to think his position is necessarily inferable from the language of the law. In *Wedekind v. Southern Pac. Co.*, 36 Fed. Rep. 279-281, a different conclusion is reached. In that case a suit was commenced, and process executed April 21, 1888. The summons and the law of the state required the defendant to appear and plead in 10 days, excluding the day of service, which was on May 1, 1888. Defendant did appear on that day, and moved to set aside the service of the summons as insufficient. On May 28th the motion was heard by the court, and taken under advisement. On May 31st, and before the motion was disposed of, a petition for removal was filed. The cause was remanded, the court holding:

"The statute required the defendant to plead to the complaint on or before May 1, 1888. It is true that on that day defendant appeared in the state court, and moved to set aside the service of the summons; but this, in itself, in no wise extended defendant's time to answer or plead to the complaint."

It was held that the petition for removal came too late. I have come to the conclusion that in this case the petition for removal came too late, and that the cause must be remanded, and it is so ordered.

THOMAS v. CHICAGO & C. S. Ry. Co.

*(Circuit Court, E. D. Michigan. February 5, 1889.)***MORTGAGE — FORECLOSURE — SALE — DEPOSITARIES — DEPOSIT OF PROCEEDS BY MASTER.**

Money received by a master in chancery in payment of property sold upon the foreclosure of a mortgage ought, in pursuance of Rev. St. U. S. § 995, to be deposited with a designated depository of the United States, and the clerk is entitled to his commission thereon.

(Syllabus by the Court.)

On petition of Walter S. Harsha, clerk of the circuit court, for an order to pay money into court.

This was a bill of foreclosure, upon which a decree for the sale of the property had been passed and executed. The decree, which was entered at the March term, 1888, directed that "out of the money which shall come into his hands as the proceeds of said sale the said master shall pay the expenses of said sale, and complainant's costs in this suit, as the same shall be taxed, and such allowances, if any, as may be made by this court; and the residue of such money, if any remains after final settlement with the purchaser, he shall deposit in the First National Bank of Detroit to the credit of this court and cause, to abide the further order of this court." The sale of the road was made by the master, who reported a cash receipt of \$54,255.10 over and above the costs and expenses of sale. Upon the filing of this report, an order was entered by consent of parties, that the master give public notice to the bondholders to present their bonds for payment; that he pay to each one the amount to which he is entitled; and "that, pending the distribution of the money, he deposit the balance of money in his hands to the credit of said cause, in the Detroit Savings Bank, the same to be paid upon his checks, countersigned by the solicitor for the complainant." This order the clerk moved to vacate as having been improvidently made in violation of Rev. St. U. S. § 995, requiring all moneys paid to officers of the United States to be deposited with the designated depository of the United States, in the name and to the credit of the court.

John H. Bissell, for complainant.

Walter S. Harsha, in pro. per.

BROWN, J. While this is nominally an effort to compel the performance of a duty enjoined by statute, viz., the deposit of money with a designated depository, it is in reality a proceeding to collect the commission of the clerk upon the moneys so deposited. By Rev. St. U. S. § 995, "all moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to credit of such court: provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of

the parties under the direction of the court." By section 996 moneys so deposited shall only be withdrawn upon the order of a judge entered and certified of record by the clerk. By section 828 the clerk is allowed "for receiving, keeping, and paying out money in pursuance of any statute or order of court one per cent. on the amount so received, kept, and paid;" and by section 798 he is required to present at each regular session of the court an account of all moneys remaining therein or subject to its order, stating in detail in what cases they were deposited, and in what cases payments have been made.

There can be no doubt that a master in chancery is an officer of the United States, (*U. S. v. Hartwell*, 6 Wall. 385,) and, *prima facie* at least, bound to deposit moneys in his hands in compliance with the law. The real question is whether the selection of another bank in this case is justified by the proviso of the statute permitting the delivery of money upon security, according to the agreement of the parties, under the direction of the court. I may say in this connection that I regard the right of a clerk to his commission simply as an incident to money in his hands or under his control, and not by any means as a reason for depositing money with him which may lawfully be deposited elsewhere; and hence, if it were clear that the proposed disposition of the money in this case was a delivery upon security within the meaning of the proviso, I should have no doubt that this might be done without the formality of a previous deposit in court. I apprehend, however, that this proviso has reference to the well-known usage of the court of chancery to invest funds in its hands in bonds or other securities, pending a litigation or an appeal, and not to a temporary deposit of money to be immediately paid out to persons showing themselves entitled thereto. A delivery upon security presupposes an investment for a certain length of time on other security than the personal responsibility of the bailee. If the parties may agree in this case that this money may be deposited with some other than the depository designated by law, it may be done in every case in which money is paid to the marshal or other executive officer of the court, and the provisions of section 828 allowing the clerk a commission rendered practically nugatory. The fact that an investment may be made upon security by agreement between the parties would seem to preclude the idea that, if no such investment were made, the parties could agree upon another depository than that designated by law. While I should reprehend any attempt of the clerk to collect fees to which he is not legally entitled, I think the court is bound to aid its officers, as well as its litigants, in the assertion of their lawful rights. But, even if this money were not delivered to a designated depository, but was allowed to remain in the bank selected by the parties, there is reason for saying that it would still be subject to the order of the court, and the clerk would be entitled to his commission. In the case of *Ex parte Prescott*, 2 Gall. 146, Mr. Justice STORY entertained a petition filed by the clerk of the district court, for the payment into court of his commission upon certain prize proceeds of a ship and cargo, which had been sold, and the proceeds deposited in certain banks, subject to the order of the

court. The court held that the money had been "deposited in court" within the meaning of the law, and that the clerk was entitled to his commission upon such money in the same manner as if it had actually been paid into his hands. The cases in which the clerk has been held not entitled to his commission are those in which the money was never paid to an officer of the court. Thus, in *Ex parte Plitt*, 2 Wall. Jr. 453, the money remained in the hands of an administrator, who was not an officer of the court. In *Re Goodrich*, 4 Dill. 230, writs of *mandamus* had been issued against the city of Little Rock, commanding the city to levy a tax to pay certain judgments, and an order made that when the tax so levied should be collected it should be paid into the registry of the court for the purpose of satisfying the judgments. Instead of so doing, the city officers paid to the attorneys for the plaintiffs, directly, the amounts of the judgments, and it was held that as the money had never been in the hands of the court, the clerk was not entitled to his commission. So in *Leech v. Kay*, 4 Fed. Rep. 72, it was held that the clerk was not entitled to a commission upon money in the hands of an assignee in bankruptcy, because the bankrupt law provided that the assignee should deposit the money in his own name, and did not contemplate that it should be paid into the registry.

The decree in this case seemed to contemplate a purchase and reorganization of the road by the bondholders, and it accordingly provided, as is proper and customary in railway foreclosures, that the bonds and coupons which represented the mortgage debt in process of foreclosure might be used in payment of the purchase price by any bidder at the sale, for their proportionate value, according to the amount so bid. It was obviously framed upon the theory that the road would not sell for enough to pay the principal or the face of the bonds. No provision was made for such bondholders as did not choose to participate in the reorganization of the road; but by the supplemental decree the master was directed to give public notice to the holders of such bonds, to present them to him for payment, in cash, of the *pro rata* amount to which each bond and coupon was entitled from the purchase money paid on sale. It is now urged that by this arrangement the bondholders who participated in the reorganization received by indorsement upon their bonds the full proportionate amount of their bonds, while the non-participating bondholders, who were paid in cash, received a like amount, but with a deduction of the commission of 1 per cent. to the clerk. This is entirely true, but it is a distinction which arises from the language of the statute itself. The statute requires only that "moneys" shall be deposited with the designated depository, and makes no such provision with regard to bonds or other personal property that may be accepted in lieu of money upon the sale. If, for instance, the plaintiff in an execution should direct the marshal to receive in payment of the property sold a railway or municipal bond at its face value, such bond would not require to be deposited; nor would the clerk be entitled to a commission upon it; but, if money is required to be collected in payment, such money, by the express language of the statute, must be deposited. There is undoubtedly some

inequality here, but it is one which results solely from the language of the statute.

An order will be entered vacating the order heretofore made in so far as it provides for a different deposit of the money than the one originally designated by the decree of March 28, 1888

UNITED STATES v. UNION PAC. RY. CO. *et al.*

(Circuit Court, D. Colorado. February 7, 1889.)

1. PUBLIC LANDS—RAILROAD GRANTS—CONSTRUCTION.

Under the Union Pacific Railroad acts defendant company had a land grant *in present* from Kansas City to Cheyenne via Denver, and its road was in process of construction. The Denver Pacific Railway & Telegraph Company had graded a road-bed from Cheyenne to Denver. Subsequently, by act Cong. March 3, 1869, entitled "An act to authorize the transfer of lands granted to" defendant company, to the latter, defendant was authorized to contract with that company for the construction and operation of defendant's road between Denver and Cheyenne, "and to grant to said Denver Pacific Railway & Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges" pertaining to that part of the road. The act further provided that "said companies are hereby authorized to mortgage their respective portions of said roads, as herein defined," for a certain amount per mile, "and each of said companies shall receive patents to the alternate sections of land along their respective lines of road," in the same manner as under the previous grant to defendant. *Held* that, under the act of 1869, defendant's grant remained a continuous grant from Kansas City to Cheyenne, and the only effect of the act was to divide the grant between the two companies.

2. SAME—INTERPRETATION BY LAND DEPARTMENT.

While it is true that, under the general rule that railroad land grants are to be limited to lands situated at right angles to the general line of the road, there would be a tract south and west of Denver which might not be covered by the grant, because outside of the angles of both branches of the road, yet, where the land department has construed the grant and the act of 1869 to embrace such tract, and has issued patents accordingly, and such construction has remained unchallenged for 15 years, and rights of third persons have attached, the court will not set aside such patents, there being some doubt as to the true construction of the acts.

In Equity. Bill to set aside land patents. On demurrer to bill.

H. W. Hobson, Dist. Atty., for complainant.

Teller & Orahod, Oscar Reuter, Bartelo & Blood, Hugh Butler, A. L. Doud, W. H. Mahone, Wells, McNeal & Taylor, Albert Smith, Wm. B. Mills, H. P. H. Bromwell, and Edward L. Johnson, for defendants.

BREWER, J. This is a bill filed by the United States against the Union Pacific Railway Company and 173 other parties, to set aside patents to several tracts of land lying south-west and adjacent to the city of Denver. The facts are these: Prior to the 3d of March, 1869, the Kansas Pacific Railway Company, then known as the Union Pacific Railway Company, Eastern Division, was engaged in constructing a line of railway from

Kansas City to Cheyenne, passing through Denver. Under the Union Pacific Railroad acts it had a land grant along the entire line. The Denver Pacific Railway & Telegraph Company, a corporation organized under the laws of the territory of Colorado, had graded a road-bed from Cheyenne to Denver. On that day, at the instance of the Kansas Pacific Railway Company, congress passed an act authorizing it to contract with the Denver company for the construction of the line from Denver to Cheyenne. The contract was made, the road was built, lands were selected by the companies along the entire line as though it were one continuous line, with a single grant, and patents issued therefor. Now, the contention of the government is that the act of 1869 modified the prior Union Pacific Railroad acts so as to cut off the grant of the Kansas Pacific at Denver, and to make a new and independent grant to the Denver Pacific from Denver to Cheyenne; and, if that were the true construction of that act, this would result. The Kansas Pacific Railroad enters Denver from the east, running in an easterly and westerly direction. The Denver Pacific enters from the north, running in a northerly and southerly direction. The two roads make a junction something in the nature of a right angle. Now, it is familiar law that railroad grants are limited by lines drawn at the *termini* at right angles to the general direction of the road, so that the Kansas Pacific grant would be terminated by a line running through Denver in a northerly and southerly direction, while the Denver Pacific grant would likewise be limited by a line run through Denver in an easterly and westerly direction. Obviously all lands lying to the south-west of Denver, west of the terminus of the Kansas Pacific road and south of the terminus of the Denver Pacific, would be beyond the reach of either grant, and these are the lands which are the subject of this suit.

Of course the important question, then, is to determine the true construction of the act of March 3. That act reads as follows:

"An act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railroad, to the Denver Pacific Railway & Telegraph Company, and to expedite the completion of railroads to Denver, in the territory of Colorado. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the Union Pacific Railway Company, Eastern Division, be, and it hereby is, authorized to contract with the Denver Pacific Railway & Telegraph Company, a corporation existing under the laws of the territory of Colorado, for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway & Telegraph Company as said line, and to grant to said Denver Pacific Railway & Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations, pertaining to said part of its line."

"Sec. 2. And be it further enacted, that the said Union Pacific Railway Company, Eastern Division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein

authorized to be constructed, operated, and maintained by the Denver Pacific Railway & Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne, and all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, Eastern Division; but nothing herein shall authorize the said Eastern Division Company to operate the road or fix the rates of tariff for the Denver Pacific Railway & Telegraph Company.

"Sec. 3. And be it further enacted, that said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding \$32,000 per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner, and within the same limits, as is provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division: provided that neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under the provisions of this act."

To determine the true meaning of this act it must be borne in mind that congress had already authorized a single line with a continuous grant from Kansas City to Cheyenne, and that that line was in process of construction. Now this act simply authorizes the Kansas Pacific to contract for the construction of a part of this line, and to transfer to the company with which it is authorized to contract a proportionate share of its own grant. There are no words of grant anywhere to be found in the act, nor is there any language which, by any construction, can be held to indicate a purpose on the part of congress to reduce the grant already made. In the first section the authority given is to contract for the construction, operation, and maintenance of that part of its line of railroad, etc., and to grant a perpetual use of its right of way and depot grounds, and to transfer rights and privileges. The second section, which perhaps is not so vital, provides for the operation of the two parts as one continuous line of railroad and telegraph, and the third section authorizes each company to mortgage its respective portion of said road. The express language—the whole drift of the act—means simply transfer, nothing more. Such, also, is the purpose as indicated by the title, "An act to authorize the transfer of land," etc.; and that the title may sometimes have a significance, see *U. S. v. Fisher*, 2 Cranch, 358; *U. S. v. Palmer*, 3 Wheat. 610, in which last case Chief Justice MARSHALL says: "The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature." Furthermore, it must be borne in mind that the grant made by the Union Pacific acts was one *in præsenti*. *Railway Co. v. Railway Co.*, 97 U. S. 491. The rights of the Kansas Pacific were fixed and vested; and while it is true that grants from the government are to be construed favorably to the government and against the grantee, yet it is also true that the intent of congress controls, and should be sought from the language of the act making the grant, and that to work a forfeiture or reduce a grant already made the intent of congress should be clear. *Railway Co. v. Mc-*

Gee, 115 U. S. 474, 6 Sup. Ct. Rep. 123. That the intent of congress was as suggested, appears also from the debate at the time of the passage of the act. Senator Harlan said: "This bill does not grant an additional acre of land, or a single dollar of bonds or anything else. It enables two companies to arrange for the construction of a line; that is all there is in the bill." The language of the act, the title of the act, and the tone of the debate, all point unmistakably, as it seems to me, to the construction I have given. Indeed, there is but a single expression which throws doubt upon this, and that is that portion of the third section which provides that each of said companies shall receive patents to the land along their respective lines of road; and yet that is perfectly consistent with the idea of division and transfer. Perhaps an expression like this, "their portion of the line," would have been more exact; and yet the meaning of the expression is perfectly clear. I do not place much reliance on the act of June 20, 1874, (18 U. S. St. at Large, 111,) for that seemed designed simply to regulate the operation of the Union Pacific Railroad system; and yet it closes with this general language, which is, to say the least, in harmony with that which has been heretofore suggested:

"And it is hereby provided that for all the purposes of said act, and of the acts amendatory thereof, the railway of the Denver Pacific Railway & Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March 3, 1869."

I therefore hold that the act of 1869 in no manner diminished the grant, but that it remained as a continuous grant from Kansas City to Cheyenne, and that its only effect was to divide the grant between the two companies.

But it is further insisted by the government that, even if the grant is to be construed as a single and continuous one, these lands were not within its scope. The grant was "of every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof." 12 U. S. St. at Large, 489, § 3. This amount was afterwards raised to 10 sections. 13 U. S. St. at Large, 356. Now, treating this as a continuous line, it forms, as I said, about a right angle at Denver. It is insisted by the counsel for the government that the grant is to be limited to lands situated at right angles to the general line of the road. Hence, in coming from the east to Denver, no land falls within the grant lying west of Denver, and in coming south to Denver, none south of Denver. Of course, within the right angle the full amount of lands could not be found, because there is an overlapping of the two lines of direction, whereas opposite to the right angle, and south-west of Denver, the lands would not be reached by any line run at right angles to the line of direction. It is also insisted that whatever lands may be lost at the right angle on the one side of the road cannot be made up by lands taken from the other side. *U. S. v. Railroad Co.*, 98 U. S. 334. There is some plausibility in this

contention, but the fact is that the selection is largely a matter of administration. Few railroads, the recipients of land grants, run their lines in a constant and straight direction, either north or south, east or west; but they are built along such routes as best subserve the purposes of their business, making many curves, and going in different directions, and the selection of land which will best fill out the intent of the grant must be, in the nature of things, as it has been, in fact, largely intrusted to the officers of the land department, and their determination cannot be successfully challenged. But assuming that there may be doubt as to whether the construction which I have placed upon the act of 1869 is the true one, and whether the proper administration of the grant looking upon it as a continuous one should have included these lands, the fact remains that this act was so construed, and this grant so administered, more than 15 years ago, and has remained unchallenged from that time until within the last two years. The question was brought directly before the land department, decided by it, and on appeal its decision affirmed by the secretary of the interior. The lands were awarded to the railroad company, and from time to time, as demanded, have been patented. Innocent parties have bought on the faith of the title as evidenced by the patents from the government, and at this late day something more than a mere doubt must exist to justify the divesting of titles thus sanctioned, and sanctioned for so long a time. *U. S. v. Railway Co.*, ante, 68.

Authorities are not wanting in the supreme court of the United States, that in cases of doubt the courts will not lightly disturb an interpretation placed by the executive departments of the government. Justice TRIMBLE said in the case of *Edwards' Lessee v. Darby*, 12 Wheat. 206-210, that such uniform interpretation by the executive department was "entitled to very great respect;" Justice STORY, in *U. S. v. Bank*, 6 Pet. 29-39, that it "would, of itself, furnish strong grounds for a liberal construction;" Justice MILLER, in *Peabody v. Stark*, 16 Wall. 240-243, that "in the absence of a clear conviction on the part of members of the court on either side of the proposition in which all can freely unite, we incline to adopt the uniform ruling of the office of the internal revenue commissioner;" Justice SWAYNE, in *U. S. v. Moore*, 95 U. S. 760-763, that "it ought not to be overruled without cogent reasons;" Chief Justice WAITE in the case of *U. S. v. Pugh*, 99 U. S. 265-269, a case which, he says, is "by no means free from doubt," calls the principle contended for "a familiar rule of interpretation." Justice WOODS, in the case of *Brown v. U. S.*, 113 U. S. 568, 571, 5 Sup. Ct. Rep. 648, after stating that, if the question under consideration were a new one, "the true construction of the section would be open to doubt," concludes that the principle contended for, "in a case of doubt, ought to turn the scale." Justice HARLAN, in the case of *U. S. v. Philbrick*, 120 U. S. 52, 59, 7 Sup. Ct. Rep. 413, says: "Since it is not clear that the construction was erroneous, it ought not now to be overturned." Justice BLATCHFORD said in *U. S. v. Hill*, 120 U. S. 169, 182, 7 Sup. Ct. Rep. 510, "that the principle contended for has been applied by the supreme court as a wholesome one for the establishment and enforcement of justice between the government and

those who put faith in the action of its constituted authorities, judicial, executive, and administrative;" and Justice FIELD, in *Robertson v. Downing*, 127 U. S. 607, 613, 8 Sup. Ct. Rep. 1328, that "it ought not to be overruled without cogent reasons." It is well said by counsel that "it is interesting to note the growth of this principle in our law. From the time Justice TRIMBLE announced it so cautiously in 1827 it has gained strength every time it was again considered by the court. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before." And this is a case where that doctrine is eminently worthy of application. The supreme court of the United States has also in two recent and important cases emphasized the necessity of reliance upon the stability of title evidenced by patents from the government. See *Maxwell Land Grant Case*, 121 U. S. 325, 7 Sup. Ct. Rep. 1015; *Iron Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. Rep. 131. Such reliance should not be disturbed in the case at bar. The demurrer will be sustained.

McINTYRE *et al.* v. ROESCHLAUB *et al.*

(Circuit Court, D. Colorado. February 7, 1889.)

PUBLIC LANDS—RAILROAD GRANTS—EXCEPTIONS—HOMESTEAD ENTRIES.

The word "attached," in 12 U. S. St. at Large, 492, (the Union Pacific land grant act,) granting land "to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed," means the filing of an entry in regular form by a settler; and the fact that subsequently to the definite location of the road such an entry is set aside because made by a person not entitled to hold a government claim, gives the company no right to the land.

In Equity. Bill by Marion W. McIntyre and others against Henry F. Roeschlaub and others, to set aside a homestead entry. On demurrer to bill.

Wells, McNeal & Taylor, for complainants.

Teller & Orahood, Rogers & Webber, and *Daniel Witter*, for defendants.

BREWER, J. This is a bill filed by the complainants against the defendants to have a certain entry adjudged null and void, and to establish their title to the lands in controversy. The lands in controversy are a part of the body of lands lying south-west from Denver, the title to which is involved in the case of *U. S. v. Railway Co.*, ante, 551, recently decided in this court. The complainants claim under the railway company; the defendants by a homestead entry. So far as the general question as to the title of the railway company to these lands is concerned, I have nothing to add to what I said in the opinion filed in that case, and if that were the only question, decree would have to go for the complainants as prayed. But it further appears that, prior to the filing of the line of definite location, one Mary S. Hooper had filed in the proper

land-office her claim to said lands as her homestead, and that the entry thus made had, not been set aside at the time of filing such definite location. To invalidate this proceeding complainants allege that said Mary S. Hooper never settled or resided upon the lands, or made any improvement thereof, or ever attempted or intended so to do; that the entry was a pure matter of speculation, and for no other purpose; that she was an alien, and had never been naturalized, and therefore was not qualified to make such entry; that immediately after the filing of her pretended claim she abandoned the territory of Colorado and moved to the territory of New Mexico, and this pursuant to an intention formed at the time she made her filing; that the Kansas Pacific Railway caused proceedings to be commenced to avoid such entry, which proceedings were finally successful, but not until after the time of filing the line of definite location. In other words, at the time of filing the line of definite location, and when the company's title became fixed, there was a homestead entry, regular in form, and apparently valid, but made by a person unauthorized to make such an entry, and without the purpose of complying with the requisite conditions. The entry was one that, when challenged, could not be sustained, and was in fact thereafter set aside. Did the grant to the Kansas Pacific attach to these lands? The decision of the supreme court in the case of *Railway v. Dunnmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566, establishes the fact that if the homestead entry had been a valid one the land would not have passed to the railroad company. The contention of complainants is that because it was subject to be set aside upon proper proceedings it must be treated as invalid, and amounting to nothing, and therefore not interfering with the grant to the company. The original grant to the company was of land "to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." 12 St. at Large, 492. In the opinion in the *Dunnmeyer Case*, *supra*, Mr. Justice MILLER uses this language:

"In the case before us a claim was made and filed in the land-office, and there recognized, before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of congress this homestead claim had attached to the land, and it therefore did not pass by the grant. Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land-office by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

Within the reasoning of that case, I think the contention of the complainants cannot be sustained. So far as the records of the land-office disclose, a proper homestead entry had attached. The government had

accepted the filing of the entry by Mary Hooper. Whether it should afterwards permit that entry to ripen into a perfect title, or should challenge her right to perfect the entry, were matters resting solely in the discretion of the government. The right to inquire into the validity of the proceedings in the land-office, regular in form, was not granted to the railroad company. Such right of inquiry remained personal to the government. It occupied the position, not of a vendor, but of a donor. It limited its gifts to lands to which a homestead right had not attached. Whenever it accepted a homestead entry, its acceptance removed the land from the terms of the grant. What should become of the matter thereafter as between the person making the entry and the government was a matter that did not affect the railway company. It had no right to inquire. The government might have waived all the informalities and defects in the person, or in the occupation, and issued its patent. Whether it did or not was a matter of which the railroad company could not complain. It was enough for it that upon the face of the records there was an apparently valid homestead entry, one which the government had recognized, and one which it might finally permit to ripen into a perfect title. The homestead claim, whether good or bad, in the language of the act, attached; and that is all the railroad company could inquire into. That being settled, the land did not pass under this grant. For this reason the demurrer to the bill will be sustained.

ARTHUR *v.* GORDON *et al.*

(*Circuit Court, E. D. Tennessee, February 2, 1889.*)

CONTRACTS—REQUISITES—AGREEMENT.

Defendant wrote plaintiff: "When you can give \$1,000 for my interest, send your deed and money," to which he replied: "I am not willing to give more than \$750;" but six days later his agent wrote to defendant: "I am directed to accept your offer," to which defendant replied: "I have turned my business [over] to W., and he will trade with you, and then send me deed. * * * Upon presentation of deed from him, will sign and send back." *Held*, that there was no contract.

In Equity.

Bill for specific performance by A. A. Arthur against William F. Gordon and Hugh and C. B. White.

Andrews & Thornburgh, for complainant.

Washburn & Templeton, for defendants.

KEY, J. The bill in this case is filed for a specific performance of an alleged contract for the sale and conveyance of certain lands situated in the vicinity of Cumberland Gap. The negotiations in regard to the matter were carried on by correspondence through the mails. C. H. Rogers appears to have initiated the correspondence by a letter dated January

18, 1887, which is not copied into the record, to which Gordon replies, February 1, 1887: "Will say you can have the lands referred to for fifteen hundred dollars, provided you want it right off, as I do not propose to give any option on the property." Rogers was the agent of complainant. March 3 or 17, 1887, complainant writes defendant Gordon: "We consider this [land] worth \$600 in cash, and if you are agreeable to sell out to us at that figure, we will remit amount with quitclaim deed for your signature. Please reply at once; for if you will not accept this offer, we may apply for partition sale in the usual way." Complainant already had purchased some undivided interests in the lands. To this proposition Gordon replied, March 23, 1887: "Yours of 17th inst. received, containing bid of \$600 for my entire interest in the Ky. & Tenn. lands, which I am very sorry to say I cannot accept. * * * When you can give \$1,000 for my interest, send your deed and money." June 22, 1887, complainant says: "Referring to your correspondence, I now beg to inform you that the acreage of your tract of land in Poor valley is considerably less than you thought it, and I am not willing to give any more than \$750 for your interest in that and your interest in the mountain lands of Kentucky. If you are willing to accept this sum, advise me immediately, and the deeds will be sent for your signature." To this proposition it does not appear that Gordon ever made any response. June 28, 1887, Seymour, as agent of complainant, wrote to Gordon: "I am directed by Mr. Arthur to accept your offer." That is, the offer of March 23, 1887. To which Gordon replied, July 5, 1887: "I have turned my business [over] to Mr. Hugh White and he will trade with you, and then send me deed in accordance with the laws of those states, quitclaim deed, * * * upon presentation of deed from him, will sign and and send back through Citizens' Bank, Nevada, Mo." July 21, 1887, Gordon and wife conveyed the lands to C. B. White.

The first question to be determined is, was there a contract between complainant and Gordon for the purchase and sale of the lands? Did their minds ever meet upon any one of the propositions which passed from one to the other? It is insisted for complainant that there was an agreement of the parties upon the offer made by defendant Gordon, March 23, 1887, to sell for \$1,000; that this proposition was accepted by Seymour's letter of June 28, 1887, and acknowledged by Gordon's reply of July 5th following. Let us see how this is. Gordon said: "When you can give \$1,000 for my interest, send your deed and money." Arthur had offered \$600, and said he would remit amount with quitclaim deed for Gordon's signature. Gordon was requested to reply at once. Arthur says as to Gordon's offer to sell for \$1,000: "I am not willing to give more than \$750. If you are willing to accept this sum, advise me." Here was a clear, definite, and explicit refusal to accept Gordon's proposition. It is as if Arthur had said: "I decline to give you a thousand dollars, but will give you \$750. Will you accept this sum?" This brought the \$1,000 proposition to an end, and in its stead came a proposition from Arthur to give \$750 which was never accepted. The alleged acceptance of the \$1,000 offer by Seymour amounted to

nothing, for there was nothing upon which it could fasten itself. The offer had been declined by Seymour's principal, and another substituted by him for it. But it is insisted that Gordon's note of July 5th in reply to Seymour's letter should be construed into an acceptance of Seymour's offer. A reasonable regard to the manifest meaning of the terms of this note does not sustain this position. "I have turned the business [over] to Mr. White, and he will trade with you. * * * Upon presentation of a deed from him, I will sign and send it back." As to turning the business over to White, he spoke of what had taken place before Seymour wrote. The fair interpretation of the language is that Gordon declined to take any step in the matter, because he had placed the business in White's hands. "White will trade with you,—that is, White will sell to you,—and when he does, and presents me the deed, I will sign it and send it back." No doubt Gordon believed that White would sell to Arthur, but certainly there was no contract, order, or direction that he should do so. The following decisions control this case:

"The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open and imposes no obligation upon either party. The one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it." *Railway Co. v. Rolling-Mill Co.*, 119 U. S. 151, 7 Sup. Ct. Rep. 168.

"A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer." *Bank v. Hall*, 101 U. S. 50.

It appears that in the case under consideration there has been no meeting together of the minds of the parties so as to make a contract mutually binding upon each in regard to the sale and purchase of the lands in controversy, and, as a consequence, complainant is not entitled to the relief he seeks. His bill will therefore be dismissed, with costs, and it is ordered accordingly.

NEUFELD v. NEUFELD.

(Circuit Court, S. D. California. February 2, 1889.)

ATTACHMENT—IN FEDERAL COURTS—INSOLVENCY PROCEEDINGS IN STATE COURT.

Under Rev. St. U. S. § 915, entitling plaintiff in a common-law case in a federal court to remedies by attachment or other process similar to those provided by the laws of the state in which the court is held, and requiring similar preliminary proof and security; and section 933, which provides that an attachment shall be dissolved on any contingency on which an attachment would be dissolved in the state courts,—proceedings in an action in which an attach-

ment has been levied will be stayed where insolvency proceedings against the debtor are instituted in the state courts, as otherwise the plaintiff would acquire an undue advantage over the state creditors, which is contrary to the intent of the statute.

At Law. On petition for stay of proceedings.
Graves, O'Melveny & Shankland, for petitioners.
Wells, Guthrie & Lee, for plaintiff.

Ross, J. The plaintiff, Nathan Neufeld, a citizen of the state of Illinois, commenced in this court, on the 31st of December last, an action at law against the defendant, Julius Neufeld, who is a citizen of the state of California, to recover a certain amount of money alleged to be due the plaintiff from defendant, in which action an attachment was duly issued, and levied by the marshal on property of the defendant situated in Los Angeles county. A few days after the commencement of the action, to-wit, January 7th, the requisite number of the California creditors of the defendant instituted insolvency proceedings against him in one of the superior courts of the state, and, in pursuance of the state statute regulating such matters, the superior court made an order directing, among other things, that no creditor whose debt is provable under the insolvency act of the state be allowed to prosecute to final judgment any action therefor against the alleged insolvent until the question of his discharge shall be finally determined, and that any and all such suits and proceedings be stayed until the further order of the said superior court.

Conceding that such order does not operate to stay or otherwise affect the action here, the counsel for the creditors in the insolvency proceedings, have, with leave of this court, filed a petition in intervention, in which is set out in full the proceedings had in the insolvency court, and which further shows that the debts and demands of the petitioners, who are residents of the state of California, accrued in said state, for goods sold to defendant, to be employed by him as stock in trade in his business; that the debt upon which the plaintiff's action is based is a debt also provable under the state law by virtue of which the insolvency proceedings are had, and that the defendant has no defense to this action, but will suffer his default herein to be entered, and thereafter judgment to be taken against him. Petitioners therefore ask that this court stay further proceedings for the enforcement of plaintiff's demand, until the state insolvency court shall have adjudicated the question of defendant's alleged insolvency, or until the further order of this court.

At the hearing of the petition the facts upon which it is based were not controverted. As already observed, counsel for petitioners do not dispute the proposition, too well established to require argument, that the right of the plaintiff to prosecute his action in this court having attached prior to the commencement of the insolvency proceedings, that right cannot be arrested, taken away, or impaired by any action of the state court. It is the action of this court that petitioners seek, and that in the interest of justice. It was not the purpose, I think, of the provisions of the Revised Statutes of the United States upon the subject of attachments

in common-law causes in the circuit and district courts, to give to the non-resident creditor any unfair advantage over the resident creditor. On the contrary, it seems to me to be plain that the purpose was to give to the non-resident, who might sue in the federal courts, the same rights, but no more, in respect to attachment, as are enjoyed by the resident creditor, who must sue in the state court. And this, I think, is manifest from the provisions themselves, which are as follows:

"Sec. 915. In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process; provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other process."

"Sec. 983. An attachment of property upon process instituted in any court of the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections, [within which the present case does not come,] shall be dissolved when any contingency occurs by which, according to the laws of the state where said court is held, such attachment would be dissolved upon like process instituted in the courts of said state: provided, that nothing herein contained shall interfere with any priority of the United States in the payment of debts."

There can be derived from this language of the statute no intent to confer upon the non-resident creditor any other or greater rights than are enjoyed by the resident creditor. It is true that the contingency has not yet occurred in the insolvency proceedings referred to, which, under the state law, would operate a dissolution of all attachments against the alleged insolvent issued out of the state courts, and which, under the express terms of section 983 of the Revised Statutes, would operate to dissolve the attachment issued out of this court; and such contingency may not occur, in which event the plaintiff herein would of course be allowed to proceed to judgment, for the satisfaction of which the property attached would be liable. But by the state law the attachment to which the resident creditors are entitled is subject to be, and as to this defendant has been, stayed by the insolvency court pending the insolvency proceedings; and unless a stay of proceedings in this case is granted by this court the plaintiff may, and doubtless will, take judgment against defendant, the manifest effect of which will be to give to the non-resident creditor a remedy by attachment for the enforcement of his demand against the defendant, which is not enjoyed by the resident creditors of defendant. And this, in my opinion, is contrary to the intent and meaning of the provisions of the Revised Statutes on the subject. It is ordered that all proceedings in the cause be stayed until the further order of this court.

GEO. D. BARNARD & Co. v. KNOX COUNTY.

(Circuit Court, E. D. Missouri, N. D. February 6, 1889.)

1. COUNTIES—WARRANTS—EXCEEDING STATUTORY LIMIT OF INDEBTEDNESS.

In order to defeat an action on county warrants, by invoking Const. Mo. art. 10, §12, providing that "no county * * * shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters," etc., it is not sufficient to show merely that during the years in which the warrants sued on were issued the expenditures exceeded the county revenues for those years, but it must be shown, in addition, that the limit had been reached before the indebtedness was incurred for which the warrants were issued.

2. SAME—COMPULSORY INDEBTEDNESS.

Rev. St. Mo. §§ 623, 624, 1061, 1184, 5376, having made it the duty of the various county officers to provide suitable books and stationery at the expense of the county for the transaction of business in their offices, debts contracted for such purposes by those officers and not by the county court, the ordinary contracting agent of the county, are not within the purview of the constitutional provision above quoted.

At Law. Agreed case.

Taylor & Pollard, for plaintiff.

G. R. Balthrope and W. C. Hollister, for defendant.

THAYER, J. This is an action on 49 county warrants, issued during the years from 1882 to 1886, both inclusive, in payment for books and stationery sold and delivered to Knox county at the instance and request of various county officers, and for public use. The defense is that when the warrants sued upon were issued by the county court of Knox county, the county court had drawn warrants in excess of the total revenue of the county for the years during which the warrants were respectively issued, and that the debt sued for was for that reason contracted in violation of section 12, art. 10, Const. Mo., which provides that "no county * * * shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose." The case has been submitted upon an agreed statement of facts, from which it appears that the books and stationery in question were furnished for public use at the instance and request of the probate judge, the clerks of the county and circuit court, and the sheriff and collector of the county, and that the same "were suitable and necessary for the officers in their official capacity to whom they were sold." It also appears that the total warrants issued by Knox county each year from 1882 to 1886, both inclusive, exceeded the revenue derived for the respective years from the highest rate of taxation which the law permits, to-wit, 50 cents on each \$100 of valuation; but that, deducting the warrants drawn on the "pauper fund" and "road and bridge fund," the warrants drawn in any one of said years did not exceed the revenue for said year. Judgment must be rendered for the plaintiff for the full amount claimed in each count, (that is, for the amount of the warrant described therein and interest at 6 per cent. per annum from the date of the alleged presentation,) for two reasons:

In the first place, there is nothing in the agreed statement to show that the indebtedness sued for was illegally contracted, even if it be conceded that the constitutional inhibition (section 12, art. 10, *supra*) applies or has reference to such an indebtedness. The only fact admitted by the agreed case is that warrants were issued each year from 1882 to 1886, inclusive, in excess of the total county revenue for the respective years, provided warrants drawn on the "pauper and road and bridge funds" are taken into account, and not otherwise. But whether, when the several items of indebtedness sued for were contracted, and the various warrants were drawn, the limit of legal indebtedness had then been reached, and the county had exhausted its power to contract further indebtedness, is not shown. The stipulation falls short of establishing the facts alleged in defendant's special plea. In this state, as is well known, county courts are required to subdivide the total county revenue into five different funds, and each fund must be devoted to the payment of the particular class of expenses for which it is set apart, and to no other. Warrants drawn by the county court must also specify the fund on which they are drawn. Rev. St. Mo. §§ 6818-6821, both inclusive. By section 5370, county treasurers are required to keep a record of warrants presented against the respective funds, and to pay them out of the funds on which they are drawn in the order of presentation, with the proviso that warrants issued to pay for "services that are usual, and for all expenses necessary to maintain the county organization," must be paid in preference to warrants that are otherwise drawn; that is, to pay for services or expenses that are of an unusual character. It is evident, therefore, that when a county incurs an indebtedness exceeding its income or revenue for the year, and some part of it is for that reason invalid, it must be that part (if any) which may be appropriately termed an "extraordinary indebtedness," or that part which was contracted after the limit of legal indebtedness had been reached. The debt sued for in this case was not an unusual debt for a county to contract. On the contrary, it was an obligation such as the county was compelled to incur annually. Its officers could not discharge their official duties without suitable books and stationery. Therefore it is important to know when the various items of indebtedness sued for in this case were contracted, and to what extent the county had incurred liabilities up to that time. Without such proof—and the agreed case is silent on that point—the court cannot say that the county had exhausted its power to incur further debts, when a single item of the bill sued for was sold and delivered. It will certainly not be presumed that the defendant contracted a debt in violation of law. The burden of showing such fact rests on him who alleges it.

In the second place, it must be held that the indebtedness now under consideration is not within the purview of the section of the constitution above quoted, (section 12, art. 10,) because it was an indebtedness which the various county officers who contracted it were bound to incur in the proper discharge of their official functions. It is made the duty of the various officers at whose instance the books and stationery involved in this case were supplied "to provide suitable books and stationery" at the expense of the county for the transaction of business in their several of-

fices. Rev. St. Mo. §§ 623, 624, 1061, 1184, 5376. The debt was contracted by those officers, and not by the county court. In the case of *Potter v. Douglas Co.*, 87 Mo. 240, it was held that the constitutional prohibition now in question was leveled against a county becoming indebted through the action of the county court,—the ordinary contracting agent of the county,—and that it had no application to an obligation cast on the county for the transportation of a prisoner to an adjoining county, and for his board while there confined in jail, inasmuch as the law made it the duty of the sheriff to take prisoners to an adjoining county, and there confine them, when there was no jail in the county where the offense was committed. In *Rollins v. Lake Co.*, 34 Fed. Rep. 845, Judge BREWER held that a provision in the constitution of the state of Colorado, very similar to the one now under consideration, did not forbid a county of that state from becoming indebted for witness', juror's, and sheriff's fees, in excess of the amount limited by the constitution, because the laws of the state made it obligatory on counties to pay all such fees. It seems, therefore, that it is settled, both in this state and in this circuit, that constitutional provisions limiting the amount of county indebtedness that may be incurred are to be construed as having reference to that class of debts which it is optional with the county court or other governing body of the county to incur, and that they are not to be taken as having reference to compulsory obligations cast on the county by operation of law, as where a county is required to pay the ordinary expenses attending the maintenance of courts and the enforcement of the laws within the county, or where particular officers are required to provide at the expense of the county the necessary supplies for the proper discharge of the duties of their office. As experience has heretofore shown that counties and municipalities generally become embarrassed by lavish expenditures which they were under no legal obligation at the time to make, or that might at least have been deferred to a more convenient season, the construction adopted in the cases above cited is reasonable, and will most likely result in accomplishing the purpose had in view by the law-maker. Judgment will accordingly be entered for the plaintiff.

HENNESSY v. CITY OF ST. PAUL.

(Circuit Court, D. Minnesota. February 6, 1889.)

NUISANCE—ABATEMENT—MUNICIPAL CORPORATIONS—POWERS.

St. Paul Mun. Code, art. 32, p. 41, which confers upon the common council "full power and authority to remove and abate any nuisance injurious to public health or safety, and to remove, or require to be removed, any building which, by reason of dilapidation, defects in structure, or other causes, may or shall have become imminently dangerous to life," etc., does not confer upon the council the exclusive jurisdiction to determine what constitutes a nuisance, but only authorizes the abatement of that which is in fact a common nuisance.

At law. On motion for new trial.

Action by David J. Hennessy against the city of St. Paul for damages caused by tearing down and removing plaintiff's building. Verdict for plaintiff, and defendant moves for a new trial.

Young & Lightner, for plaintiff.

W. P. Murray, for defendant.

NELSON, J. A suit was brought against the defendant for tearing down and removing plaintiff's frame building located on Robert street, in the city of St. Paul, in this district. The building was rented at the time a fire damaged it to the extent of from 30 to 50 per cent. of its value. It was vacant and untenanted on April 30, 1886, and was declared by the common council of the city imminently dangerous to life and property by reason of fire and its dilapidated condition, and a nuisance, and on July 1, 1886, was taken down. The act of the city is attempted to be justified under its charter and ordinances. The trial resulted in a verdict for the plaintiff. The charter of the city of St. Paul gives the common council power and authority to remove and abate any nuisance injurious to public health or safety, and to remove any building which, by reason of dilapidation * * * or other causes, may have or shall have become imminently dangerous to life and property. City Charter, p. 41, art. 32, Mun. Code St. Paul. On October 7, 1869, the following ordinance was passed (article 32, p. 41, Mun. Code St. Paul:)

"The common council shall have full power and authority to remove and abate any nuisance injurious to the public health or safety, and to remove, or require to be removed, any building which, by reason of dilapidation, defects in structure, or other causes, may have or shall become imminently dangerous to life or property," etc.

On April 30, 1886, a resolution of the common council was approved by the mayor, authorizing the destruction and removal of plaintiff's building. It was urged on the trial, and it is pressed with some degree of earnestness, that under the charter and ordinance as above recited, the exclusive jurisdiction was conferred upon the common council to determine what constitutes a nuisance. I do not think so. The common council undoubtedly has the power to abate nuisances, and a dilapidated and vacant building, by reason of fire, and its temporary occupation by disorderly persons and trespassers, and its use as a receptacle of filth, may become a common nuisance as recognized by law. But unless a nuisance, as defined by the common law or by statute, exists, the act of the common council cannot make it one by a mere resolution. Such a doctrine might place the property of the people, no matter what in fact might be its real condition and character, at the disposal of the common council, without compensation. A nuisance cannot be created by mere declaration of the city council, unless it is in some manner injurious to the public; and the ordinance or declaration heretofore recited is no defense in this suit, unless the building is proved to be a common nuisance. Power to abate or suppress is confined to abating or suppressing that which is imminently dangerous to life and property, and a nuisance; and where the facts do not create the danger, a resolution or or-

dinance of the common council to the contrary cannot avail. 1 Wood, Nuis. § 744; *Everett v. City*, 46 Iowa, 66; *Yates v. Milwaukee*, 10 Wall. 497; *Clark v. Mayor*, 13 Barb. 32; *Underwood v. Green*, 42 N. Y. 140. In the case cited by counsel (*Harvey v. Dewoody*, 18 Ark. 252) the demurrer interposed by the plaintiff to the plea of the defendant admitted the facts alleged, which showed the building a nuisance *per se*. No evidence was excluded on the trial tending to show the building unsafe, and dangerous to life and property, and I find no error committed. Motion for new trial denied.

KENTUCKY & I. BRIDGE Co. v. LOUISVILLE & N. R. Co.

(Circuit Court, D. Kentucky. January 7, 1889.)

1. CARRIERS—INTERSTATE COMMERCE COMMISSION—CONSTITUTIONAL LAW—JUDICIAL POWERS.

Congress, in establishing "inferior courts," and prescribing their jurisdiction, must confer upon the judges appointed to administer them the constitutional tenure of office,—that of holding "during good behavior,"—before they can become invested with any portion of the judicial power of the government.

2. SAME.

The act to regulate commerce does not undertake either to create an "inferior court," or to invest the commission appointed thereunder with judicial powers or functions.

3. SAME.

The interstate commerce commission is invested with only administrative powers of supervision and investigation, which fall far short of making it a court, or its action judicial, in the proper sense of the term. Its action or conclusion upon matters brought before it for investigation is neither final nor conclusive; nor is it invested with any authority to enforce its decision or award. It hears, investigates, and reports upon complaints made before it, but subsequent judicial proceedings are contemplated and provided for as the remedy for the enforcement of the order or report of the commission in all cases where the party against whom its decision is rendered does not yield voluntary obedience thereto.

4. SAME—EFFECT OF REPORT.

The commission is charged with the duty of investigating and reporting upon complaints; and the facts found or reported by it are only given the force and weight of *prima facie* evidence in such judicial proceedings as may thereafter be had for the enforcement of its recommendation or order. The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of, and report upon, matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every circuit court of the United States upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and enforced by said law.

5. SAME—POWER OF CONGRESS.

Congress, under its sovereign and exclusive power to regulate commerce among the several states, has the power to create a commission for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce; and no valid constitutional objection can be urged against making the findings of the commission *prima facie* evidence in subsequent judicial proceedings. Such a provision merely prescribes a rule of evidence, clearly within well-recognized powers of the legislature, and in no way encroaches upon the court's proper functions.

6. SAME—POWER OF CIRCUIT COURT.

The act does not make the circuit court the mere executioner of the commissioners' order or recommendation, so as to impose upon the court a non-judicial power. The court is not restricted to the mere ministerial duty of enforcing an order of the commission. The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the commissioners' report is made *prima facie* evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the cause *de novo*, upon proper pleadings and proofs; the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy.

7. SAME—JURISDICTION—CITIZENSHIP.

The right asserted by petitioner arises and is claimed under a law of the United States which relates to a subject over which congress has exclusive control; and this is sufficient to sustain the court's jurisdiction, independent of the citizenship of the parties to the controversy, since it involves a federal question.

8. SAME—COMMON CARRIERS—BRIDGE COMPANIES.

Where a railway company, by contract with a bridge company, acquires the right to use a bridge, with its approaches, for the engines, cars, and trains of the railway company, the first section of the "act to regulate commerce" regards the railway company as the owner or operator of the bridge and approaches, for the time being, as to all freight transported by the railway company over the bridge; and as to all such traffic, the railway company, and not the bridge company, must be regarded as the common carrier. Such a bridge company is not, either in law or in fact, a common carrier of interstate traffic, within the scope and meaning of said section; and it cannot invoke the provisions of said act, to compel railway companies to transact business with or through such bridge company. Between such a bridge company, and the railway carriers of the country, the act establishes no such reciprocal relations, duties, and obligations as require the latter to form business connections with the former.

9. SAME—TRANSFER COMPANIES—SWITCHING CARS.

Where a corporation, which is under no legal obligation to do so, voluntarily contracts to switch cars over its tracks, between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars, such corporation, in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman. In respect to cars or traffic thus handled, such corporation can only be regarded as a switchman, or transfer company; and it is no more a common carrier of interstate commerce or traffic, within the provisions of the law, than a city transfer company, which checks a passenger's baggage at the hotel where it is received, and carries it, for an agreed compensation, to the station of the railway over which it is to be transported into another state.

10. SAME—BRIDGE COMPANIES—CHARGES FOR TRANSFER.

When a bridge company, owning no freight cars of its own, solicits freight for railway companies, who will furnish the cars, and over whose lines the freight is to go, and merely transfers such cars over its bridge, delivering them to the railway companies furnishing the same, and charging for its service its regular bridge-toll, but making no charge for transporting the freight contained or carried in the cars, such a bridge company is not a common carrier of such interstate freight. The object and purpose of the bridge company in thus constituting itself the soliciting agent for the railway companies who are willing to provide the cars for the freight it may secure, is manifestly to obtain tolls for the use of its bridge; and the law does not require the railway companies to keep up such an arrangement with the bridge company, in order to protect its interest in securing tolls for its bridge.

11. SAME—TRANSPORTATION CHARGES—TOLLS.

Where the charter of a bridge company makes its bridge and approaches thereto, such as it had authority to construct, a public thoroughfare or highway for the use of which by railroads, or street cars, wagons, vehicles, animals, and foot-passengers it was authorized to charge "reasonable tolls," for

the collection of which suitable toll-gates could be established, the word "tolls," as used in such a charter, is strictly applicable to charges for the use of its highway, rather than to compensation for transportation services which the bridge company may perform or be permitted to render.

12. SAME—CONSTRUCTION OF CHARTER.

Where the charter of a bridge company confers upon it the franchises and powers of building, maintaining, and operating its bridge and approaches, designated as its terminal facilities, such franchises and powers do not, in and of themselves, constitute the bridge company a common carrier of property; on the contrary, they are appropriately confined to the erection, operation, and maintenance of a thoroughfare or public highway, open to the use of others, common carriers and private parties, upon making compensation therefor in the shape of "reasonable tolls."

13. SAME.

The charter powers of said company, neither expressly nor by any clear implication, confer upon it authority, "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor;" nor do they in any way constitute said company a common carrier, the rule of construction applicable to such charters being that "no power is conferred upon a corporation which is not given expressly, or by clear implication."

14. SAME—CONNECTING CARRIERS—INTERCHANGE OF TRAFFIC.

Where the charter of a railroad company provided "that any and all such railroad or railroads hereafter constructed may connect and join with the road hereby contemplated," the connection thus authorized is a physical and not a business connection, and it does not require an interchange of traffic at the point of junction.

15. SAME—COMBINATIONS TO PREVENT CONTINUOUS CARRIAGE.

The seventh section makes it unlawful for any common carrier, subject to the provisions of the act, "to enter into any combination, contract, or agreement, express or implied, to prevent, by change of time-schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination," etc. It is no violation of said section for a railroad company to enter into contracts with other companies for the establishment of through routes, and through rates, for the continuous carriage of interstate traffic. Such contracts are in nowise inconsistent with the things forbidden by said section.

16. SAME—CONNECTING CARRIERS—REASONABLE, PROPER, AND EQUAL FACILITIES.

The second clause of the third section provides that "every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines," etc.; but neither this nor any other provision of the law requires of the common carrier of interstate commerce the duty of either forming new connections, or of establishing new stations for the reception and delivery of freights. The act to regulate commerce deals with such common carriers as it finds them, and leaves to them full discretion as to what extensions they will make of their lines, the connections they may form, and the yards and depots they may choose to establish. When railroad companies, in compliance with their charter obligations, have provided themselves with convenient, suitable, and ample stations and depots for the accommodation of their business, the law imposes upon them no duty, either to the public or other railroad lines, of making new stations, yards, or depots, even though such additional constructions might be for the convenience of the public or of other carriers. Congress has certainly not undertaken—even if it possessed the power—to deal with such matters.

17. SAME.

When a new railroad makes a physical connection with an old railroad at a point other than the established yard or depot of the old road, but neither company has any yard, station, depot, or ground, at the point of connection, nor any buildings, sheds, or platforms there for the reception and accommodation of freights to be handled and exchanged at that point, nor any clerks or employes stationed there for the inspection of cars, reception of freights,

etc., an interchange of traffic at such a point cannot be made in a proper and convenient way to either company; and no authority is conferred upon the commission or upon this court to compel the old company to provide at said point of connection the same or equal facilities which it had previously provided at its regular, established yards and depots.

18. **SAME.**

Where a new railroad makes a physical connection with an old railroad, at a point other than the established yard or depot of the old road, and there are no facilities at said connection for receiving, forwarding, or delivering freight, individual shippers or consignees of freight have no right to require the old company to receive or deliver their traffic at such point of connection; and the new company, or other companies using its tracks, cannot properly demand or require of the old company to concede to it or them rights and facilities which the old company is under no obligation or duty to grant or provide for individual owners or shippers of interstate commerce. This would be conferring upon common carriers engaged in transporting interstate traffic rights and privileges superior to those intended for the benefit of such commerce itself. The law was not designed to advance the interests of carriers, but was intended for the benefit and advantage of the commerce they transported; and the provisions of the act all look to that as its object and purpose.

19. **SAME—UNDUE OR UNREASONABLE PREFERENCES.**

The fact that a railroad company interchanges traffic with certain railroads, at its regular, established yard or depot, (where it has provided all reasonable, proper, and equal facilities for that purpose,) and refuses to interchange traffic with a new road at a point of connection where no such facilities exist, does not constitute any "discrimination," or any "undue or unreasonable preference or advantage," in favor of the railroads with which such interchange is made. The third section of the act does not mean that whatever facilities a railroad company may furnish or provide for the interchange of business with connecting lines at any one place, (such as its regularly established and properly equipped depot,) it is bound to provide for any and all other railroads at such other and different points as they may select in making their connection. On the contrary, said section means that where a railroad subject to the provisions of the act has provided and established at any given place its facilities in the shape of yards, stations, and depots for the interchange of traffic, or for the receiving, forwarding, and delivering of passengers and property, and there affords such facilities to some of its connecting lines, it shall not deny to other connecting lines at that point the same proper, reasonable, and equal facilities.

20. **SAME.**

It by no means follows because certain facilities for the interchange of freight are furnished by a railroad to another connecting line or lines at one point, upon certain terms, conditions, and considerations, and where ample accommodations for the transaction of such business are provided and maintained at the joint expense of the companies using them, that another company, making a physical connection with the road furnishing such facilities at another, different, and distant place is entitled to demand at said different point of connection the same or equal facilities. The company making the physical connection, at a point other than that at which the established road has already provided its facilities, and conducts its interchange with other connecting lines, cannot demand or require an interchange at such point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought. It cannot rely upon the terminal facilities at another point of the road with which it has formed the physical connection; nor can it compel the road with which the connection is made to join with it in the expense of providing at that point the facilities necessary and proper for the interchange.

21. **SAME—SIMILAR OR DISSIMILAR CIRCUMSTANCES.**

No provision of the act confers equal facilities upon connecting lines, under dissimilar circumstances and conditions. On the contrary, even as to interstate commerce itself, the distinction is recognized throughout the law between discriminations and preferences which are just and reasonable and those which are unjust and unreasonable, according as they are made or given under similar or dissimilar circumstances and conditions. All discriminations and preferences are not forbidden or made unlawful, but only such as are un-

just, or undue, or unreasonable. In each and every case, therefore, the question whether a discrimination is unjust, or a preference is undue or unreasonable, either as to the common carrier or the commerce it may transport, involves a consideration of the circumstances and conditions under which such discrimination or preference is made or given.

22. SAME—TERMINAL FACILITIES—CHANGE OF CONNECTING POINT.

An interchange of traffic at a new point of connection between railroads, where there are no buildings, sheds, platforms, or other facilities for the proper care, protection, and handling of freight, and no clerks or employes stationed there to look after and attend to the business, cannot possibly be carried on without requiring the old road to concede the use of its track and terminal facilities to the new road, or without imposing upon the old road the trouble, inconvenience, and expense of handling the traffic interchanged between them; and neither the commission nor this court has any authority to require the old road to concede the use of its tracks and terminal facilities in order to accomplish an interchange of traffic; nor can this court or the commission impose upon the old road the duty of making such interchange at its own expense, over its own tracks, with its own engines, at its own yard, and with its own employes. Such interchanges between railroads are arranged by mutual agreements, fixing the compensation to be paid for services, and for the use of improvements, and providing for "prorating" the expense incident to such interchange. But if the parties cannot themselves agree upon such terms, neither this court nor the commission can make an agreement for them, under the existing law, and under circumstances such as exist in this case.

23. SAME—DISCRIMINATION.

The provision in the third section of the act, to the effect that a common carrier shall not be required "to give the use of its tracks and terminal facilities to another carrier engaged in like business," is a limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities for the interchange, or for the receiving, forwarding, and delivering, of traffic to, from, and between connecting lines; and therefore it is left open to any common carrier to contract, or enter into arrangements for the use of its tracks and terminal facilities, with one or more connecting lines, without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in, such arrangements. No common carrier can therefore justly complain of another that it is not allowed the use of that other's tracks and terminal facilities upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines.

24. SAME—TRANSPORTATION OF INTERSTATE TRAFFIC—RATES.

The first section of the act provides that all charges for services rendered by common carriers subject to the provisions of the law "shall be reasonable and just," and prohibits and declares unlawful "any unjust and unreasonable charge." This is the sole requirement of the law upon the subject of rates which common carriers, subject to the provisions of the law, may demand for the transportation of interstate traffic.

25. SAME—THROUGH ROUTES AND RATES.

Arrangements in respect to through freight traffic and joint through rates or charges, as well as the forms of bills of lading, and the apportionment to be made of such joint traffic rates, and of losses or damage to freight in course of transit, are all matters of private arrangement. Such arrangements, which usually include the reciprocal interchange of cars, and the use of each other's tracks and terminal facilities, are prompted by considerations varied and complex. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases, and with other connecting lines, they might be prejudicial and injurious to the interest of one or both; and companies in the latter situation cannot properly claim, as matter of right, what the former have acquired under and by virtue of private contract or arrangement.

26. SAME—TRAFFIC ARRANGEMENT—COMMON LAW.

At common law, the refusal of a common carrier to make through traffic arrangements at or upon joint through rates, with one connecting railroad company, such as it makes or enters into with another connecting line, does not constitute any undue or unreasonable discrimination in charges or facilities.

27. SAME—ACT OF 1866.

Section 5258, Rev. St. U. S., (embracing act June 15, 1866,) imposes no duty; it merely permits or authorizes the carriage of traffic from one state to another, and, to that end, the formation of continuous lines by mutual agreement. It confers no power to compel a railroad company to make through routes and through rates with one connecting line because it has, by agreement, made them with another.

28. SAME.

It is clear that from the provisions of section 6 of the act two or more common carriers may lawfully enter into contracts or agreements for the establishment of through routes at or upon joint through rates; because copies of such contracts and agreements, and of the joint tariffs of such carriers, are required to be filed with the commission. If, in the exercise of the right thus impliedly, if not expressly, recognized, a common carrier, by private arrangements, forms a through route, and establishes joint through rates, with certain connecting lines, it cannot be compelled to concede to all other connecting railroads the same or equal through rates, on traffic which the latter may offer for transportation.

29. SAME.

The act does not undertake to create between connecting lines such an agency or *quasi* partnership relation as is necessarily involved in agreements or arrangements for the establishment of through routes and the making of through rates. As such arrangements exist by contract, express or implied, the fact that a common carrier enters into them with one or more connecting lines does not impose upon such carrier the duty or obligation to make the same or like contracts with all other lines.

30. SAME.

No authority is conferred upon common carriers of interstate commerce to issue through tickets to passengers, or through bills of lading for property, at through rates, over connecting lines, in the absence of such arrangements between the companies.

31. SAME—ENGLISH ACTS.

The commission is not invested with authority to establish through routes, nor to fix through rates, between connecting lines. The English act of 1873, amendatory of the act of 1854, did confer such authority upon the English commission; but our act to regulate commerce contains no such provision, and confers no such authority.

32. SAME—RIGHTS OF CONSIGNORS TO ROUTE SHIPMENTS.

An individual shipper or consignor cannot legally require a railroad company to send a shipment, by a particular route, beyond the company's line, at the same or equivalent through rates which such company may have established with other connecting lines; and what the individual shipper of interstate commerce may not lawfully demand, common carriers engaged in transporting such commerce may not lawfully require, of connecting lines.

33. SAME—THROUGH AND LOCAL TRAFFIC—DISCRIMINATION.

In the absence of through traffic arrangements between two railroad companies, the one has the right to treat freights tendered to it by the other as local business, and to charge for the transportation thereof its local rates to destination; and in doing so no discrimination is made against the other company on the traffic it carries; nor does the company charging local rates on such freights make or give any undue or unreasonable preference to other lines, or to the traffic they handle, with whom it has agreements for through routing, and at through joint rates, which may be lower than its local rates to the same points; because the service in the two cases is not the same, or identical.

34. SAME—OBLIGATION OF CONTRACTS.

Neither the act to regulate commerce, nor the act of June 15, 1866, (Rev. St. U. S. § 5258,) was ever intended to invade the domain of private contracts between common carriers, which were valid when made, and are not in conflict with the provisions of the law. The observance of good faith between parties, the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences, than the public policy sought to be established in the facilitation of commercial intercourse among the states, which the act of June 15, 1866, aimed to promote.

85. SAME—CONSTRUCTION OF ACT.

The law should be as liberally construed in favor of commerce among the states as its language will permit; but when complaint is made, or relief is sought, solely or mainly in the interest of the common carriers engaged in the transportation of such commerce, the act complained of, or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred. And where the complaining carriers are not in a position to commend themselves to the favorable consideration of a court of equity, no strained construction of the law should be made, in order to afford them, or either of them, the relief they seek at the hands of the court.

86. SAME.

Under the terms and operations of a contract made by a bridge company and three railroad companies, the railroad companies secured and enjoyed all reasonable, proper, and equal facilities for the interchange of cars and traffic between them, which interchange was conducted for many years at the regular, established yard or depot of one of them, and the expenses of such interchange were shared by them in certain proportions, fixed by contract. After the passage of the act to regulate commerce, one of the railroad companies voluntarily abandoned those facilities, and changed its business to another bridge,—not in the interest of the public, nor of the interstate commerce it handled, but for its own private benefit and advantage,—and then sought to compel the company (at whose yard the interchange of traffic had been conducted) to allow such interchange at a new point of connection, and to afford at such point facilities equal to those which the applicant had voluntarily abandoned. *Held*, that the application ought not to be granted.

87. SAME—POWERS OF CONGRESS.

Possessing such sovereign and exclusive power over the subject of commerce among the states, it is difficult to understand why congress may not legislate in respect thereto, to the same extent, both as to rates and all other matters of regulation, as the states may do in respect to purely local or internal commerce; but the court is not called upon in the present case to say what would or would not come within this regulating power, for the existing law does not undertake to prescribe anything more upon the subject of rates than that they shall be reasonable and just; and it does not undertake to require a common carrier, subject to its provisions, to establish through routes and through rates with all connecting lines, merely because it may have done so with one of them.

In Equity. Proceedings to enforce order of interstate commerce commission.

Ramsey, Maxwell & Ramsey, Bullitt & Shield, and E. F. Trabue, for petitioner.

Lytleton Cooke and Ed. Baxter, for respondent.

Before JACKSON and BARR, JJ.

JACKSON, J. On February 10, 1888, the Kentucky & Indiana Bridge Company, a corporation created by the laws of Kentucky and Indiana, owning and operating a bridge across the Ohio river between Louisville and New Albany, and claiming to be a common carrier of interstate commerce, filed its petition before the interstate commerce commission, against the Louisville & Nashville Railroad Company, alleging as the ground of its complaint that said railroad company, in violation of the provisions of the act to regulate commerce, approved February 4, 1887, and in combination and conspiracy with the Louisville Bridge Company, a corporation owning and operating the only other bridge across the Ohio river at Louisville, and with other railroad companies interested in and using said last-named bridge, for the purpose of preventing or obstructing the transfer of traffic and freight over petitioner's bridge, had

refused, and was still refusing, to interchange traffic with, or to receive from petitioner or the railroad companies using its bridge, cars or freight tendered said Louisville & Nashville Railroad Company, for transportation over its line or lines southward, or to deliver to petitioner, or any railroad company using its tracks and bridge, freights arriving by the Louisville & Nashville Railroad at Louisville, for or consigned to points on petitioner's said railway, or to any railroad connecting therewith at New Albany, although said Louisville & Nashville Railroad Company afforded such facilities for the interchange of traffic to said Louisville Bridge Company, and to the railroads north of the Ohio river using that bridge. The point of connection between petitioner's track and that of the Louisville & Nashville Railroad, at which said interchange of traffic was demanded and refused, was at Seventh street and Magnolia avenue, in the city of Louisville. The prayer of the petition was "that the defendant, (the Louisville & Nashville Railroad Company,) be required, by the order of the commission, to interchange traffic with the petitioner and with the railway companies using its railroad at said point of connection at Seventh street and Magnolia avenue, and to receive from petitioner and said railway companies using its railroad all freight tendered by it or them to said defendant for transportation to points on or beyond, and by way of its railroad or railroads, and to deliver to petitioner and to the railroad companies using petitioner's railroad, at said point of connection, all freights arriving at Louisville over defendant's railroad, and consigned to petitioner or to railroad companies using petitioner's railroad, or to points on the line of petitioner's railroad, or the railroads using its track."

In its answer to said petition the defendant did not concede that the petitioner was a common carrier of interstate commerce. It admitted the physical connection of its own and the petitioner's tracks at Seventh street and Magnolia avenue, which connection, under its charter, it could not prevent; but denied that such connection imposed upon it, either by the state or federal law, the duty of making a business connection, for the interchange of traffic at that point. It denied that said connection was a suitable and convenient place for the interchange of cars or freight with the petitioner or railroads using its tracks and bridge, for the reason that neither itself nor the petitioner had any depot, platforms, buildings, or other suitable facilities there for the interchange of traffic, and because defendant had no clerks, agents, car inspectors, repairers, or other employes at that point, to attend to the business of such interchanges. It further denied that such interchange at said point could be made without the use of its tracks and terminal facilities by the petitioner. It further claimed that the requirement to interchange traffic at said point of connection would be unreasonable and improper, because the defendant already had in the city of Louisville four regular yards and depots, with ample facilities and accommodations for the handling and interchange of traffic arriving at or going from said city. That its main yard and depot for the reception and delivery of freight was at Ninth street and Broadway, in the city of Louisville, where it interchanged traffic with the Louisville Bridge Company, and the railroads north of the Ohio river

using that bridge, and where it had ample accommodations and an adequate force of clerks, agents, and employes to transact the business, and to make all exchanges of traffic. The defendant further set up the fact that, in 1872, it had entered into a written contract with said Louisville Bridge Company, and with the Jeffersonville, Madison & Indianapolis Railroad Company, and the Ohio & Mississippi Railway Company, under and by virtue of which it had agreed to interchange freights and traffic with said railroad companies, and any other company using said bridge, upon certain terms, more favorable to itself, than the Kentucky & Indiana Bridge Company had or could offer, and which contract (hereafter fully set out) defendant felt was still obligatory and binding upon it. For these and other reasons set forth in its answer the Louisville & Nashville Railroad Company claimed that it was not discriminating against petitioner, and was justified in not acceding to its demand for an interchange of traffic at the Seventh street and Magnolia avenue connection, as such interchange with petitioner at that point would entail upon it extra expense, inconvenience, and trouble, and compel it to violate its contract and obligations with the Louisville Bridge Company.

On the issues thus made, testimony, oral and written, was presented, and arguments were heard before the interstate commerce commission, which, on August 2, 1888, rendered its decision in the premises as follows:

"This case having been heretofore submitted on the evidence, and on written and printed briefs, and having been maturely considered, and the commission now finding that complainant is a common carrier; and that, as such, defendant is bound and obliged by law to give to it equal facilities for the interchange of traffic to those it affords to other common carriers; that defendant cannot lawfully refuse to receive traffic which is brought to it over the bridge of the complainant, on the ground that the railroad company bringing it had contracted with defendant to bring all its traffic across the Ohio river at this point on the Louisville bridge; and that the point of connection of complainant's line with defendant's road in the city of Louisville is a suitable point at which defendant should receive traffic for and from complainant: It is now ordered that the complaint be, and the same is hereby, sustained, and that defendant cease from refusing to receive from complainant and the carriers using its track the traffic brought and offered to it at the point of connection aforesaid. It is further ordered that defendant allow and afford to complainant, as a common carrier, at that point, the same equal facilities which it affords to other common carriers at the points of connection with their lines, respectively. And it is further ordered that a notice embodying this order be forthwith sent to the defendant corporation, together with a copy of the report and opinion of the commission herein, in conformity with the provisions of the fifteenth section of the act to regulate commerce."

Notice, embodying the order of the commission, together with a copy of its report and opinion in the premises, was promptly sent to and received by the Louisville & Nashville Railroad Company; and thereafter, on the 12th day of September, 1888, the Kentucky & Indiana Bridge Company tendered to the Louisville & Nashville Railroad Company, at said point of connection, (Seventh street and Magnolia avenue in the city of Louisville,) a Cincinnati, Hamilton & Dayton car, No. 13,082, from Cincinnati, Ohio, via the Ohio & Mississippi Railway, loaded with ma-

chinery, consigned to Columbia, Tenn., a point on the Nashville & Decatur Division of the Louisville & Nashville Railroad, which the latter declined to receive. The general freight agent of the Kentucky & Indiana Bridge Company, in making tender of this car, addressed to T. J. Kean, the agent of the Louisville & Nashville Railroad Company, under date of September 12, 1888, the following note:

"DEAR SIR: Cincinnati, Hamilton & Dayton car 13,082, from Cincinnati, via Ohio & Mississippi Railroad and the Kentucky & Indiana Bridge Company, containing machinery for Columbia, Tenn., is now standing on track connecting Louisville & Nashville Railroad and the Kentucky & Indiana Bridge Company's belt line, at Seventh street and Magnolia avenue, and convenient for your engine to get hold of it. The regular billing for this car has been sent to your office by the Ohio & Mississippi people, in the usual manner. Please say if you will accept and forward this freight."

The billing referred to in said letter, which was sent by the Ohio & Mississippi Railway to the Louisville & Nashville Railroad, was in the following form:

"(FORM 1829.)

"L. & N.—LOUISVILLE, Sept. 12, 1888.

"M. Harry Smythe, Columbia, Tenn.:

"No. 1442.

To OHIO & MISSISSIPPI RAILWAY CO., Dr.

"For transportation of merchandise from Cincinnati, 9, 12, 1888, W. B. Mem. Car 13082, C. H. D.

Address.	Package.	Description of Property.	Weight.	Rate.	Charges.
		Machinery.....	6960	15	\$10 44
		O. R., C. H. & D.....		12	8 35
		L. & N.....		53	\$18 79
		Through.....		80	

"Received payment:

"_____, Cashier.

"Way-bill, Mem. Car 13082. From Cincinnati, O., 9, 12, 1888.

"No. 1442.—C., H. & D.

LOUISVILLE, 12th, 1888.

"Received of Ohio & Mississippi Railway, the following described property, in good order except as noted:

Address.	Description of Property.	
Harry Smythe, Columbia, Tenn.	Machinery, O. R.	6960

"C., H. & D.

"Charges, \$18.79."

The car thus tendered having been declined, the agent of the Louisville & Nashville Railroad Company returned said billing to the agent of the Kentucky & Indiana Bridge Company, on the same day of the

tender. Thereupon the Kentucky & Indiana Bridge Company, on 13th September, 1888, filed its bill or petition in this court against the Louisville & Nashville Railroad Company, under the provisions of the sixteenth section of the interstate commerce act, setting out and reciting therein the said proceedings had before the commission, together with its report and order in the same, alleging that the findings of fact by said commission were correct and true, and charging that since the order of the commission in the premises was made, and notice thereof delivered to defendant, complainant had, on its own behalf, and on behalf of other common carriers using its tracks, requested said defendant to make interchange of freight with it and with said carriers, at the point of connection (Seventh street and Magnolia avenue) between petitioner's line and defendant's road in the city of Louisville, and had brought and offered to defendant, at said point of connection, freight in car-loads, coming from points beyond the state of Kentucky, and north of the Ohio river, and destined to points beyond, and south of the south line of the state of Kentucky, and had requested defendant to receive and forward the same, and had further requested defendant to afford petitioner, as a common carrier, and to the common carriers using its tracks, the same facilities for the interchange of freight which defendant afforded to other common carriers in the city of Louisville, with their lines respectively; but that defendant had refused, and was still refusing, to interchange interstate freight of any sort, or under any circumstances, with it, at said point of connection, or elsewhere in the city of Louisville, or to so interchange with any common carrier using its tracks. That defendant refused, and was still refusing, either to receive or to deliver at said point of connection, or elsewhere in the city of Louisville, any freight whatever from or to petitioner, or any common carrier using its tracks; and in all respects had violated, refused, and neglected, and would continue to violate, refuse, and neglect, to obey, in any respect, the lawful directions and requirements of said commission, as set forth in its said report and order; and would continue its refusal in any manner to interchange freight with, or to afford any facilities whatever to, petitioner, or to said common carriers using its tracks, for such interchange of traffic, or for receiving, forwarding, and delivering passengers and property between the connecting lines of the petitioner and defendant. Wherefore the petitioner prayed "that by the writ of injunction, or other proper process issuing from this court, the defendant, the Louisville & Nashville Railroad Company, may be restrained from further continuing to violate or disobey said order and requirement of said commission, and may be enjoined to render obedience to the same; and that the defendant may be so enjoined and required to interchange traffic with your petitioner, and with the railway companies using your petitioner's railroad at the said point of connection at Seventh street and Magnolia avenue, in Louisville, Ky., and to receive from your petitioner, and said railroad companies using petitioner's railroad, all freight tendered by it or them to the said defendant for transportation to points on, beyond, and "via" defendant's railroad or railroads, and to deliver to the petitioner, or railroad companies using

petitioner's railroad, at said point of connection, all freight arriving at Louisville on defendant's railroad, and consigned to the petitioner, or to said railroads using petitioner's railroad, or to points on the line of petitioner's railroad, or of railroad companies using petitioner's tracks; and for such other and further relief in the premises as to this honorable court may seem just, proper, and equitable." Upon the filing of said petition this court, in conformity with the provisions of the sixteenth section of the interstate commerce act, and to the end that a speedy hearing and determination of the matter in controversy might be had, issued its order, directing defendant to be served with a copy of said petition, and requiring it to make its response or defense thereto on the 3d day of October, 1888, at which time the defendant appeared and filed its answer, which is quite lengthy, and sets up various matters and grounds of defense to the relief sought.

Respondent, after admitting petitioner's corporate capacity, sets out the acts of Kentucky and Indiana, under and by virtue of which it was organized, and certain provisions of its amended and original charter, showing the extent and character of its corporate powers and franchises, which respondent alleges constitute petitioner nothing more than a bridge company, having no right as a common carrier whatever, and only authorized to demand and receive tolls for the use of its bridge and terminal tracks connected therewith. Respondent denies that petitioner is either *de jure* or *de facto* a common carrier of interstate commerce, and disputes the correctness of the commission's finding of fact or conclusion of law on that question. Respondent denies that petitioner, as such carrier, had tendered it any interstate freight or passengers for transportation over respondent's road since the order of the commission. In that connection, and as showing the character in which petitioner handles the freight or traffic which it sought to have interchanged at said point of junction in Louisville, respondent states that petitioner, on September 29, 1886, entered into a written contract with the Ohio & Mississippi Railroad Company, whose road enters Louisville from the north side of the Ohio river, under and by the terms of which the latter was allowed for a period of 20 years, and upon the payment of an annual rental by way of toll, "to run its locomotives, cars, and trains over petitioner's bridge and approaches;" said Ohio & Mississippi Railroad Company agreeing on its part "to carry and transport over the said bridge, approaches, and railway tracks all of its locomotives, cars, freight, passengers, mail, express matter, and everything else carried or transported by it on its own line of railroad, destined or consigned to or from Louisville, and to or from points which require their passage over the Ohio river at or near Louisville;" "the interchange of freight business at Louisville and New Albany between said [Ohio & Mississippi] railway company and any connecting road, shall be done over the tracks of the bridge company, between the south approach to its bridge and the tracks of such connecting road;" and that, by the fourth clause of said contract, petitioner agreed to transfer cars from the Ohio & Mississippi Railway Company's transfer-yard south of Bank street, in Louisville, to respondent's railroad, or the Ches-

apeake; Ohio & Southwestern Railroad, at a switching charge of one dollar per car.

Respondent further states that on June 21, 1887, the petitioner made and entered into a written contract with the Louisville Southern Railroad Company, whose road enters Louisville from the south, by the terms of which petitioner had leased to said railroad company for the period of 99 years the equal right to possess and own, in common with petitioner, for railroad purposes, the railroad right of way, road-bed, main and side tracks, and switches, appurtenances, and fixtures possessed or owned, or hereafter possessed or owned, by petitioner, on the south side of the Ohio river, between Magnolia avenue and the yard of said Louisville Southern Railroad Company in Louisville; that by said contract it was further agreed that petitioner and said railroad company should construct a line of track, with the necessary switches and sidings, eastwardly along Magnolia avenue, to a connection with the track of respondent, at or near the intersection of said Magnolia avenue and Seventh street, said connection to be constructed and maintained at the joint expense of petitioner and said Louisville Southern Railroad Company, and to be operated by the latter in the manner stipulated; that by the eighth clause of said contract the Louisville Southern Railroad Company agreed to provide and keep a sufficient number of suitable switching-engines on hand, and to handle promptly all freight cars to be moved between petitioner's transfer tracks in Louisville and the railroads of respondent and the Chesapeake, Ohio & Southwestern, at a charge or switching rate to be fixed by the parties to said contract, which charge, or the gross revenue thus obtained, was to be divided between petitioner and the said railroad company in the proportion of 55 per cent. to the latter and 45 per cent. to the former, except as to the switching charges on cars of the Ohio & Mississippi Railway Company, which petitioner had, by its contract of September 29, 1886, agreed to transfer at one dollar per car. The Louisville Southern Railroad Company was to make no charge for switching such cars of the Ohio & Mississippi Railway Company, but the switching charge of one dollar for transferring the cars of that company was to be paid wholly to petitioner.

Under the operation of said contracts with the Ohio & Mississippi and the Louisville Southern Railroad Companies, respondent insists that petitioner had nothing to do with the carriage or transportation of any interstate freights coming from or destined to said Ohio & Mississippi Railway Company, except the duty of transferring the cars of said railway company between certain points south of the Ohio river, for an agreed switching charge of one dollar per car; and that by its contract with the Louisville Southern Railroad Company petitioner had assigned and transferred to the former the right to do all the switching business passing over petitioner's tracks; so that, as the result of the two contracts, petitioner had nothing at all to do with interstate freight carried either by the Ohio & Mississippi Railway Company or the Louisville Southern Railroad Company; and in respect to said freights was neither *de jure* nor *de facto* a common carrier.

Respondent further states that petitioner owned no freight cars; that it had five engines and ten passenger cars, and assumed to transfer passengers between the cities of Louisville and New Albany, but had never tendered respondent any passengers for transportation; that petitioner also assumed to carry freight, locally, between said cities, but has tendered none of such freight to respondent for transportation on its road. Respondent also states that petitioner has on several occasions procured freight cars from railroad companies, and, having loaded them on some one of the five side tracks in Louisville connected with petitioner's track, assumed to issue bills of lading therefor to points beyond Louisville or New Albany; but in all such cases the freight charges are paid to the railway companies from whom the cars were ordered or procured, and that petitioner's only charges in the matter were for bridge-tolls, and for its terminal services in switching the loaded car; said bridge-tolls varying from one and one-fourth to six cents per hundred pounds, according to classification of freight, and the switching charges varying from one dollar to three dollars per car.

Respondent admits that it is a common carrier of interstate freight and passengers, between points situated upon its railroad, but denies that it is a common carrier of such interstate traffic to or from points beyond its own railroad, or that it holds itself out to the public as a common carrier, undertaking to transport beyond its own lines. Respondent avers that it has at all times refused to engage in the transportation of either freight or passengers to or from points beyond its own lines, except where certain agreements or arrangements had been made between itself and the other railroad companies, whose roads were part of the through routes, under which agreements or arrangements certain through rates were established, and the proportions of these rates to be received by the different companies whose roads formed the through routes were agreed upon; also the proportion in which losses resulting from such through business should be borne by said companies; also the terms and conditions to be inserted in the through tickets and bills of lading; but that respondent had never entered into any such agreement or arrangement with petitioner, and was unwilling to do so, or to act under through tickets or through bills of lading, which petitioner might see proper to issue, in the absence of such agreement fixing and defining the terms and conditions of through traffic received from, or to be delivered to, petitioner. Respondent admits the proceedings had before, and the report and order made thereon by, the commerce commission, as alleged in the petition; admits that since said commission's order was made, and said notice thereof was delivered to respondent, petitioner had, on its own behalf, and, perhaps, assuming to act on behalf of the Ohio & Mississippi Railway Company, requested the respondent to make interchange of freight with it, and with carriers using its track, at the point of connection between petitioner's track and respondent's track, at Seventh street and Magnolia avenue in the city of Louisville; that petitioner had requested respondent to afford it and the common carriers using its track the same facilities for the interchange of traffic at said point of connec-

tion which respondent affords to other common carriers in the city of Louisville, at other points where their connections are made, and that respondent had refused, and was still refusing, to interchange interstate freight of any sort, or under any circumstances, with petitioner, or with any common carrier using its track, at petitioner's said point of connection. Respondent states that to accommodate certain local shippers at Louisville, whose establishments are located upon side tracks connected with the track of petitioner in Louisville, it has been, and is still, willing, without being legally bound to do so, to accept, at said point of connection, car-load freights destined to points south of Louisville, on or reached by respondent's railroad system, and to transport the same at Louisville rates proper, provided such car-load freights originate at or on local Louisville sidings, except a certain siding claimed to be owned by the Kentucky & Indiana Stock-Yard Company; that since the order of said commission the petitioner had not brought or offered to respondent, at said Seventh street and Magnolia avenue connection, any freight, in car-load lots, coming from points beyond the state of Kentucky, and north of the Ohio river, and destined to points beyond and south of the south line of the state of Kentucky, or any other interstate freight which it had requested respondent to receive and forward, except in one instance, viz., the car containing machinery, as above described, tendered on September 12, 1888, which respondent declined to receive; and respondent insists that in declining to receive said car, and in refusing to interchange traffic with petitioner at said point of connection, it has not violated any lawful order or requirement of said commission. Respondent claims that the order of said commission in petitioner's favor is not lawful, and it is not therefore bound to obey the same. Respondent denies the truth and correctness of said commission's findings of fact in several material particulars. It denies that petitioner is either *de jure* or *de facto* a common carrier of interstate commerce, as found and reported by the commission. It denies that petitioner, as such carrier, has tendered respondent any interstate freight or passengers, for transportation over its road, since the order of the commission. It denies that petitioner, even as a *de facto* common carrier, is now, or was at the time of instituting said proceedings before the commission, engaged in interstate traffic between points south or east of Louisville, or north of New Albany, and avers that the Ohio & Mississippi Railway Company was the only common carrier engaged in said interstate traffic handled or switched over petitioner's track.

In this connection respondent says "that wherever petitioner has undertaken to load cars upon its sidings, either in New Albany or Louisville, for points in other states, it has procured the cars from railroad companies owning the lines for which said freight was destined; and the charges for the transportation of such freight were and are paid to said railroad company or companies furnishing the cars, the said bridge company (petitioner) rendering no service, and making no charge, in regard to said cars (or freight) except charges for switching them," and receiving its regular bridge-toll, if the cars passed over its bridge. Respondent denies that petitioner's connection with its track at Seventh street and Magnolia avenue, in Louisville, is a proper, suitable, and conven-

ient point for the interchange of traffic between respondent and petitioner, or with common carriers using the latter's tracks, as found by the commission. Respondent states that there are no buildings at that point for clerks, porters, and other employees, needed and required in carrying on an interchange of traffic there; that such interchange at that connection would entail extra expense and trouble upon respondent, would involve the use of its terminal facilities, as all cars interchanged at that point would have to be hauled from there, over respondent's main track, to its yard and freight depot at Ninth and Broadway, in Louisville, and if all the common carriers who might choose to use petitioner's tracks were to have an interchange of traffic at that point it would be very inconvenient and unsuitable, etc. Respondent denies the correctness of the commission's finding that it refuses to afford petitioner, or common carriers using its bridge, all proper, reasonable, and equal facilities for the interchange of traffic such as respondent furnishes to other carriers of interstate commerce at the city of Louisville, and states that "respondent is and has always been willing to receive from and deliver to petitioner, at respondent's regular freight depot at Ninth and Broadway streets, in Louisville, any freight that may be consigned to or by petitioner, upon being paid therefor Louisville rates proper;" and further says that "the facilities afforded by respondent at said depot are reasonable and proper in themselves, and are equal to the facilities which respondent affords to all other Louisville consignees or consignor; and as petitioner and respondent have made no agreements or arrangements for doing through business of any kind, petitioner is a mere local Louisville customer, so far as respondent is concerned, and is therefore entitled to no other facilities than those which respondent furnishes to all of its other Louisville customers." Respondent further shows that it has three freight-yards in the city of Louisville, and a fourth near thereto, which are fully adequate for the transaction of all its business, both freight and passenger; that its main or principal yard and depot is located at Ninth and Broadway, where the traffic crossing the Ohio river at Louisville is interchanged with the various railroads leading north from Louisville, and where local freight brought from the south, destined to Louisville, or received at Louisville destined to points south, is handled. Respondent says such is the capacity and commodious character of this yard and depot that six trains, of eighteen cars each, making an aggregate of one hundred and eight cars, standing upon six tracks, can be loaded and unloaded at the same time under shelter, and that respondent keeps at that point a large force of clerks, inspectors, porters, etc., for the transaction of its freight business. Respondent claims that, having under its charter obligations established four ample and adequate yards and depots at Louisville for the transaction of its business, and where its interchanges with other carriers are made, and both through and local freights are received and delivered, it cannot be required to establish or furnish other and additional facilities at Seventh and Magnolia avenue, for the convenience or accommodation of petitioner or the carriers using its tracks. Respondent states that the lines of railroad owned, leased, controlled, and operated by it extend from Cincinnati to Louisville, Nashville, Chattanooga, Decatur, Montgomery, Mo-

bile, New Orleans, and other southern points; that from Louisville to Cincinnati its road, located on the south side of the Ohio river, forms a competing line with the Ohio & Mississippi Railway, extending from Louisville to Cincinnati, on the north side of said river; that going south, or to Chattanooga and points south of there, its road is in active competition with the Cincinnati Southern and the Louisville Southern Railroads; that prior to 1872 freight and passengers crossing the Ohio river at Louisville had to be transferred through the city, and ferried across the river, which occasioned serious delays and extra expense to traffic and travel, to remedy which the Louisville Bridge Company was incorporated in 1856, by the legislature of Kentucky, for the purpose of constructing a railroad bridge across the Ohio river at or near the city of Louisville; that the charter of said Louisville Bridge Company was so amended in 1862 as to authorize it to contract with any incorporated railroad company, "to warrant the annual profits of the bridge to be built by said company shall be equal to keeping the bridge in repair, and of its operation, and that the net earnings shall be equal to six per cent. on a cost of \$1,000,000."

Said bridge company was further authorized to contract, at an agreed sum or rate, with any railroad company, for the annual use of said bridge by the cars or for the purpose of said railroad company; and it was made lawful for any railroad company incorporated by the laws of Kentucky to subscribe to the stock of said bridge company, and to make the guaranties and agreement as to the earnings of the bridge, authorized by the act. That by an act of congress approved February 17, 1865, (amending an act approved July 14, 1862, declaring the bridge across the Ohio river at Steubenville to be a lawful structure,) the Louisville & Nashville Railroad Company and the Jeffersonville, Madison & Indianapolis Railroad Company were authorized to construct a railroad bridge over the Ohio river at the head of the falls of the Ohio, subject to all the provisions of said act of July 14, 1862; and the bridge so to be constructed was declared "to be a lawful structure." That under this legislation, state and federal, the capital stock of the Louisville Bridge Company was subscribed for by various parties, individuals, and corporations, including the Jeffersonville, Madison & Indianapolis and the Louisville & Nashville Railroad Companies,—the subscription of the latter being for \$300,000,—and the bridge was constructed; and that thereafter, upon its completion, on June 5, 1872, a written contract was entered into between said Louisville Bridge Company as party of the first part, the Jeffersonville, Madison & Indianapolis Railroad Company of the second part, the Ohio & Mississippi Railway Company of the third part, and the Louisville & Nashville Railroad Company of the fourth part, stipulating, among other things, as follows:

"*First.* That the second, third, and fourth parties agree, respectively, to use said bridge. *Second.* The first party agrees that the tolls and charges over and for the use of said bridge and its tracks, in the transportation of freight, passengers, mails, and other goods received from or delivered to the roads of second, third, and fourth parties, per ton, or per passenger, or per car, en-

gine, or other means of transfer, over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge; paying a dividend of six per cent. upon its capital stock of \$1,500,000; the interest upon said bonds (of the bridge company) as the same matures; a sinking fund, sufficient to pay off said bonds of \$800,000 at maturity; the amount necessary to keep up the corporate organization of the first party; and such taxes as may be chargeable against such bridge company on said bridge or other property pertaining thereto, or otherwise.' *Third.* That said charges and tolls shall, from year to year, be reduced in proportion to the reduction of interest on said bonds, by the operation of the sinking fund. *Fourth.* That the tolls and charges shall always be the same to each of the second, third, and fourth parties. *Fifth.* That the tolls and charges to other railroads or railroad companies, for like use of said bridge and the approach owned by the first party, shall not be less than those charged to or incurred by the parties hereto. *Sixth.* That all such tolls and charges paid by other railroads shall be applied to, and form a part of, the fund hereinbefore provided for the payment of expenses, sinking fund, interest, dividend, and taxes, the same as if paid by the second, third, and fourth parties. *Seventh.* That in the event the bridge should by any casualty be injured so as to render it useless or dangerous, and it should become necessary to rebuild the whole, or any material part thereof, involving an expenditure greater than could be realized from a judicious amount of guarantied rates and charges, 'then an additional number of bonds were to be issued, to yield a fund sufficient to renew and repair the bridge; and in that event the tolls and charges were to be increased, so as to provide for the payment of such additional bonds, and to provide a sinking fund, to retire them at maturity.' *Eighth.* The second and third parties (the Jeffersonville, Madison & Indianapolis, and Ohio & Mississippi Railway Companies) each severally agreed 'that it will pass over the said bridge all the freight, passengers, mails, express matter, and other goods carried on and over their railroads to and from Louisville, and to and from points which require their passage over the Ohio river at or near Louisville, during the existence of this agreement,' and will pay punctually to the first party the tolls and charges stipulated for the use of said bridge and approaches thereto owned by the bridge company. *Ninth.* The party of the fourth part (the Louisville & Nashville Railroad Company) 'covenants with each of the parties of the first, second, and third parts, their respective successors and assigns, that it will deliver to said party of the first part to be passed over the said bridge, or to the parties of the second or third parts, or to such other railroad company or companies as may, for the time being, be transporting freight, passengers, mails, express matter, and other goods over said bridge, all the freight, passenger, mail, and express matter, and other goods carried on and over its road, or any part thereof, destined for Jeffersonville, in the state of Indiana, or any other points which require their passage over the Ohio river at or near Louisville, during the existence of this agreement, and will charge on said traffic, in addition to its rates for transportation service, the then established rate of tolls and charges hereinbefore provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party.' *Tenth.* The north approach to said bridge, being owned by the second party, (the Jeffersonville, Madison & Indianapolis Railway Company,) and the line of the third party, entering Jeffersonville, being connected therewith, it was agreed between said parties that the third party would use said approach to and from said bridge in going on and over the same, and that all the trains, cars, and engines passing over said approach and bridge 'shall be under the control and direction of the second party, and that whatever rules are prescribed for the government of the trains,

cars, and engines of the second party in the premises shall be equally applicable to the trains, cars, and engines of the third party, each being dealt with alike, and the second party covenants to furnish all needful and sufficient engines for the service mentioned, and at all times to transfer, with the same promptness and care, over the said bridge, the trains, cars, engines, and traffic of the third and fourth parties that it does the trains, cars, engines, and traffic received from or to be delivered to its own road,—the intention being that each of the parties shall enjoy equal facilities over said approach and bridge.' *Eleventh.* That 'for the service aforesaid of said engines of the second party, and the conducting and management of the same, and of cars, trains, and business over said approach and bridge, the second party shall be allowed a reasonable compensation, to be apportioned between the parties hereto in proportion to the services to each, per ton, and per passenger, or per engine, or other means of transportation, as the parties may hereafter agree.' *Twelfth.* That 'if any difference shall arise between the parties, or any of them, as to the construction of any of the provisions of this contract, or the mode of performance, the same shall be submitted to arbitration; the qualification of arbitrators, and an umpire, and the obligation to perform the award by them made, to be the same as hereinbefore provided.' *Thirteenth.* That 'this contract shall continue in force and operation until it shall be terminated by some one of the parties thereto, giving notice in writing to the other parties, of its intention to terminate the same at the expiration of two years from the giving of such notice; at the expiration of which two years the same shall terminate as to all parties hereto included in such notice.'"

Respondent further states that since said contract was entered into, the Louisville, New Albany & Chicago Railway Company and the Louisville, Evansville & St. Louis Railroad Company have been allowed to use said bridge and its approaches in substantial accordance with the provisions of said contract; that the rates of tolls and charges upon said bridge have been continually growing less per ton and per passenger, as the volume of traffic over the bridge has increased; that the dividends agreed to be paid upon the capital stock of said bridge company were, seven or eight years since, reduced from 6 to 4 per cent. semi-annually, and that the sinking fund is now sufficient to pay off the mortgage bonds of the bridge company, which mature in December, 1888; that since the construction of said bridge, and under the operation of said contract, the practice has been for the roads coming into Louisville from the north to have their freight cars switched by the Jeffersonville, Madison & Indianapolis Railroad engines across the said Louisville bridge, to the transfer-yards of respondent at Ninth and Broadway, where all cars loaded for one point in the south were put into trains, and forwarded to destination; and whenever a car contained freight destined to two or more points in the south, the freight was unloaded, assorted, and reloaded into cars destined to those points; that a similar practice or mode of conducting the traffic prevailed as to all freight coming over the respondent's road from the south, destined to points north of the Ohio river, and crossing the river at Louisville; and further, that said Louisville bridge has been and is fully adequate to transfer all traffic crossing the Ohio river at Louisville, and to do it as promptly and cheaply as it can possibly be done by any other bridge. Respondent then states that the Ohio & Mississippi Railway Company continued to use said Louisville bridge

under the terms of said contract of June 5, 1872, and to interchange traffic, under arrangements therefor with respondent, at respondent's yard and freight depot, at Ninth and Broadway, in Louisville, until February 4, 1888, when said Ohio & Mississippi Railway Company gave notice of its intention to withdraw from said contract at 12 o'clock noon of that day. Respondent says it is perfectly willing to continue to interchange traffic with said Ohio & Mississippi Railway Company, and with all other railroads reaching Louisville from the north, if they will use said Louisville bridge, and will continue to make the interchange at respondent's yard at Ninth and Broadway, which has been prepared at great expense, and where all necessary and adequate facilities are at hand; that to allow said Ohio & Mississippi Railway Company to divert its traffic from said bridge will reduce the annual revenue thereof about one-fifth, or not less than \$129,167.17 per annum, and the loss of that revenue will compel a corresponding increase in the tolls to be paid by respondent upon the traffic which it is bound to send across said bridge, causing an annual loss and injury to respondent of several thousand dollars. Respondent says that petitioner, having built a new bridge across the Ohio river, has induced the Ohio & Mississippi Railway Company to abandon the Louisville bridge and to use petitioner's bridge, and now seeks to compel respondent to interchange traffic with the said Ohio & Mississippi Railway Company, at the intersection of petitioner's track with respondent's road, at Seventh street and Magnolia Avenue, where there are no facilities for such interchange, and from which point all cars interchanged would have to be hauled over respondent's track, to its yard and freight depot at Ninth and Broadway, thus necessitating the use by petitioner of respondent's terminal facilities at Louisville. Respondent says that it cannot at said point of connection return or deliver cars to petitioner without using the latter's tracks to a greater or less extent, and that by the terms of the ordinance of the city of Louisville, granting petitioner the right to lay its tracks in said city, it is provided that before entering upon the use of petitioner's tracks respondent or any other railroad company shall pay to petitioner a *pro rata* share of the cost of constructing such tracks, and shall bind itself, by contracts with the city of Louisville, that respondent or such other railroad company will contribute its *pro rata* share towards the repair and maintenance of any additional tracks, and of any gates, approaches, culverts, bridges, trestles, or fills that may be necessary to the safe and efficient use of said tracks, and towards the maintaining of such watchmen as may be necessary to the proper guarding of street crossings, etc.; that respondent, having a sufficient number of tracks of its own for the transaction of all its business at and in said city, has no desire to use petitioner's tracks, and is unwilling to incur the hazard of litigation with the city of Louisville by even such use of petitioner's tracks as would be necessary in returning cars to it.

Respondent insists that the order of the interstate commerce commission in favor of petitioner and against respondent is not a lawful order or requirement, for the following reasons, viz.: *First*. Because petitioner

is neither *de jure* nor *de facto* a common carrier of interstate commerce. *Second.* Because respondent is required to interchange traffic with common carriers using petitioner's track at said point of connection at Seventh street and Magnolia avenue, when no such carriers were parties to the proceedings in which the order was made. *Third.* Because at said point of connection there are no buildings, sheds, or conveniences for the interchange of freights, and no clerks, inspectors, or other employes to attend to such interchange; while all such facilities, to an ample and sufficient extent, are provided at respondent's Ninth and Broadway yard and depot, where it interchanges with all other railroads coming into Louisville from the north side of the Ohio river. *Fourth.* Because under said order respondent is required to receive and deliver, at said point of connection, freight from and to any carrier using petitioner's track, although such carrier may have contracted with respondent to bring its traffic over the Louisville bridge, and to interchange it with respondent at its regular yard; that it will compel respondent to interchange at said connection freights which the Ohio & Mississippi Railway Company may bring across the Ohio river over petitioner's bridge, in violation of its contract with respondent and others, and, in effect, impair the obligation of that contract. Respondent submits that it cannot be lawfully required to release the Ohio & Mississippi Railway Company from the obligation imposed by said contract. *Fifth.* Because the effect of said order is to compel respondent indirectly to furnish to the public petitioner's bridge as an additional facility for the interchange of traffic crossing the river, after respondent had contributed as a stockholder in building the Louisville bridge, and secured the use of that bridge as a terminal facility at Louisville for the transfer of traffic across the Ohio river. *Sixth.* Because the effect of said order is to force respondent to enter into contracts with petitioner, and with carriers using its tracks, for the through transportation of interstate traffic to and from points beyond respondent's lines of railroad, simply because respondent has seen proper to make such contracts with other common carriers. *Seventh.* Because the effect of said order will be, not only to require respondent to receive from petitioner and all common carriers using its tracks, interstate traffic, but also to transport it at the same *pro rata* of through rates that respondent may have agreed to with other carriers; the result of which, as respondent insists, will be indirectly to establish the rates which respondent is to charge on interstate through traffic tendered it by petitioner, or by carriers using petitioner's tracks; and this respondent denies the authority of the commission, or of congress, to do. *Lastly.* Respondent submits that congress cannot require or authorize this court to execute or enforce any order that said commission may assume to make; and if the petition in this case is to be regarded as an original proceeding in this court, to enforce the supposed rights of petitioner under the act of congress to regulate commerce, and without regard to the order made by said commission, then respondent insists that the court has no jurisdiction, because the petitioner is a corporation chartered and created by the laws of Kentucky and Indiana, and respondent is a corporation also chartered and created by the laws of Kentucky.

Upon the filing of respondent's answer, all matters of fact raised by the pleadings and necessary to a proper determination of the legal questions involved were by the court referred for investigation and report to a special referee, before whom much proof was taken on both sides, and the facts bearing upon the controversy were gone into more fully than before the commission. On the 29th of October, 1888, the referee submitted his report in the premises, with all the evidence introduced. The respondent filed numerous exceptions to said report, which was presented at the same time with the hearing upon the merits. Many of respondent's said exceptions are, in the judgment of the court, well taken, and should be allowed; but without noticing or acting upon them in detail, which would unnecessarily extend this opinion, the court finds the material facts of the case as disclosed by said report, and such modification thereof and additions thereto as the evidence supporting and sustaining respondent's allowed exceptions to the same warrants, to be as follows: The Louisville & Nashville Railroad Company was incorporated by an act of the state of Kentucky, approved March 5, 1850, with power to construct "a railroad from Louisville to the Tennessee line, in the direction of Nashville;" and for the transportation of persons, merchandise, and property of any kind over or along said railroad was authorized to charge any sum, not exceeding certain specific rates. Its charter, among other things, provided that "it shall not be lawful for any other company, or any other person or persons, to travel upon or over any of the roads of said company, or to transport persons or property thereon, without the license and permission of the president and directors thereof;" but power was reserved to the state of Kentucky to incorporate thereafter other railroad companies, and it was provided (section 18) "that any and all such railroad or railroads hereafter constructed may connect and join with the road hereby contemplated." By an amendment to its charter, made in 1860, said company was authorized to "make arrangements with other companies for through freights and passage from distant points, on such terms as they may agree from time to time." Under proper legislative authority, the lines of the Louisville & Nashville Railroad Company, have since been extended, so that it now owns, controls, and operates a system of railroads running from Cincinnati, crossing the Ohio river at Newport, Ky., to Louisville, Nashville, Chattanooga, Decatur, Montgomery, Mobile, New Orleans, and other southern cities. Under the requirements of its charter, it has provided, and for many years has had in use, for the accommodation of travel and traffic at Louisville, four separate and distinct freight yards and depots, with ample buildings, platforms, switches, and other facilities, including an adequate force of clerks, inspectors, and employes connected therewith, for the handling of freight and passengers arriving at or leaving that city, which constitutes one of its main terminal points. These four yards are conveniently located; No. 1 being at First and Water streets, near the river front; No. 2 at East Louisville; No. 3 at South Louisville; and No. 4 at Ninth and Broadway streets, in the western portion of Louisville. This latter yard and depot is one of the most commodious in the United States, with every facility and convenience for the safe, rapid, and

cheap handling of traffic. Its character and capacity is correctly stated and described in respondent's answer. This yard, supplied with sufficient switches and sidings, extends southward from Broadway to Oak street, in Louisville. From Oak street to the South Louisville yard the Louisville & Nashville Railroad owns only a right of way 66 feet in width, occupied with double main tracks, with a spur switch on the east side thereof, running down Seventh street, to a work or repair shop of the company. Said four yards, with their buildings and accommodations, have been procured and constructed by respondent at a cost of about \$1,500,000, and the same are now worth that sum. From 1872 to October 21, 1887, all freight traffic coming to Louisville from railroads north of the Ohio river, and destined to points south on the line or lines of the Louisville & Nashville Railroad Company, and all freights brought by the Louisville & Nashville Railroad Company from the south, and destined to points north of the Ohio river, were interchanged by and between respondent and all other railroads entering Louisville from the north side of the river, at said Ninth and Broadway yard and depot, which was reached by connections made at Tenth and Maple street, one block west of said yard. The Louisville & Nashville Railroad Company does not engage in the business of a common carrier of interstate commerce to or from points beyond its own lines of road; neither does it hold itself out to the public as a common carrier of such interstate traffic. It has at all times refused to engage in the transportation of freight or passengers to or from points beyond its own line, except when certain agreements or arrangements have been made between itself and the other railroad company or companies whose roads were to form part or parts of the through routes to be thus established. Under the said agreements or arrangements, certain through rates for transportation over the through route or routes are established, and the proportion in which such through rates are to be divided between the different companies comprising the through route are agreed upon; also the proportion in which the respective companies shall share in the losses resulting from such through business, and the terms and conditions to be inserted in the through tickets and bills of lading issued by them respectively. The Louisville & Nashville Railroad Company has now, and for many years past has had, such traffic arrangements with railroad companies reaching Louisville from the north side of the Ohio river, and extending to the cities of St. Louis and Chicago; but such agreements not only prescribe the terms and conditions on which the business shall be transacted, and the rates prorated, but also designate the points and places on the respective railroads, between which the through route and the through rate shall apply.

Under the arrangements which the Louisville & Nashville Railroad Company now has, and has heretofore had, with the railroads entering Louisville from the north side of the Ohio river, for through routes and through rates, many points, both on the north and south sides of the Ohio river, reached by the contracting companies, are not included; and through bills of lading and through tickets on the agreed through rates

are only authorized to be issued by the respective parties to such arrangements to and from the points designated by their agreement. If the railroads north of the river, although parties to such arrangements with the Louisville & Nashville Railroad Company, bring freight to Louisville for transportation south via the Louisville & Nashville Railroad Company, in violation of the terms, conditions, and restrictions of the agreement for through route and through rate, or for points other than those embraced in the arrangement, the Louisville & Nashville Railroad Company refuses to receive and transport the same, except at local Louisville rates, treating such freight as a local Louisville shipment. In the absence of express contract, fixing the period during which such arrangements for through routes and rates shall continue, they are subject to change, modification, or abrogation on notice from any of the parties, and are actually changed or abrogated from time to time, as the interest of the companies may dictate or require. Respondent's existing arrangements or agreements with railroad companies entering Louisville from the north side of the Ohio river over the Louisville bridge, for through routing and through rating, upon agreed *pro rata* division of rates, provide and require that all such traffic shall be interchanged at Tenth and Maple streets, or between Ninth and Tenth streets, near Broadway, where respondent's main freight-yard is located, and where ample facilities have been provided for such interchange. The Louisville & Nashville Railroad Company has never entered into any arrangement with the petitioner for the interchange of interstate traffic on through routes and at through rates, and refuses to receive such freight from it, except the same be delivered at one of respondent's freight stations, where respondent will receive such freight, issue proper bills of lading therefor, and transport it upon precisely the same terms and conditions on which like kind of property is received and handled for other Louisville shippers.

It is shown by the evidence that arrangements for joint through routes and through rates which create and establish a *quasi* partnership and agency relation between the parties thereto are always, and necessarily, the subject-matter of private contract or agreement between the railway companies over whose roads the traffic is conducted, based upon various considerations,—such as the division of rates, the solvency, reliability, and promptness of the respective lines; their ability to furnish equipment and suitable facilities for the dispatch of business; their ability to deliver business to the through line, or the traffic each can furnish; the mileage rate to be paid or allowed on cars passing on or over each other's line; the method of adjusting losses; the effect upon their other traffic, etc. From 1850 to 1872 traffic crossing the Ohio river at Louisville had to be transferred by means of ferry-boats, which was attended with great expense, delay, and trouble, and often subject to serious interruptions, by low stages of water, and ice on the river. To remedy this condition of things, the Louisville Bridge Company was incorporated by the state of Kentucky, March 10, 1856, with powers to construct a railroad bridge across the Ohio river at Louisville. By an amendment to the charter,

made in 1862, the bridge company was authorized to contract with any railroad company incorporated under the laws of the state of Kentucky or any other state of the United States, to warrant the annual profits of the bridge to be built by said company to be equal to the keeping of the bridge in repair, and of its operation, and that the net earnings should be equal to 6 per cent. on the cost of \$1,000,000. It was further authorized to contract at any agreed sum or rate with any railroad company chartered by the state of Kentucky or any other state of the United States for the annual use of said bridge by the cars, or for the purpose of said railroad company; and any railroad company incorporated by the state of Kentucky was authorized to subscribe to the stock, or make the guaranties and agreements authorized by the charter. The bridge was declared to be a lawful structure by an act of congress approved July 14, 1862. This act was amended in 1865, so as to authorize the Louisville & Nashville Railroad Company and the Jeffersonville Railroad Company to construct a railroad bridge over the Ohio river at Louisville. Under these acts of legislation the capital stock of the Louisville Bridge Company was subscribed for by the Jeffersonville, Madison & Indianapolis Railroad Company, the Louisville & Nashville Railroad Company, and other corporations, and by individuals. The Louisville & Nashville Railroad Company owned \$300,000 of the stock until December, 1880, when it ceased to be a stockholder.

On June 5, 1872, upon the completion of said bridge, a written contract was entered into between the Louisville Bridge Company of the first part, the Jeffersonville, Madison & Indianapolis Railroad Company of the second part, the Ohio & Mississippi Railway Company of the third part, and the Louisville & Nashville Railroad Company of the fourth part, in which it was recited that the capital stock of the bridge company was \$1,500,000; that its mortgage debt was \$800,000, evidenced by bonds to mature December 1, 1888, bearing interest at 7 per cent., payable semi-annually. The contract provided that the second, third, and fourth parties agreed to use the bridge as covenanted therein; that the tolls and charges over and for the use of the bridge and its tracks in the transportation of freight, passengers, mails, and other goods received from or delivered to the roads of said second, third, and fourth parties per ton, and per passenger, or per car, engine, or other means of transfer over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge, paying a dividend semi-annually of 6 per cent. on the capital stock of \$1,500,000, the interest upon the bonds as the same shall become payable, a sinking fund sufficient to pay off the bonds of \$800,000 at maturity, the amount necessary to keep up the corporate organization of the first party, with its proper officers and servants, and such taxes as may be chargeable against the bridge company on said bridge or other property appertaining thereto, or otherwise; that the charges and tolls shall from year to year be reduced in proportion to the reduction of interest on the bonds by the operation of said sinking fund, and the tolls and

charges shall always be the same to each of the second, third, and fourth parties; that the tolls and charges to other railroads or railroad companies for like use of the bridge and the approach owned by the first party shall not be less than those charged to or incurred by the parties to the contract; that all such tolls and charges paid by other railroads or other railroad companies shall be applied to and form a part of the fund provided for the payment of expenses, sinking fund, interest, dividends, and taxes, the same as if paid by the second, third, and fourth parties to the contract. The parties of the second and third parts agree that they will pass over the said bridge all the freight, passengers, mails, express matter, and other goods carried on or over their roads to and from Louisville, and to and from points which require their passage over the Ohio river at or near Louisville, during the existence of the agreement, and will pay punctually to the bridge company the tolls and charges for the use by them of the bridge, tracks, and approaches owned by the bridge company.

The Louisville & Nashville Railroad Company covenanted with each of the other companies to deliver to the Louisville Bridge Company, to be passed over the said bridge, or to the parties of the second or third part, or to such other railroad company or companies as may, for the time being, be transporting freight, passengers, mails, express matter, and other goods over the bridge, all the freight, passengers, mails, express matter, and other goods carried on or over its roads, or any part thereof, destined for any points which require their passage over the Ohio river at or near Louisville, during the existence of the agreement, and will charge on said traffic, in addition to its rates for transportation service, the then established rates of tolls and charges provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party. The approach to said bridge at the north end was owned by the Jeffersonville, Madison & Indianapolis Railroad Company; and the Ohio & Mississippi Railway Company agreed with the Jeffersonville, Madison & Indianapolis Railroad Company to use said approach to said bridge in going into and over it, and it was agreed between them that all the trains, cars, and engines passing over the approach and over the bridge shall be under the control and direction of the Jeffersonville, Madison & Indianapolis Railroad Company, and that whatever rules are prescribed for the government of the trains, cars, and engines of that company shall be equally applicable to the trains, cars, and engines of the Ohio & Mississippi Railway Company, each being dealt with alike; and the Jeffersonville, Madison & Indianapolis Railroad Company covenanted to furnish all needful and sufficient engines for the service so provided for, and at all times to transfer with the same promptness and care over said bridge the trains, cars, engines, and traffic of the third and fourth parties that it does the trains, cars, engines, and traffic received from or to be delivered to its own road, it being intended that each of the parties shall enjoy equal facilities over the approach and the bridge. A reasonable compensation is provided for, to be paid to the Jeffersonville, Madison & Indianapolis Railroad Company for the service to be rendered, to be apportioned between the parties to the contract, in pro-

portion to the service to each. It is further provided that the contract shall continue in force and operation until it shall be terminated by some one of the parties thereto giving notice in writing to the other parties of its intention to terminate the same at the expiration of two years from the giving of such notice; at the expiration of two years, the same shall terminate as to all the parties thereto, included in such notice. When said contract went into operation, and to provide for the interchange of the traffic as therein contemplated, the Louisville & Nashville Railroad Company, at its own expense, constructed freight platforms and improvements therefor on the south side of Maple street, in Louisville, near Tenth street, at which point connection was readily and easily made with the tracks of the Louisville Bridge Company and the Jeffersonville, Madison & Indianapolis Railroad Company, running south from the river along Fourteenth street.

On May 22, 1873, the Louisville & Nashville Railroad Company, the Jeffersonville, Madison & Indianapolis Railroad Company, and the Ohio & Mississippi Railroad Company, designated as the parties of the first, second, and third parts, respectively, entered into a written contract, whereby the first party leased to the second and third parties a portion of the ground and terminal facilities then occupied jointly by the three parties, and situated on the south side of Maple street, in Louisville, between Eleventh and Tenth streets, and on Tenth street, where interchange of traffic had been and was being effected between them, for which the second and third parties were to pay the first party \$200 per month; the proportion of said sum which the second and third parties were respectively to pay being graduated according to the number of car-loads of freight transferred for each by the first party. Said second and third parties were also to pay the first party the sum of \$7,515.30, being one-half of the actual cost of the improvement, consisting of platforms, etc., made on said ground; the proportion which the second and third parties were to pay of said sum being 57 per cent. for the former, and 43 per cent. for the latter. The agreement further provided that when said parties of the second and third parts should pay said amount, with interest from January 1, 1873, they should be joint owners, with the first party, of said improvement, in proportion to the amounts paid towards the whole cost of the same, viz., \$15,030.58. The contract provided for the readjustment of this one-half ownership in the building from year to year, on the basis of the work done at said transfer platform, for said second and third parties, respectively. The lease was to continue for five years, after which it was optional with the first party to continue the same. The arrangement was not terminated at the expiration of five years, but was continued thereafter by the parties to the same. The Louisville & Nashville Railroad Company having, some years after the execution of said contract, changed its track-gauge to conform to that of other roads north of the Ohio river, and constructed much more commodious platforms and buildings and large yards, at Ninth and Broadway streets, about four or five hundred feet east of the Maple-Street platform, it was agreed between said parties that their interchange of traffic should take place at that

point; and it was accordingly done at said Ninth and Broadway yard and depot, until terminated by the Ohio & Mississippi Railway Company, as hereinafter stated. On May 16, 1888, the Louisville & Nashville Railroad Company and the Louisville Bridge Company entered into a written contract, which, after reciting the said contract of May 22, 1873, and that it was for the mutual benefit of the parties thereto that the location of said union (or Maple-Street) transfer platform should be changed, and the business conducted on the ground of the Louisville & Nashville Railroad Company, situated on the south side of Broadway street, between Ninth and Tenth streets, provided that the second party, and all railroad companies running cars over its bridge, subject to the right reserved to admit any other railroads not using said bridge, should have the joint use of said yards, platforms, and buildings of the first party, located at Ninth and Broadway, (designated in the record as "Yard No. 4;") that for such joint use the second party (the Louisville Bridge Company) agreed to pay a monthly rental of \$200, and, in addition thereto, such proportion of the interest at 6 per cent. per annum, upon the cost of said transfer platform and tracks, as the number of cars handled for the second party bears to the total number of cars handled. Said contract further provided that the expense of the operation of said transfer platforms and tracks (viz., labor of loading and unloading, clerk hire, maintenance, and repair, etc., premiums of insurance, and taxes which might be lawfully levied and assessed upon said property) should be divided between the parties to the agreement, in the proportion that the number of cars handled at said platforms for each party, and for any other railroad companies that might thereafter be admitted to its use, bears to the total number of cars so handled; "it being understood, that the total number of cars shall not only include cars handled for the first party and the railroad companies using the second party's bridge and tracks, but also such as may be handled for other parties hereafter admitted to the use of said transfer platforms and tracks;" and it was further agreed that "other railroad companies than those now using the bridge and tracks of the second party may also be admitted to the joint use of said transfer platform and tracks, on the terms herein set forth,—that is to say, that they will bear their proper proportion of the ground rent, interest on the cost of the platforms and tracks, and the expense of maintenance and operation of the said platforms and tracks, based upon the number of cars handled, as per the second and third articles hereof." The switching of cars to and from said transfer platforms was to be done by the Louisville & Nashville Railroad Company, between the points of the old joint siding on south side of Maple street, without cost to the second party. The contract provided for a readjustment of the monthly rental from time to time, upon certain terms, not necessary to notice, and the arrangement was to continue in force until terminated by six months' notice in writing from either party. It is still in full force and operation as between respondent and the Louisville Bridge Company, and all the railroad companies entering Louisville from the north side of the Ohio river, except the Ohio & Mississippi Railway Company, which latter company

ceased to make its transfer of traffic with respondent at said Ninth and Broadway yards in February, 1888.

While this contract bears date in May, 1888, its terms and provisions were agreed upon and arranged in January, 1888, with the knowledge and consent of the Ohio & Mississippi Railway Company. Since the aforesaid contract of June 5, 1872, was entered into, the Louisville, Evansville & St. Louis Railroad Company, and the Louisville, New Albany & Chicago Railroad Company have been allowed to use, and are still using, said Louisville bridge and approaches, in substantial accordance with the terms and provisions thereof. Said railroad companies also make their transfers and interchanges of freight traffic with respondent at said Ninth and Broadway yard. Since the date of said contract the rates of tolls and charges have decreased per ton and per passenger, as the volume of traffic over the bridge has increased. About eight years ago the dividends agreed to be paid upon the capital stock of the bridge company were reduced from 6 to 4 per cent. semi-annually, and under the operation of said contract the sinking fund therein provided for is now sufficient to pay off the bonds of the bridge company, which mature in December, 1888. Under the operation of said contracts of June, 1872, and May, 1873, the business between the railroads north of the Ohio river and Louisville & Nashville Railroad Company was conducted in this manner. The parties having established the yard of the Louisville & Nashville Railroad Company at Ninth and Broadway, in Louisville, as the point for the interchange of traffic, the railroads from the north brought their cars to their respective yards on the north side of the river. From there they were hauled by the Jeffersonville, Madison & Indianapolis Railroad Company, for the Louisville Bridge Company, to the yards of the several companies, on the south side of the river; and cars containing freight to be delivered to the Louisville & Nashville Railroad Company were then, by the Jeffersonville, Madison & Indianapolis Railroad Company, switched over Fourteenth and Maple streets to respondent's yard and transfer station at Ninth and Broadway, where they were received, and the goods in less than car-load lots were assorted, distributed, and reloaded into cars, and placed in trains, for their proper destination. Car-load lots were generally transferred to proper tracks, and placed in trains, destined to points of shipment. Cars coming over respondent's road from the south, containing goods destined to points north of the river, were brought to the same yard, and delivered at the Maple and Tenth street platform and tracks, where the Louisville Bridge Company, or the Jeffersonville, Madison & Indianapolis Railroad Company, acting as its switchman, received the same, and transferred the freight to proper points on the lines of the railroads north of the river. The expenses connected with such interchange of traffic, together with a rental allowance to respondent for the use of its terminal facilities, as shown by said contract of May, 1873 and 1888, was borne by the several railroad companies *pro rata*, all companies interchanging business with respondent being placed upon the same footing, and all furnished the same facilities. The interchange of traffic continues in the same manner, at said point, as

to all the roads north of the Ohio river, except the Ohio & Mississippi Railway Company, which, on February 4, 1888, gave notice that it would; and did, withdraw from said contracts, at noon on that day. Said Ohio & Mississippi Railway Company has, since its withdrawal from the contract of June 5, 1872, ceased to interchange traffic with respondent at Ninth and Broadway, as formerly, and now conducts its business over the Kentucky & Indiana Bridge Company, which was chartered by the state of Kentucky in 1880, and completed its bridge across the Ohio river, between New Albany and Louisville, in 1886. Its charter provisions and powers, as conferred by the laws of Kentucky, so far as material to this case, are as follows:

"Said Kentucky & Indiana Bridge Company is hereby empowered to locate, build, construct, and maintain, under the laws of the United States, a bridge for railway, wagon, street railway, and other purposes, between the cities of Louisville, Ky., and New Albany, in the state of Indiana, from any convenient and accessible point within the limits of the city of Louisville, or within one mile thereof; and said company is hereby clothed with all the powers, privileges, rights, and franchises, necessary for the carrying out the purposes named herein. Said corporation shall have the power to lay down on said bridge a single or double track for railroad cars or street cars, or for wagons or other vehicles, and all animals, and to erect footways for passengers, and to charge for the use thereof reasonable tolls; and for said purpose may erect on either or both sides of said bridge toll-gates, and may do all other acts or things necessary for collecting the charges for the use of said bridge, and may also run any line of railways through the city of Louisville upon such terms as may be prescribed by ordinance of said city of Louisville, or along any street or alley, to connect with any railway, bridge, transfer company, or depot; and shall have the right to operate or lease said connecting line or lines, and may charge a reasonable compensation for the use of the same. Said corporation may contract with any railroad company in or out of this state for the use of said bridge by its cars and engines, or for other purposes; and any railroad, or street railway, or person, or municipal corporation, in or out of this state, may subscribe for the capital stock of said corporation, upon any terms or conditions agreed upon, and may make such contracts or agreements as may be deemed expedient for the use, management, or control of said bridge. Said Kentucky & Indiana Bridge Company is authorized to contract with or to construct any railway or terminal line, either in Kentucky or in the state of Indiana, which may be necessary for completing its terminal facilities, and it may construct such line or lines in the county of Jefferson, state of Kentucky, as may be necessary to complete the connection with other railways or depots. Said Kentucky & Indiana Bridge Company is authorized to contract with any company organized under the laws of the state of Kentucky for the erection of said bridge, and the construction of any terminal lines connecting with it, and to pay for the same in bonds or stock of said company, at such price as may be agreed upon. Said Kentucky & Indiana Bridge Company is authorized to contract with or to construct any railway or terminal line, either in Kentucky or in the said state of Indiana, which may be necessary for completing its terminal facilities; or it may extend such branch lines through the city of New Albany, state of Indiana; and it may construct such line or lines in the county of Jefferson, state of Kentucky, as may be necessary to complete the connection with other railways or depots. Said Kentucky & Indiana Bridge Company is authorized to connect its line with the line of the Short Route Transfer Company, and for that purpose may cross other railway or bridge lines, passing either under or over the same. The

said company is also authorized to cross the land of other railway or bridge companies, in case it may be necessary, in running its connecting lines. The Kentucky & Indiana Bridge Company shall have the right and power to condemn any land in the city of Louisville, or county of Jefferson, state of Kentucky, that may be necessary or proper for the construction or maintenance of any line of railway which said company is authorized by its charter, or amendment or amendments thereto, to construct, maintain, or operate."

On March 2, 1881, under a general law of the state of Indiana, providing for the incorporation of companies formed for the purpose of constructing bridges for railway or common roadway purposes, or both, over rivers and streams forming the boundaries of said state, certain parties adopted articles of association "for the purpose of constructing, operating, and owning a bridge for railway and common roadway purposes, over and across the Ohio river," between New Albany and Louisville. The association was styled the "Kentucky & Indiana Bridge Company," and the articles recited that "the object and purpose of said company is to construct, own, and operate a bridge from a point in said city of New Albany, across the said Ohio river, to a point in said city of Louisville, for both railway and common roadway purposes, together with, as an extension of and in connection with said bridge, a firm and substantial causeway," etc. The statutes of Indiana empowered said company "to construct a railway with one or more tracks from said bridge and embankment, and to connect the same with other railway tracks, and to fix the rates of toll for persons and property passing over said bridge and tracks connected therewith, whether in cars propelled by steam or otherwise." The company, under the statute, had authority "to connect the line of railway over said bridge by continuous line of railway, in such manner, and upon such route and terms, as may be deemed most expedient, with any other line of railway whatever; and to maintain, use, operate, and control the said connection, when completed, and charge and receive tolls for the use thereof." The two bridge companies thus formed under the laws of Kentucky and Indiana were, on March 10, 1881, consolidated under the same name. Whether such consolidation was effected under proper legislative authority, does not appear. The bridge was built by the consolidated company, which thereafter, on September 29, 1886, entered into a written contract with the Ohio & Mississippi Railway Company, the important provisions of which are the following:

"The bridge company agrees to allow the railway company to run its locomotives, cars, and trains over the Kentucky & Indiana bridge and approaches, from a convenient point of connection at Vincennes street, New Albany, to the ground of the railway company at Fourteenth street, in Louisville, or, should the railway company elect to do so, to a connection with the track of the Short Route Railway Transfer Company, near Thirteenth street, in Louisville; the railway company's locomotives, cars, and trains to have preference over those of a similar class of other railroad companies that may use the bridge, so far as such preference can be legally granted by the bridge company." The bridge company is to keep its bridges, approaches, and lines of railway in repair at its own expense; it agrees "to establish, provide, and maintain tracks connecting its present tracks with the tracks of all other railroads now seeking New Albany, within a reasonable time, either directly, or

through the use of the other railway lines, and to switch the cars of the railway company, over such connecting tracks, at a switching charge of \$1 per car; also, to transfer cars from the railway company's transfer yards south of Bank street, in Louisville, to the Louisville & Nashville Railroad, or the Chesapeake, Ohio & Southwestern Railroad at the same rate per car." It is agreed that "the tolls shall be fixed at the same rate, from time to time, as the rate of the Louisville Bridge Company, and these tolls shall be paid monthly by the railway company to the bridge company; it being provided, however, that whenever the sum so collected shall exceed the sum of \$17,500 per quarter, any excess over such amount shall be paid back to the railway company; but the railway company agrees to pay to the bridge company \$17,500 per quarter, whether or not the amount of tolls so collected equals that sum, the intention being to give a fixed annual rental to the bridge company of \$70,000 per annum." But the railway company is to "endeavor, with reasonable dispatch, to clear itself of future liability for tolls, rentals, charges, or otherwise, under its present contract for the use of the Louisville bridge, and until such liability shall be removed the railway company shall not be compelled to pay any tolls hereunder to the bridge company. And the Kentucky & Indiana Bridge Company may, at its own cost, and in the name of the said Ohio & Mississippi Railway Company, defend against any claim of liability on the part of said Ohio & Mississippi Railway Company under said contract. The railway company agrees * * * to carry and transport over said bridge, approaches, and railway tracks, all of its locomotives, cars, freight, passengers, mails, express matter, and everything else carried or transported by it on its own lines * * * destined, consigned to or from Louisville, or to or from points which require their passage over the Ohio river at or near Louisville: provided, however, that said railway company is at liberty, if it so desires, to perform its passenger service over any other bridge; but the rental to be paid hereunder shall not be decreased by reason thereof. The interchange of freight at Louisville and New Albany between said railway company and any connecting road shall be done over the tracks of the bridge company, between the south approach to its bridge and the tracks of such connecting road, so far as the Ohio & Mississippi Railway Company can lawfully control the same, and the charge for the use of such tracks shall not exceed that on any other line. The railway company agrees, so far as it lawfully may, not to carry or transport over the said bridge and the approaches and tracks thereto any locomotives, cars, freight, passengers, mail, and express matter, between Louisville and New Albany, that originates in or comes from any railroad or water line entering the one place, and destined for the other, it being mutually understood and agreed between the parties thereto that the bridge company shall have the sole, exclusive right to control, carry, and transport over the bridge and the approaches and tracks thereto all traffic not received from or destined to points reached over the railroad of the railway company, north and east of New Albany. The railway company agrees to furnish, at its own cost, all power necessary for the transfer of its locomotives, cars, freight, passengers, mails, and express matter transported by it, over the said bridge and the approaches and tracks thereto."

Said contract was to continue in force and in operation 20 years from the date of commencement of payment of tolls by the railway company to said bridge company, and it is still in full force, and being acted upon by said parties.

On June 21, 1887, the petitioner entered into a written contract with the Louisville Southern Railroad Company, which connects Louisville with the south by way of the Cincinnati Southern Railroad, under and

by the terms of which said bridge company leased to the Louisville Southern Railroad Company, for a period of 99 years, an equal right to possession and use in common with it for railroad purposes, the railroad, right of way, road-bed, main and side tracks, switches, telegraphs and telegraphic facilities, and other appurtenances and fixtures, now possessed or owned, or which may be hereafter possessed or acquired by the Kentucky & Indiana Bridge Company, between a point in Magnolia avenue, where the Louisville Southern Railroad Company's tracks join with those of the Kentucky & Indiana Bridge Company, to the connection with the tracks leading to the yard of the said Louisville Southern Railroad Company, on or near the line of Hardin street, between Bank and Market streets, in Louisville. The parties to said contract agreed to construct a line of track, with the necessary switches and sidings, eastwardly along Magnolia avenue, from the junction of the Kentucky & Indiana Bridge Company's and the Louisville Southern Railroad Company's tracks, to a connection with the main tracks of the Louisville & Nashville Railroad Company at or near the intersection of Magnolia avenue and Seventh street, said connection to be constructed and maintained at the joint expense of the Kentucky & Indiana Bridge Company and the Louisville Southern Railroad Company, in the manner described in said contract. The Louisville Southern Railroad Company agreed to provide and keep a sufficient number of suitable switch-engines on hand, and to handle promptly and with dispatch all freight cars to be moved between the Kentucky & Indiana Bridge Company's transfer tracks, between Bank and Market streets, and the Chesapeake, Ohio & Southwestern Railroad Company's railroad, and the Louisville & Nashville Railroad Company's railroad, at a charge to be fixed by the parties to the contract. The Louisville Southern Railroad Company agreed to pay to the Kentucky & Indiana Bridge Company, of the revenue thus obtained, in the following proportion, namely, 55 per cent. to the railroad company, and 45 per cent. to the bridge company. In case said railroad company fails or refuses to remove all freights passing over this part of said tracks with promptness and dispatch, then the bridge company reserves the right to move said freight, and to receive and collect all tolls due for said service. The bridge company was not to grant any other party or parties the right to do any switching, or make transfers of cars or freight on the line of road or tracks aforesaid. Said contract further provided as follows:

"And whereas, the said Kentucky & Indiana Bridge Company has heretofore entered into a contract with the Ohio & Mississippi Railway Company, providing for the transportation of all freight from said railway to the roads south of the Ohio river, over the tracks herein described, and for which a charge is to be made by said bridge company: Now, it is agreed, and it is part of the consideration of inducing the bridge company to enter into this agreement, that all such freight coming from the said Ohio & Mississippi Railway Company, and delivered and deliverable to the said railways south of the Ohio river, shall be moved over the tracks herein described, from the yards on Hardin, between Bank and Market streets, to such railways, without charge or cost, and shall be made by the railroad company, with its engines, at rates to be fixed by the bridge company, and the tolls or revenue

derived from such freight so moved shall belong exclusively to the bridge company, and shall not be subject to division, as herein provided for the revenue derived from freight moved or handled on said tracks."

Said contract was to continue in force for and during the whole period of 99 years from and after September 1, 1887. It has not since been changed or modified, and the business being done between petitioner and said Louisville Southern Railroad Company is carried on and transacted under and in pursuance of the provisions of said contract. The Louisville Southern Railroad Company has not, however, fully performed the switching service on the tracks of the Kentucky & Indiana Bridge Company, as it undertook to do. It has only done said switching from Thirty-Second and Market streets, south, at night, using one engine. The rest of said switching has been done by the Kentucky & Indiana Bridge Company. All the transfer slips or bills on freight so switched are made out by the Kentucky & Indiana Bridge Company, which collects the charges therefor from the company or companies for whom the service is performed. The petitioner and the Ohio & Mississippi Railway Company and the Louisville Southern Railroad Company have a yard near Thirty-Second and Market streets, in Louisville, at which said companies' interchanges of traffic are made.

Petitioner's tracks in Louisville branch in two lines, the point of divergence being near the intersection of Twenty-Ninth and Rudd streets. From this point one of said lines extends eastwardly near the canal-bank to a point on Thirteenth street, where it connects with the road of the Short Route Railway Transfer Company, over which and the Chesapeake, Ohio & Southwestern road, running eastwardly, petitioner and railroads using its bridge can readily connect with respondent's yard No. 1, at First and Water streets, and extending thence to Preston street. Petitioner's other line extends southwardly to Magnolia avenue, where it connects with the Louisville Southern. Under several ordinances of the city of Louisville, passed from time to time, petitioner was given authority to construct and extend its tracks in or over certain designated streets in said city. The ordinance which conferred upon said bridge company the right to lay its tracks on or along Magnolia avenue was approved April 12, 1887. It granted to said bridge company the right "to locate, construct, maintain, and operate a single or double track railway, with necessary switches, turnouts, sidings, crossings, signals, and watch-houses, along Magnolia avenue from Eleventh to Eighteenth streets, and along other land acquired or to be acquired, west from Eighteenth street to the city limits, and to connect, with proper curves, with the Chesapeake, Ohio & Southwestern Railway, and the Louisville Southern Railroad, and other railroad lines which may hereafter desire to make connections with the same." By the second section of the ordinance the said bridge company was required, under proper regulations for the safe and convenient use of said tracks constructed between the points named, to "permit other roads now built or hereafter to be constructed desiring to connect through such portions of the city to use the railway tracks laid down or constructed through and along said line as

herein provided, upon conditions, however, that before entering on the use of said tracks any railway company shall pay to the Kentucky & Indiana Bridge Company its *pro rata* share of the cost of constructing the same, including damages awarded by reason of the construction thereof, and shall bind itself, by contracts with the city of Louisville, for the benefit of all parties interested, that it will contribute its *pro rata* share towards the repair and maintenance of any additional tracks, and of any gates, approaches, culverts, bridges, or trestles, or fills that may be necessary to the safe and efficient use of said tracks, and towards the maintaining of such watchmen as may be necessary to the proper guarding of the street crossings," etc. Similar provisions are found in the other ordinances. This ordinance of April 12, 1887, is the only one produced which gives said bridge company authority to locate its tracks on Magnolia avenue, and grants the right from Eleventh street westward.

Respondent's tracks at the intersection of Seventh street and Magnolia avenue are located eight hundred and twenty feet, or over two squares, to the eastward from Eleventh street. The said bridge company has shown no authority or license from the city of Louisville to extend its line or track from Eleventh street eastward along Magnolia avenue to the Seventh street and Magnolia crossing, or to a connection with respondent's tracks at that point; but it has actually made such an extension, and on the 20th of October, 1887, effected or formed a physical connection of its track with respondent's main line, at Seventh street and Magnolia avenue. This connection was made under the following circumstances: The vice-president and general manager of the said bridge company, under date of September 6, 1887, addressed to the vice-president of the Louisville & Nashville Railroad Company a note as follows:

"DEAR SIR: The Kentucky & Indiana Bridge Company desire a connection with your road, at the corner of Seventh street and Magnolia avenue, for the purpose of mutual interchange of freight, between your road and the various other roads with which the Kentucky & Indiana Bridge Company, as a transfer company, connects. At Seventh street and Magnolia avenue there are two private switches connected with your road,—the one belonging to the Union Warehouse Company, and the other to Mrs. Bullitt and the Bank of Louisville. If we should make arrangements with either of these parties for the use of their switch, is it satisfactory to you for us to make connections at that point, provided your present rights of connection with the property of these parties is not interfered with?"

The Louisville & Nashville Railroad Company objected to the desired connection at said point, and to the bridge company's use of said private switches. The matter was referred to their respective attorneys. The attorney for the Louisville & Nashville Railroad Company advised its officers that under the eighteenth section of its original charter respondent could not lawfully object to or prevent the proposed connection, but that such connection would not, under a decision of the Kentucky court of appeals, cited, necessitate or require a business connection at said point, or confer any right on the bridge company to use its track, or run cars over its road. The bridge company having the right to thus force a

physical connection, the Louisville & Nashville Railroad Company thereupon, on October 14, 1887, withdrew its opposition to such connection, and it was made October 20, 1887. Said point of connection, at Seventh street and Magnolia avenue, is situated between the South Louisville yard and the Ninth and Broadway yard and station of respondent. It is 1.17 miles south of the Ninth and Broadway station, and 1.83 miles north of the South Louisville yard. Between said yards respondent's trains and engines are constantly passing and repassing, day and night. The Louisville & Nashville Railroad Company neither receives nor delivers freights at said connection, either for private parties or other railroads. It has never been established or recognized as a station or place at which freight should be received or delivered. There are no buildings, platforms, sheds, or other facilities at said point for the interchange of business traffic, nor has either petitioner or respondent any ground or land at that place on which such buildings, platforms, and facilities suitable and convenient for the interchange of freights, and the accommodation of clerks and employes, could be erected. Respondent has only 66 feet right of way at said point, which is needed for its tracks; while the petitioner has not even such right of way, if the license or permission of the city of Louisville to lay its track eastwardly along Magnolia avenue from Eleventh street is necessary to confer said right. By means of said connection it is practical to switch freight cars, loaded or empty, from the track of petitioner to the main track of respondent, and *vice versa*; but no interchange of freight cars and freight business between respondent and petitioner and railway companies using petitioner's bridge and tracks can be conducted at said Seventh street and Magnolia connection without subjecting respondent to extra expense, trouble, and inconvenience, beyond what it is required to incur in interchanging with other roads, at its regular yards and stations; and, the greater the traffic to be interchanged at said junction, the greater would be such expense to and burden upon the respondent. The interchange of freights in broken lots, or less than car-loads, cannot be made at said connection. Such freights received from petitioner at said junction have to be hauled 1.17 miles to the Ninth and Broadway depot of respondent, to be assorted and reloaded into cars, and placed in trains for destination. Neither can car-load lots of mixed or miscellaneous freight, destined for different points, be interchanged there, without being transferred to and assorted and reloaded at Ninth and Broadway. If such freights are to be delivered by respondent to petitioner at said point, they have first to be carried to respondent's said depot, there unloaded, assorted, reloaded, and hauled back by respondent's engines, and placed upon petitioner's track. So that, in receiving and delivering less than car-load lots of freight at said Seventh and Magnolia connection, respondent would be put to the expense and trouble of hauling all such freight 2.34 miles without compensation, together with the expense incident to the unloading, distributing, and reloading the same at its Ninth and Broadway station. Freight in car-load lots, interchanged at said connection, would require respondent to switch or haul the same to the same station, to be

there put into or taken from trains, and then carried back to or beyond said point. If petitioner makes such delivery of either car-loads or broken lots of freight at Ninth and Broadway, it involves the use of respondent's terminal facilities. If respondent performs said service, there is involved the use of its engines, its tracks, its platforms, its clerks and employes at said Ninth and Broadway station, for which no compensation has been agreed upon between petitioner and respondent. All such services and matters, as to other railroads entering Louisville from the north side of the Ohio river, and interchanging traffic with respondent at its Ninth and Broadway station, are made the subject of private contract and agreement, under and by the terms of which respondent is allowed and paid a consideration for the use of its engines, tracks, and terminal facilities in the shape of a monthly rental, interest on its improvements, and a *pro rata* proportion of the depot expenses connected with the transfer of freight; such as clerk hire, salary of employes, and wages of laborers, based on the amount of business done for each of said roads. The petitioner has made no offer of such compensation to respondent for the interchange of traffic it seeks at its said connection. The mere reception of car-load lots of freight by respondent at said Seventh and Magnolia junction, without reference to any transfer thereof to said Ninth and Broadway yard and depot, to be put into trains for distribution, would necessitate the employment by respondent of car inspectors, both day and night, to examine the condition of such cars, take their numbers, and keep a record thereof; it not being usual or proper for one railroad company to receive from another company car-load freights without having such cars inspected by its own agents, at the point of reception, to ascertain the condition of the same. This would entail upon respondent some additional expense. If respondent accepted loaded cars at said point of connection, it might or might not have the right to transport the freight to destination in such cars. If it had the right to use, and did use, such cars, it would, besides the expense of getting the same to its Ninth and Broadway station, and placing them in proper trains, be required to pay to the owner thereof wheelage or mileage at the rate of three-fourths of one cent per mile, and be responsible for all damage done the cars while in its possession, or on its road. If respondent had not the right or did not desire to use such cars, it would be under the necessity of not only conveying them to the Ninth and Broadway station, but of unloading and reloading them there, at its own cost and expense.

Petitioner has no freight cars of its own, and can make no reciprocal interchange of cars with respondent. Petitioner never sought to effect a direct connection with respondent's Ninth and Broadway yard. A direct approach to said yard might have been made up Broadway and Tenth streets, with the consent of the city of Louisville; but no application was made for leave to pursue that route, nor was any effort made by petitioner to secure a nearer and more direct connection with respondent's road than at Seventh street and Magnolia avenue. That connection was made in pursuance of petitioner's contract with the Louisville Southern Railroad Company, bearing date June 21, 1887. It is entirely practicable for pe-

petitioner and the railroads using its bridge and tracks to interchange traffic with respondent at the latter's Ninth and Broadway yard and depot, which can be reached by transferring or switching over the Short Route Transfer line, and the Chesapeake, Ohio & Southwestern, and thence up Fourteenth street, over the line of the Louisville Bridge Company, and Jeffersonville, Madison & Indianapolis line, to the junction at Tenth and Maple, where respondent receives from and delivers to other roads all freight to be interchanged. To reach respondent's said yard by this approach involves a switching charge of two dollars per car to the petitioner, or the railroads using its bridge; the Short Route Company and the Chesapeake, Ohio & Southwestern making a charge of one dollar, and the Louisville Bridge Company and the Jeffersonville, Madison & Indianapolis also charging one dollar per car for such switching services. Prior to October 21, 1887, petitioner and the railroads using its bridge and track having freight for the Louisville & Nashville Railroad Company, destined to points on its roads south of Louisville, delivered such freight at said Ninth and Broadway yard, by bringing or having the same brought over said approach or route, and paying therefor switching charges of two dollars per car. The same facilities still exist, and are still open to petitioner and the railroads using its bridge, for reaching respondent's Ninth and Broadway yard, and for the interchange of traffic at said point. In addition to this mode of reaching a connection with respondent, the petitioner and the railroads using its bridge had, and still have, another approach, by way of the Short Route and Chesapeake, Ohio & Southwestern line, to respondent's yard at First and Water streets, in Louisville, which would involve a switching charge of only one dollar per car. These routes, which were open and accessible to petitioner and the railroads using its bridge prior to October 20, 1887, when it made the physical connection at Seventh street and Magnolia avenue, have since continued to exist, and are still available to petitioner, as a convenient means of reaching respondent's regular yards with such freight as it seeks to have respondent transport over its lines. Respondent is willing to accept and receive at its Ninth and Broadway or other yards, all freight brought to it by or over petitioner's bridge, and to transport the same to destination on its lines, at local Louisville rates, such as it charges all other Louisville shippers; but is not willing and declines to accept and transfer such freight, upon a through routing, and at through rates, such as it has agreed upon with the railroads using the Louisville bridge. This refusal is rested upon the ground that respondent has no arrangement or agreement with petitioner and the railroad companies using its bridge, fixing and defining the terms and conditions upon which such through routing shall be made, and the through rates prorated between them.

The Louisville & Nashville Railroad Company has at all times, both before and since the passage of the interstate commerce act, refused to engage in the transportation of freight or passengers to or from points beyond its own lines, except where previous agreements or arrangements had been made between itself and other carriers, whose lines were part or parts of the through routes to be thus established, which agreements

prescribed the terms, conditions, and restrictions on which the business should be done, and defined the share which each road was to receive of the through rates. The interchange of traffic between connecting lines constituting the through route over which such traffic is to be passed at or upon through rates is always a matter of contract between the several companies operating such lines; and such arrangements are, in the absence of express agreement to the contrary, terminable at the pleasure of either party. Petitioner is not a member of, and has no representation in, any freight or passenger associations, by whom through rates are fixed; and it has never offered or attempted to interchange any passenger traffic with respondent. Its passenger traffic business to and from the south is done exclusively with the Louisville Southern Railroad Company. Petitioner has no voice in making the division of through rates on traffic carried over or across its bridge. Its bridge-toll is the only charge to be paid it by the companies engaged in such through traffic. Under a contract entered into between them in 1887, the petitioner receives from and delivers to the Louisville, New Albany & Chicago Railroad Company, at New Albany, freights transported or to be transported over its bridge to and from Louisville; said contract being terminable by either party upon 30 days' notice. Petitioner issues no bills of lading for shipments from Louisville to any points south reached either by the Louisville Southern or the Louisville & Nashville Railroad Companies; nor does it issue any bills of lading for shipments from Louisville to Cincinnati or other points reached via the Ohio & Mississippi Railway Company. If a consignor at Louisville desired to ship over petitioner's bridge to Cincinnati or other point on the Ohio & Mississippi Railway Company's lines, the latter would issue the bill of lading, and collect the freight. If shippers at Louisville wished their freight for St. Louis to go over the Kentucky & Indiana bridge, via the Louisville, Evansville & St. Louis Railroad, petitioner would accept and receive such freight on one of its Louisville tracks, provided the cars in which to load the same were furnished by the Louisville, Evansville & St. Louis Railroad Company; would then way-bill such car and freight to the latter road, which would issue the regular bill of lading therefor, and charge and collect its regular transportation rates thereon, and pay to petitioner its bridge-toll for passing over its bridge. So, if a Louisville shipper desired to ship his goods to Chicago over petitioner's bridge and over the Louisville, New Albany & Chicago Railroad, petitioner would accept such shipments on its tracks in Louisville, if said railroad company would furnish the cars in which to load it, and would bill the same to the Louisville, New Albany & Chicago Railroad, which would perform the transportation service, and charge or collect the freight or fares thereon. So, if New Albany shippers wished to ship goods south over the Louisville & Nashville Railroad, petitioner would accept such shipment, if respondent would furnish the car or cars in which to load it; would then furnish to respondent a way or transfer bill for such car and freights, and respondent would issue its own bill of lading therefor, pay petitioner its bridge-toll for passing the freight over its bridge, and collect its regu-

lar charges for transporting the goods to destination. Petitioner has no freight cars of its own, and neither procures nor furnishes cars in any other manner. On business thus handled, the rates given or charged the shippers are, in some cases, the bridge-tolls and the rates of the railroad over which the shipment has to be carried by the company furnishing the car or cars and performing the service; in other cases the line furnishing such car or cars pays the bridge-toll itself. Jeffersonville, New Albany, and Louisville being grouped, and having the same rates to and from all points south on shipments thus procured by petitioner for respondent, and loaded in cars furnished by respondent, the bridge-toll would be paid by respondent, and to that extent would reduce its regular rate to destination of goods going south of Louisville. The petitioner makes the transfer and delivery of such cars to the road over which the freight is to go, and collects from such road its bridge-toll. In addition to its bridge-toll thus charged and collected of roads for which petitioner may have solicited shipments, petitioner, in some cases, where cars are loaded on its tracks, or loaded cars are received from one railroad to be transported to some other line over its tracks, makes and collects a switching charge from the company for whom the service is performed, ranging from one dollar to three dollars per car. Where the respondent and railroads north of the Ohio river have entered into arrangements or agreements, forming through routes and through rates, as to which the bridge companies are not consulted, and have no voice, the bridge-tolls are first deducted from the through rate, and the remainder of the traffic charges for the service is prorated between the parties forming the through route, according to their agreement. The shipper does not, as a matter of fact, pay the bridge-tolls in every instance, either under such through routeing and through rating or when there is no such arrangement for through traffic. Owing to its competition with the Cincinnati Southern Railroad, which owns its own bridge, and pays no bridge-tolls, respondent, in respect to much of its southern traffic, has to bear the burden of such tolls at Louisville, or deduct such tolls from its rates to Louisville and across the bridge at that point. So, in respect to through rates, competition will force the roads crossing the river at Louisville to fix such through rates as though no arbitrary bridge charge or toll was to be paid or deducted therefrom; and in such cases the roads, and not the shippers, pay said tolls.

From March, 1887, to October 20, 1887, petitioner, to a limited extent, interchanged traffic with, or delivered traffic to, respondent at the latter's yard at Ninth and Broadway, such traffic being brought over the connections reaching Maple and Tenth streets; and in some instances issued bills of lading for such freight, whether at through or local rates does not appear. The Ohio & Mississippi Railway Company continued to interchange with respondent at said yard, under the terms of the contracts of June 5, 1872, and May, 1873, until February 4, 1888, when the said Ohio & Mississippi Railway Company gave notice to the Louisville Bridge Company and to respondent that it would, and did, withdraw from said contract of June 5, 1872, at noon on that day. The

said Ohio & Mississippi Railway Company has since February 4, 1888, ceased to use said Louisville bridge and the connections afforded by that route for reaching respondent's yard at Ninth and Broadway, but instead uses the petitioner's bridge under the contract of September 29, 1886, and through petitioner seeks an interchange with respondent at said Seventh street and Magnolia junction. By the withdrawal of the Ohio & Mississippi Railway Company from said contract of June 5, 1872, and its abandonment of the Louisville bridge, there has been a decrease in the receipts or revenues of said bridge to the amount which would have been derived from the Ohio & Mississippi Railway Company's traffic. This loss to the bridge company amounts to about one-fifth of its income, or about \$129,167.17, on the basis of receipts for 1887. Said bridge company has not increased its tolls for 1888, but the loss of the Ohio & Mississippi Railway Company's business has prevented any decrease or reduction in said tolls, which it could and would otherwise have made, if said railway company had continued the use of said bridge, and complied with said contract of June 5, 1872. Said bridge company's revenues are, in part, made up of tolls upon freight interchanged by respondent with the roads using said bridge, and such freights, or the roads themselves, will have to pay an increase of some \$27,000 in tolls in consequence of the Ohio & Mississippi Railway Company's withdrawal from the use of said bridge, and the respondent's proportion thereof will amount to about \$13,000 per annum.

The respondent is otherwise interested pecuniarily in the tolls of said bridge and in the reduction thereof, inasmuch as under its competition with other routes said tolls to a considerable extent have to come out of its revenues received on through rates, and are not paid by shippers or consignees. Said Louisville Bridge Company for some years past has had surplus revenues, which have been, from time to time, prorated and paid back to certain of the railroads using its bridge. The respondent has received no part of such surplus earnings, and made no demand for it. Whether it is entitled to share in such surplus earnings, is not involved in this controversy. Respondent is, however, interested in having all the earnings of the bridge company, not required to meet the charges provided for in the contract of June 5, 1872, applied in a way to reduce the bridge-tolls, which affect its rates and business. The Louisville Bridge Company can do business over its bridge and terminal lines as cheaply and promptly as the Kentucky & Indiana Bridge Company can over its bridge and terminal lines; and had, in 1888, and prior thereto, and still has, capacity to transact all the business which the railroads crossing the Ohio river were able to bring to it.

The capital stock of the Louisville Bridge Company amounts to \$1,500,000. Its bonded debt of \$800,000 is paid, or fully provided for. The capital stock of the Kentucky & Indiana Bridge Company is \$1,700,000, and its bonded debt \$1,400,000. The respondent ceased to be a stockholder in the Louisville Bridge Company in 1880. The Ohio & Mississippi Railway Company never complained of the manner in which it was served over the Louisville bridge before withdrawing from said

contract of June 5, 1872. Its own yards at Louisville, and on the north side of the river, were insufficient for the handling of its business. This occasioned at times some delay in transferring its cars. On one occasion, while the employes of the Louisville & Nashville Railroad Company were on a strike, and the cars of the Ohio & Mississippi Railway Company were crowded in the yards of respondent, it declined to receive other cars from the Ohio & Mississippi Railway, until the latter's cars, which were blocking its yard, were removed. This occasioned some short interruption to the interchange of traffic between them. The yards of respondent and other roads than the Ohio & Mississippi Railway Company were ample for the handling of all the business passing over the Louisville bridge.

The main line of the Ohio & Mississippi Railway Company enters Jeffersonville, Ind., convenient and readily accessible to the Louisville bridge. After entering into the contract with the petitioner, dated September 29, 1886, the Ohio & Mississippi Railway Company extended a branch line from Watson, Ind., a town north-east from Jeffersonville, over a route provided for it by petitioner, to New Albany, Ind., so as to form a connection with the Kentucky & Indiana Bridge Company's line and bridge. While the Ohio & Mississippi Railway Company has the right, under said contract of September 29, 1886, to use petitioner's terminal lines in New Albany, and its bridge and southern approaches thereto, down to said railway company's yard at Hardin and Bank streets, it has not, under said contract or otherwise, the right to use petitioner's lines or tracks in Louisville south of said yard, or out to the junction which petitioner has made with respondent's track at Seventh street and Magnolia avenue; to reach which point its cars and freight have to be switched by the petitioner, or its ally, the Louisville Southern, at or for a switching charge of one dollar per car, which the Ohio & Mississippi Railway Company has to pay petitioner. Nor does it appear from the record that said Ohio & Mississippi Railway Company has any authority, either from the state of Kentucky or the city of Louisville, to extend its own line or track south from its said yard, so as to form a direct connection with respondent, at any point. At said Seventh street and Magnolia avenue connection a limited interchange of traffic was carried on between petitioner and respondent from October 21, 1887, up to and including the 16th of November, 1887, but such interchange was had without the knowledge of the officers of the respondent having authority to direct and sanction the matter. When it was brought to the attention of respondent's officers having authority to control the subject, such interchange was stopped at said point, and respondent thereafter treated all freight coming over its road for petitioner, or points on its tracks, as Louisville city business, and required petitioner to pay the freight and charges thereon before delivery would be made. The expense bills furnished petitioner showed that the business was placed upon respondent's city, and not upon its transfer, books. A number of empty cars were returned to the respondent at said connection, and a considerable number of stock cars were delivered by respondent to petitioner at

said point, under a temporary injunction from the chancery court of Louisville, which injunction was subsequently dissolved.

The car which petitioner tendered on September 12, 1888, at Seventh street and Magnolia junction, and which respondent refused to accept, was brought from Cincinnati, and over petitioner's bridge, by the Ohio & Mississippi Railway Company, to its yard south of the river in Louisville, which was the southern terminus of said railway. From that yard it was placed upon the tracks of the petitioner, and by it switched to said Seventh street and Magnolia connection, under the contract of September 29, 1886, at and for a switching charge to the Ohio & Mississippi Railway Company of one dollar. The transfer slip, which petitioner offered respondent with said freight, specified the rate of 53 cents per 100 pounds, as the charge which respondent was to receive for transporting the car of freight to Columbia, Tenn., its point of destination. It does not appear that Columbia, Tenn., was one of the points to or from which respondent interchanged traffic with other railroads north of the river, upon a through routeing and at through rates; nor does it appear that the rate of 53 cents per 100 pounds, which the transfer slip proposed to allow respondent, conformed either to respondent's rates from Louisville to Columbia, Tenn., or the through rates arranged between respondent and its northern connections over the Louisville bridge. The terms, conditions, and stipulations of the bill of lading which was issued by the Ohio & Mississippi Railway Company to the shippers, or forwarded to the consignee, were not made known to respondent, nor was the rate charge apportioned to it tendered respondent, either before or at the time of offering the freight. Respondent's agents, however, assigned no reasons for refusing to receive and transport said car. There are certain private sidings, constructed under written contracts between their owners and the respondent, connecting with respondent's main tracks, between its Ninth and Broadway yard and its South Louisville yard, to and from which respondent delivers and receives its own cars, loaded or to be unloaded with what is called "dead freight,"—such as lumber and other non-perishable articles,—on the transportation of which respondent charges and collects local Louisville rates. Respondent is fully provided with cars, both freight and passenger, for the transaction of its business, and is unwilling and refuses to transport the cars of other railroads offered it by petitioner, who has no freight cars of its own, and pay mileage for the use of the same; and also declines to deliver its own cars to petitioner, to be carried away from respondent's lines and yards, and look to petitioner either for mileage therefor or damage for injury while in its possession. In the absence of buildings, platforms, sheds, and employes at said Seventh street and Magnolia avenue connection, such as are required and necessary to carry on an interchange of traffic between petitioner and respondent at that point, respondent, in order to comply with the order of the commission, must either allow petitioner and the railroads using its bridge the use of its tracks and terminal facilities, without any provision or arrangement as to the compensation to be paid for the use thereof, or must,

against its will, receive and use cars offered by petitioner, paying mileage thereon, and incurring the expense of switching the same to its Ninth and Broadway yard, there to be put into trains, and again hauled over the same distance; and it must also permit its own cars containing freight consigned to it or to be handled by petitioner, to go into petitioner's possession and be used by it, after respondent has been to the trouble and expense of carrying such freight to its Ninth and Broadway depot, and there unloading, assorting, and reloading, and then bringing the same back to said Seventh street and Magnolia connection for delivery. All other railroads entering Louisville, including the Louisville Bridge Company, having connections, directly or indirectly, with respondent, and interchanging business with it, whether on through or local rates, allow and pay respondent an agreed consideration for the use of its tracks and terminal facilities, and bear their *pro rata* proportion of the expense of handling the traffic interchanged, and also arrange for the mutual allowance and payment of mileage on cars of each used by the other, where cars are interchanged. No complaint is made, nor does it appear that respondent's local Louisville rates of freight charges on interstate traffic are unreasonable. Petitioner's bridge is used principally by the Ohio & Mississippi Railway Company and the Louisville Southern Railroad Company. The latter, being in active competition with respondent from Louisville south to and beyond Chattanooga, interchanges little or no business with the Louisville & Nashville Railroad Company, either directly or through the instrumentality of petitioner. The through business carried or brought by the Ohio & Mississippi Railway Company over petitioner's bridge south constitutes the main, if not sole, traffic which petitioner seeks to have interchanged with respondent at Seventh and Magnolia avenue connection.

On the foregoing statements of facts, and under the pleadings, the leading and important questions presented for consideration and determination are the following:

First. Is the commission created by the act to regulate interstate commerce invested with, and does it exercise, judicial powers, such as to make its orders the judgment of a court, which is wanting in constitutional authority, because its members have no such tenure of office as required by the constitution in the establishment of "inferior courts?"

Second. What is the nature of the present proceeding in this court? Is this court merely to enforce the order of the commission, and thus exercise a non-judicial power, or is the case in this court to be treated as an original and independent suit, in which its own judgment on the facts and merits may be rendered?

Third. Is petitioner, either in law or fact, such a common carrier of interstate commerce, within the scope and contemplation of the act to regulate commerce among the states, as will entitle it to claim the benefits of said law, or to have its provisions enforced in its behalf?

Fourth. Is petitioner's connection with respondent's road at Seventh street and Magnolia avenue in the city of Louisville a suitable and convenient point for the interchange of traffic between them and the rail-

roads using petitioner's tracks? And is respondent's refusal to interchange business at said point an unjust and unreasonable discrimination against petitioner?

Fifth. Does the law impose upon respondent the duty of making an interchange with petitioner at said connection, if such interchange of traffic involves the use by petitioner, and the roads using its bridge, of the tracks and terminal facilities of respondent, or subjects respondent to expense over and above what it incurs in interchanging traffic with other railroads, at its regular and established yards in Louisville?

Sixth. Does the interstate commerce law, rightly construed, require respondent not only to interchange traffic at said point of connection with petitioner and railroads using its tracks, but also to afford and concede to them on such interchange of business the same through routeing, and upon the same joint through rates, which respondent has, by contract, arranged and agreed upon with certain railroads entering Louisville from the north side of the Ohio river? In other words, does said act require that, if respondent has entered into traffic arrangements with one or more railroads connecting with it over the Louisville bridge, for the joint through routeing of business, at or upon through rates, to be apportioned between them, it shall concede to or make with any or all other roads engaged in interstate commerce, and connecting with it at other and different points, and running in different directions, the same or similar arrangements for through traffic, and upon the same joint through rates? And if this is required by the law, is such requirement valid, and within the constitutional power and authority of congress to regulate commerce among the states?

The first and second of said propositions are so connected and dependent upon each other that they may properly be considered together. In respect to the question presented by the first, counsel for respondent takes the position that the interstate commerce law confers judicial powers upon the commission; that such judicial powers are exercised in its proceedings; that its orders are judgments of a court not lawfully created, since its members are not appointed and commissioned in accordance with article 3, § 1, of the constitution, inasmuch as they hold office only for designated periods, and not "during good behavior," which latter "constitutional tenure of office judges must possess before they can become invested with any portion of the judicial powers of the Union;" and that the proceedings before, and the order or judgment of, the commission are and were consequently void. In respect to the second question, it is claimed by counsel for respondent that, aside from the judicial character and power attempted to be conferred upon said commission, the interstate commerce law imposes upon this court non-judicial powers which it cannot properly exercise, inasmuch as it is limited and restricted by the sixteenth section of the act to the mere enforcement of the commissioner's orders, if found to be lawful, with no authority to go into the merits of the controversy between the parties, and make its own adjudication thereon; but if not so limited and restricted to the mere enforcement of an order made by another body, and the proceed-

ing in this court can be regarded and treated as an original and independent suit to determine the rights of the parties, that the court has no jurisdiction of the case, because the parties complainant and defendant are both corporations of the state of Kentucky. In support of their position that judicial powers are conferred upon and exercised by the commission, counsel refer to various provisions contained in sections 12, 13, 14, 15, 16, 17, and 18, of the act, which, together with the rules of practice adopted, show, as they insist, that a proceeding before the commission, like the one in question, involves and embodies features and earmarks of judicial procedure and action in the following particulars, viz.: *First*, a petition, corresponding with the petition or bill in equity, is filed; *second*, notice is issued for, and service thereof made upon, the defendant or party complained of, conforming to, and corresponding with, the process of subpoena in courts of the United States, requiring such defendant to satisfy the complainant, or to appear and answer the same; *third*, the filing of defendant's answer, as in equity, which makes up or forms the issue or issues; *fourth*, the issuance of subpoenas requiring the attendance of witnesses, or for the taking of depositions, upon the issues made up by the answer; *fifth*, the assignment of a time and place for the hearing, when and where the parties appear in person or by attorney, witnesses are sworn and examined, and arguments are made orally or by brief; *sixth*, when the conclusion is reached, a written report, corresponding in all respects to an opinion, is delivered, filed, and published; *seventh*, the order of the commission is recorded by its secretary, as decrees in equity are recorded by clerks of court; and, *eighth*, a copy of such order, under the seal of the commission, issues to the defendant, requiring obedience thereto. This mode of procedure certainly conforms in many respects to the regular practice of courts, and is no doubt authorized by the law; but does it involve the performance of judicial acts, and the exercise of judicial powers, by the commission, as claimed? It is well settled that congress, in ordaining and establishing "inferior courts," and prescribing their jurisdiction, must confer upon the judges appointed to administer them the constitutional tenure of office,—that of holding "during good behavior,"—before they can become invested with any portion of the judicial power of the government; and if the act to regulate interstate commerce does in fact establish an inferior court, the commissioners appointed thereunder for certain fixed periods are clearly not such judges as can be invested with any portion of the judicial power of the United States, and their decision in matters affecting personal or property rights could have no force or validity. But does the interstate commerce law undertake either to create an "inferior court" or to invest the commission appointed thereunder with judicial functions? We think not. While the commission possesses and exercises certain powers and functions resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the act designates as the "recommendation," "report," "order," or "requirement" of the board is neither final nor conclusive; nor

is the commission invested with any authority to enforce its decision or award. Without reviewing in detail the provisions of the law, we are clearly of the opinion that the commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court, or its action judicial, in the proper sense of the term. The commission hears, investigates, and reports upon complaints made before it, involving alleged violations of or omission of duty under the act; but subsequent judicial proceedings are contemplated and provided for, as the remedy for the enforcement, either by itself or the party interested, of its order or report in all cases where the party complained of or against whom its decision is rendered does not yield voluntary obedience thereto. By the fourteenth and sixteenth sections of the act it is provided that the report or findings made by the commission "should thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found."

The commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of *prima facie* evidence in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendation or order. The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every circuit court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the act. It is neither a federal court under the constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings. This federal commission has assigned to it the duties, and performs for the United States, in respect to that interstate commerce committed by the constitution to the exclusive care and jurisdiction of congress, the same functions which state commissioners exercise in respect to local or purely internal commerce, over which the states appointing them have exclusive control. Their validity in their respective spheres of operation stands upon the same footing. The validity of state commissioners invested with powers as ample and large as those conferred upon the federal commissioners, has not been successfully questioned, when limited to that local or internal commerce over which the states have exclusive jurisdiction; and no valid reason is seen for doubting or questioning the authority of congress, under its sovereign and exclusive power to regulate commerce among the several states, to create like commissions for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce. What one sovereign may do in respect to matters within its exclusive control, the other may certainly do in respect to matters over which it has exclusive authority.

We are also clearly of opinion, that this court is not made by the act the mere executioner of the commissioner's order or recommendation, so

as to impose upon the court a non-judicial power. Congress has, in some cases, assigned to federal courts duties which, though of a *quasi* judicial nature, did not come within the judicial power granted in the constitution. Thus the act of March 23, 1792, (1 U. S. St. at Large, 243,) required the circuit judges to examine into the claims of persons asking for pensions, and make report thereon to the secretary of war. The judges of the circuit courts for the districts of New York and Pennsylvania held that the function or duty thus imposed was not judicial. So the circuit court for the district of North Carolina declared that it could not execute that part of the act which required it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. *Hayburn's Case*, 2 Dall. 409. In *U. S. v. Ferreira*, 13 How. 40, which arose under the act of March 3, 1849, directing the judge of the district court of northern Florida to adjudicate upon certain claims for injuries, and report the evidence thereon, the supreme court held that the authority thus conferred was not "authority to exercise any of the judicial powers of the United States under the constitution." And the judge's decision was held not to be the judgment of a court of justice, but simply "the award of a commissioner." The principle announced in these cases would sustain counsel's position, if this court, under the provisions of the interstate commerce law, is limited and restricted to the mere ministerial duty of enforcing an order or requirement of the commission, whether it be regarded as a judicial or a non-judicial tribunal. But such is not, in fact, the jurisdiction which this court is called upon to exercise. The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the commission's report is made *prima facie* evidence of the matters or facts therein stated. It is clear that this court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the cause *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy. The court is empowered "to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said commission shall be *prima facie* (not conclusive) evidence of the matters therein stated." No valid constitutional objection can be urged against making the findings of the commission *prima facie* evidence in subsequent judicial proceedings. Such a provision merely prescribes a rule of evidence clearly within well-recognized powers of the legislature, and in no way encroaches upon the court's proper functions. *Holmes v. Hunt*, 122 Mass. 505. It is further provided in said sixteenth section that when the subject in dispute shall be of the value of \$2,000 or more either party to such proceedings before said court may appeal to the supreme court of the United States, under the same regulations as now provided by law in respect of security for such appeal. In view of these provisions relating to the substance of the

proceeding in this court, and clearly indicating its true character as an original suit, we should not be misled by other expressions in that section, which seem to imply that the duty imposed upon the court is only to enforce, in a ministerial way, the requirement of the commission. In the case of *U. S. v. Ritchie*, 17 How. 525, which arose under the act of March 3, 1851, (9 St. at Large, 631,) and August 31, 1852, (10 St. at Large, 99,) creating a board of commissioners to settle private land claims in California, and providing for an "appeal" to the district court, the supreme court held that what was called an "appeal" was a mere mode of removing the papers and evidence from the board of commissioners, and the institution of an original proceeding in court, where all questions were to be reheard and re-examined *de novo*. The rule laid down in that case is directly applicable to the present proceedings, and sustains the construction which we place upon the provisions of section 16 of the law under consideration. As an original and independent suit, can the jurisdiction of this court be maintained, inasmuch as both petitioner and respondent are corporations (and therefore citizens of the state of Kentucky?) We think there can be no doubt on this question. The right asserted by petitioner arises and is claimed under a law of the United States, which relates to a subject-matter over which congress had exclusive control. This is sufficient to sustain the court's jurisdiction, independent of the citizenship of the parties to the controversy, since it involves a federal question. The first and second of the above propositions are accordingly ruled against the respondent's contention.

Upon the third inquiry presented, involving the question whether petitioner is such a common carrier of interstate commerce as entitles it to invoke and assert the provisions of the act in its own behalf, or in behalf of other railroads which use its bridge, or for whom it transfers cars, our conclusions are: *First*, that petitioner is certainly a common carrier in fact of interstate passenger traffic between New Albany and Louisville, but that traffic is not involved in this controversy, since petitioner has not offered, nor does it propose to interchange, such passenger traffic with respondent at any point; and, *secondly*, that petitioner is not, in law or in fact, a common carrier of property or freights, within the true meaning of section 1 of the act to regulate commerce, and that in respect to freight which it offers or seeks to have interchanged with respondent at said Seventh and Magnolia connection it is only a transfer company or agency engaged in performing a switching service, for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight transported or transferred, but simply a switching charge for the shifting of cars, loaded or empty, from one line or connection to another. Little, if anything, can be added to what has been so well said in the dissenting report of Mr. Commissioner Schoonmaker, on the subject of petitioner's legal *status* and character, under its charter and articles of association, the provisions of which are fully set out in the foregoing statement of facts. We concur in the views expressed and the conclusions reached by him, that petitioner's corporate powers fall short of making it a common carrier of property having the right to en-

gage in the transportation of freight for hire. The charter powers and franchises conferred upon petitioner make its bridge and approaches thereto, such as it had authority to construct, a public thoroughfare or highway, for the use of which by railroads, or street cars, wagons, vehicles, animals, and foot passengers it was authorized to charge "reasonable tolls," for the collection of which suitable toll-gates could be established. The word "toll" is, no doubt, sometimes employed in railroad charters to express the charge for transportation, rather than for the use of the structure over which such transportation may be conducted, but it is manifestly not used in that sense when applied to a bridge built and maintained for use by the public, or others engaged in transporting property. The franchises and powers conferred upon petitioner of building, maintaining, and operating its bridge and approaches, designated as its "terminal facilities," do not, in and of themselves, constitute it a common carrier of property; on the contrary, they are appropriately confined to the erection and maintenance of a thoroughfare or public highway, open to the use of others, common carriers and private parties, upon making compensation therefor in the shape of "reasonable tolls." These "tolls" which petitioner is authorized to charge for the use of its bridge are not applicable to, nor demandable for, any transportation service it may perform or be permitted to render. The word, as used in its charter, is strictly applicable to charges for the use of its highway, rather than to compensation for transportation services to be performed by itself. The distinction between such an incorporated bridge or highway, established and maintained for use by common carriers and others, upon paying compensation for such use in the way of "tolls," however graduated, and that of an incorporated common carrier engaged in transporting property for hire, is well defined. It is pointed out and illustrated in the case of *Boyle v. Railroad Co.*, 54 Pa. St. 310, and *Railroad Co. v. U. S.*, 93 U. S. 442-445. In the latter case, Mr. Justice BRADLEY, speaking for the court, says, (page 451:)

"But it is not alone in charters which contemplate the creation of railroads as public highways that we find evidence of the understood distinction between railroads as mere thoroughfares, and the operations to be carried on upon them by means of locomotives and cars. This is manifest from the fact, amongst other things, that express power is invariably given (if intended to be conferred) to the railroad company to equip its road, and to transport goods and passengers thereon, and charge compensation therefor. This practice evidently springs from the conviction that a railroad company is not necessarily a transportation company, and that to make it such, express authority must be given for that purpose, in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication."

The rule here laid down applies with more force to the case of an incorporated bridge company, like petitioner, whose charter powers neither expressly nor by any clear implication confer upon the company authority "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor." The powers and franchises conferred

upon petitioner find their legitimate scope and operation in the building, operating, and maintaining of its bridge and approaches thereto, for the public purposes it was intended to subserve,—that of furnishing and forming a highway over which common carriers and others should have the right or privilege of transporting goods or passing, as they pass over a turnpike, a canal, or a ferry, upon paying reasonable tolls for the use of the structure or thoroughfare; and do not in any way constitute petitioner a common carrier of goods, authorized to equip its road, or to charge compensation for transporting goods on or over the same. Nor does petitioner, in the legal sense of the term, act or hold itself out to the public as a common carrier of property, in connection with the railroads on either side of the Ohio river. It has no freight cars. When it solicits or accepts freight upon its tracks on either side of the river for any railroad company, it is compelled to call upon the railroad for whom the freight is intended, or over whose line it is to go, to furnish the cars in which to load the same. Such cars the petitioner merely transfers over its bridge, and delivers to the railroad furnishing the same, charging for its service its regular bridge-toll, which is in no sense a charge for transporting the freight contained or carried in the car or cars. In some cases it makes an additional charge for switching cars which require to be transferred from one connection to another. Its object and purpose in thus constituting itself the soliciting agent for the railroad companies who are willing to provide the cars for the freight it may secure is manifestly to obtain “tolls” for use of its bridge. Again, it is perfectly clear that petitioner cannot be properly regarded as a common carrier of the interstate freight transported over its bridge by the Ohio & Mississippi Railway Company, for the obvious reason that said bridge and approaches thereto to and from the yard and depot of the Ohio & Mississippi Railway Company at Hardin and Bank streets, in the city of Louisville, under the terms of the contract of September 29, 1886, between petitioner and said railway company, and under the provision of section 1 of the act to regulate commerce, constitute a part and portion of the Ohio & Mississippi Railway Company’s lines, over which said railway performs its own transportation service. The provision of section 1, referred to, provides that “the term ‘railroads,’ as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term ‘transportation’ shall include all instrumentalities of shipment or carriage.” Having, by contract with the petitioner, not only acquired the right to use said bridge and approaches, but secured for its engines, cars, and trains a preference over all other railroads in such use, down to its southern terminus in the city of Louisville, and being in the actual use thereof under said contract, during the period covered by the present controversy, the Ohio & Mississippi Railway Company must, for the time being, be regarded as the owner or operator of said bridge and approaches, under the above provision of law, as to all freights transported by said company; and the through

traffic which it carries over said bridge to its yard and depot in Louisville is in no sense either handled or moved by petitioner as a common carrier. In thus making the bridge and approaches a part or portion of the line of the railroad which uses or operates it under contract, there is a clear implication that the act to regulate commerce did not intend to include such bridges as independent carriers or "railroads" coming within the purview of the law.

The Ohio & Mississippi Railway Company neither owns nor operates any connecting line with respondent. It has no authority, either from the state of Kentucky or the city of Louisville, to connect with respondent at any point. Under its contract with petitioner it has no right to use petitioner's tracks south of Hardin and Bank streets, or to the petitioner's connection with respondent's road, at Seventh street and Magnolia avenue. What, then, is or was the real relation which petitioner sustains to the Ohio & Mississippi Railway Company in respect to freights which the latter transports from the north side of the Ohio river to its yard in Louisville, and which petitioner has tendered and seeks to have interchanged with respondent at its Seventh street and Magnolia connection? The case of the car tendered on the 12th of September, 1888, will serve to illustrate this relation. That car was brought by the Ohio & Mississippi Railway Company over its road, including said bridge as a part thereof, to said company's yard in Louisville,—the southern terminus of its lines. It was then placed on the track of petitioner, who, for a switching charge of one dollar, to be paid by the Ohio & Mississippi Railway Company, transferred the car to said Seventh street and Magnolia connection, and requested respondent to receive it there. The service performed was wholly within the limits of Louisville. The charge for that service was not made for the transportation of the goods contained in the car, but simply for switching the car itself. Upon what principle is petitioner to be held or regarded as a common carrier, either of this car or of its contents? It was transferred under the obligation of its contract with the Ohio & Mississippi Railway Company to perform the service for one dollar. It was under no public duty to do such switching for any common carrier. It could not be required, aside from its agreement, to perform such service; and in performing the same it assumed none of the responsibilities of a common carrier, but only those of a switchman moving the vehicle in which the Ohio & Mississippi Railway was transporting its traffic. In respect to cars or traffic thus handled, petitioner can only be regarded as a switchman or transfer company. In the performance of such service it is no more a common carrier of interstate commerce or traffic, within the provisions of the law, than a city transfer company which checks a passenger's baggage at the hotel where it is received, and carries it, for an agreed compensation, to the station of the railroad over which it is to be transported into another state. The act to regulate commerce does not extend to such agencies, or embrace such transfer companies, nor can they invoke the provisions of said act in their behalf, or in behalf of those whom they thus serve. The Ohio & Mississippi Railway Company could readily

have effected the delivery of said car (tendered by petitioner on the 12th of September, 1888) at respondent's Ninth and Broadway yard, through connections via the Short Route Transfer, the Chesapeake, Ohio & South-western, and the Jeffersonville, Madison & Indianapolis lines, reaching and extending up Fourteenth street to Maple and Tenth streets, at a cost of two dollars; or it could have reached respondent's yard at First and Water streets, over the Short Route Transfer Company's line, at a charge of one dollar. Under its contract with petitioner it paid for cars switched to said Seventh street and Magnolia connection one dollar per car, making a saving to itself of one dollar per car, in going to that point, rather than to the Ninth and Broadway yard; but in pursuing this course for the benefit of itself and petitioner there is imposed upon defendant, if it is compelled to accept such cars at said Seventh and Magnolia connection, an extra expense of more than one dollar, in keeping some one at said point to inspect and receive such cars, and in addition thereto the cost of switching the same to said Ninth and Broadway yard, to be put into proper trains for destination. The interchange of traffic between the Ohio & Mississippi Railway Company and respondent at the latter's Ninth and Broadway yard, which is entirely practicable, and where respondent is entirely willing to make such interchange, would deprive petitioner of its switching charge of one dollar, and would increase the cost to the Ohio & Mississippi Railway Company to the extent of one dollar per car; and this benefit to the one, and increased cost to the other, without regard to the extra expense imposed upon the respondent at one point over the other, discloses one of the objects sought to be effected, in seeking to force or compel an interchange at the point of connection selected by petitioner for its own convenience. But what public interest is to be subserved in aiding the petitioner to accomplish this object, or what bearing it has upon interstate commerce, which the act of congress undertakes to regulate, is difficult to perceive. It is, however, certain that the business thus transacted by petitioner does not make it, in law or in fact, a common carrier of interstate traffic. It is equally certain that petitioner is not a common carrier of that class of interstate freight which it solicits for railroads, either under express or implied agreement, and for which such roads furnished it with cars, for the transfer of which over its bridge petitioner charged and collected bridge-tolls only. The law does not require respondent or any other railroad company to keep up such an arrangement with petitioner as to continue to supply it with cars in order to obtain such traffic; thus making petitioner its soliciting or collecting agent in order to protect its interest in securing tolls for its bridge. Aside from the service performed by petitioner in these two classes, there is nothing in its business, as actually conducted, to sustain its claim to be even a *de facto* common carrier of interstate freight traffic. The petitioner and the Louisville Bridge Company occupy precisely the same position and character,—they both charge tolls for the use of their bridges. They differ in the manner of doing business in this: that petitioner, in addition to its bridge-tolls, collects, in certain cases, for the services performed in making transfers

of cars, a switching charge, which the Louisville bridge does not make against the railroads using its bridge. Neither of them are, in law or in fact, common carriers of interstate traffic within the scope and meaning of the first section of the act to regulate commerce; and neither can invoke the provisions of that law to compel railroad companies to transact business with or through them. Between such a bridge company as petitioner and railroad carriers of the country the law establishes no such reciprocal relations, duties, and obligations as require the latter to form business connections with the former. We accordingly rule this third proposition against the petitioner.

The fourth point presented in this case, which is whether petitioner's connection with respondent's road at Seventh street and Magnolia avenue, in Louisville, is a proper, suitable, and convenient place for the interchange of traffic between them and the railroads using petitioner's track, and whether respondent's refusal to interchange at said point is an unreasonable and unjust discrimination against petitioner, and the carriers using its track, involves questions both of fact and law. We think it clear that petitioner cannot, either in its own behalf or in behalf of railroads using its bridge, assert any valid right to an interchange of business with respondent at said point, under the eighteenth section of the latter's charter, which authorizes other railroads to make connections with its line of road. It is settled by the case of the *Shelbyville R. Co. v. Louisville, etc., R. Co.*, 82 Ky. 541, and *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 681, 4 Sup. Ct. Rep. 185, that the connection thus authorized is a physical, and not a business, connection, requiring an interchange of traffic at the point of junction. Petitioner's claim must therefore be founded, if it has any existence in law, upon some provision or requirement of the act to regulate commerce. Counsel for petitioner accordingly rely upon the second clause of the third section, in connection with the seventh section of said act, as sustaining petitioner's right to demand and require an interchange of traffic with respondent at said junction. The seventh section of the law makes it unlawful for any common carrier, subject to the provisions of the act, "to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time-schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carriers shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith, for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act." The facts show no violation of this provision of the law on the part of respondent. The contracts which it had with several railroads when the act to regulate commerce went into operation, and which still continue in force, are in nowise inconsistent with the things forbidden by this section, and there is no pretext for saying that defendant has since the pas-

sage of the interstate commerce act entered into any combination, contract, or agreement "to prevent, by change of time-schedule, carriage in different cars," or by other means or devices, the carriage of freight from being continuous. It has made no change in its method of doing business, indicating the slightest intention of violating the provisions of said section, and petitioner cannot, and does not in his petition, assert any such claim. Its right of interchange must therefore rest alone upon the second clause of the third section of the act, which provides that "every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges, between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." Neither this nor any other provision of the law requires of the common carrier of interstate commerce the duty of either forming new connections or of establishing new stations for the reception and delivery of freights. The act to regulate commerce deals with such common carriers as it finds them, and leaves to them full discretion as to what extensions they will make of their lines, the connections they may form, and the yards and depots they may choose to establish. When railroad companies, in compliance with their charter obligations, have provided themselves with convenient, suitable, and ample stations and depots for the accommodation of their business, the law imposes upon them no duty, either to the public or other railroad lines, of making new stations, yards, or depots, even though such additional constructions might be for the convenience of the public, or of other carriers. Congress has certainly not undertaken, even if they possessed the power, to deal with such matters.

Now, it clearly appears from the foregoing statement of facts that respondent has already established, and has in use in the city of Louisville, four suitable, ample, and conveniently located and fully-equipped yards and depots, at one or the other of which it receives and delivers all freights arriving at or departing from Louisville, and makes all its interchanges of freights with other lines, furnishing to the latter at said places "all reasonable, proper, and equal facilities," not only for such interchange of traffic, but also "for receiving, forwarding, and delivering of passengers and property to and from its line or lines, and those connecting therewith," and does this without discrimination in its rates and charges as between such connecting lines. At petitioner's Seventh street and Magnolia avenue connection neither respondent nor petitioner has any yard, station, or depot; neither owns any ground there except respondent's right of way, 66 feet in width, on which its double main tracks are located; neither has any buildings, sheds, or platforms there for the reception and accommodation of freights to be handled and exchanged at that point; nor has either of them any clerks or employes stationed there for

the inspection of cars, receipting for freights, etc. Without such accommodations, and without the employment of such clerical force located there, an interchange of traffic at said point cannot be made in a proper and convenient way to either party. No authority is conferred upon the commission or upon this court to compel respondent to provide at that connection the same or equal facilities which it had provided at its regular, established yards and depots in Louisville, in order to effect an interchange with petitioner and the railroads using its bridge. Respondent neither receives nor delivers Louisville freights, whether local or through, at that point. In some instances it receives and delivers its own cars on and from certain private sidings in Louisville and at local Louisville rates; said private sidings being constructed and used under special contracts with the owners, and subject to respondent's right to remove or sever its connection with them at any time. Under said contracts such private sidings constitute, for the time being, portions of respondent's Louisville lines. The interchange sought by petitioner is entirely different. Louisville shippers or consignees of either local or interstate freight could not require respondent to receive or deliver their traffic at said Seventh street and Magnolia avenue connection, and in refusing to accept from or to deliver interstate traffic to private shippers or consignees at said point it could not be claimed that respondent was denying to them the same proper, reasonable, and equal facilities which it afforded to other shippers or consignees who delivered and accepted their through freight at its Ninth and Broadway yard and depot. If we assume that petitioner is a common carrier within the meaning of the law, can it or the railroads using its track in the manner heretofore stated properly demand or require of respondent to concede to it or them rights and facilities which respondent is under no obligation or duty to grant or provide for the owners and shippers of interstate commerce? This would be conferring upon common carriers engaged in transporting interstate traffic rights and privileges superior to those intended for the benefit of such commerce itself. The law was not designed to advance the interests of or to benefit the carriers, but was intended for the benefit and advantage of the commerce they transported, and the provisions of the act all look to that as its object and purpose. With no facilities at said Seventh street and Magnolia connection for the interchange of traffic, or for the receiving, forwarding, and delivering of property there, and being under no legal duty or obligation to provide such facilities at said point upon what principle can it be successfully asserted that in declining to transact such business at such place respondent is refusing or denying to petitioner and the roads using its track "all proper, reasonable, and equal facilities" for the interchange of traffic, or for receiving, forwarding, and delivering of property, such as it has provided and affords to other connecting lines at its Ninth and Broadway yard and depot? Can it be properly said that such refusal involves any discrimination against petitioner and the railroads using its track, and seeking a connection at that point, with respondent, or against the traffic it or they may handle? In refusing to transact business with petitioner at Sev-

enth street and Magnolia avenue junction, while interchanging with other connecting lines at Ninth and Broadway station, is respondent making or giving "any undue or unreasonable preference or advantage" to the latter companies, or the traffic they transport? An affirmative answer cannot be made to these questions, unless the third section of the commerce act is construed to mean that whatever facilities a railroad company engaged in interstate traffic may furnish or provide for the interchange of business with connecting lines at any one place, such as its regularly-established and properly-equipped depot, it is bound to provide for any and all other railroads, at such other and different points as they may select in making their connection. The section does not admit of this construction. It obviously means that where a railroad subject to the provisions of the act has provided and established at any given place its facilities in the shape of yards, stations, and depots for the interchange of traffic or for the receiving, forwarding, and delivering of passengers and property, and there affords such facilities to some of its connecting lines, it shall not deny to other connecting lines at that point the same proper, reasonable, and equal facilities for such interchange, or for receiving, forwarding, and delivering of property to and from such other connecting line. The question, therefore, as to what constitutes reasonable, proper, and equal facilities necessarily involves a consideration of the place, accommodations, terms, and conditions at and under which facilities for interchange are sought, as compared with those where such interchange is conceded or afforded. It by no means follows, because certain facilities for the interchange of freight are furnished by a railroad to another connecting line or lines at one point, upon certain terms, conditions, and considerations, and where ample accommodations for the transaction of such business are provided and maintained at the joint expense of the companies using them, that another company making a physical connection with the road furnishing such facilities at another, different, and distant place is entitled to demand at said different point of connection the same or equal facilities. The company making the physical connection at a point other than that at which the established road has already provided its facilities, and conducts its interchange with other connecting lines, cannot demand or require an interchange of freight at such point of physical connection, without first furnishing at such point reasonable and proper facilities for the interchange sought. It cannot rely upon the terminal facilities at another point of the road with which it has formed the physical connection; nor can it compel the road with which the connection is made to join with it in the expense of providing at that point the facilities necessary and proper for the interchange. In saying that petitioner, or other road in its position, could not properly require an interchange at the new point of physical connection before it had first provided reasonable facilities there for transacting the business incident to an interchange of traffic, we do not mean to be understood as holding that, after providing such facilities at the point of connection, it could then lawfully require respondent to interchange traffic with it and the railroads using its tracks at that place. We do not

pass upon that question now, as it is not involved in the present controversy.

It is perfectly manifest from the location of the said Seventh street and Magnolia connection, and from the lack of all suitable and proper accommodations there for conducting the business involved in the interchange of freights, and from the manner in which such freight, whether in car-load or broken lots, would have to be handled by respondent, that, if respondent is required to furnish at that point all proper, reasonable, and equal facilities, or, as required by the order of the commission, "the same equal facilities" which it furnishes and affords to the lines connecting with it at Ninth and Broadway yard, petitioner will thereby secure benefits and advantages superior to those conferred upon any other connecting line or lines, and largely, if not entirely, at respondent's expense. The order of the commission imposes no terms and conditions under which the interchange at said connection shall be made. Petitioner is not required to pay respondent anything for switching services which it will be compelled to perform in interchanging, or any rental for the use of its terminal facilities at Ninth and Broadway, where the freights, both in car-loads and broken or mixed lots, have to be transferred, and put into proper trains. Neither is petitioner required to bear any portion of the expense of handling the traffic at said yard; and in seeking the aid of this court to compel obedience to said order, or to enforce its rights, petitioner makes no offer to compensate respondent for such services and expenditures. The commission did not, perhaps, have the authority to impose such terms and conditions upon the petitioner; nor has this court either the right or the necessary *data* to settle and adjust those matters, which are the subject of private contract and arrangements between the parties. But, without the imposition of such terms and conditions, it is clear that petitioner and the railroads using its tracks and seeking an interchange at said connection will secure, without cost to themselves or compensation to respondent, services, and the benefit of facilities and of employes, for which other connecting lines interchanging at other places make respondent compensation, and bear their proportion of the terminal expense. The law never contemplated such results. No provision of the interstate commerce act confers equal facilities to connecting lines under dissimilar circumstances and conditions. On the contrary, even as to interstate commerce itself, the distinction is recognized throughout the law between discriminations and preferences which are just and reasonable and those which are unjust and unreasonable, according as they are made or given under similar or dissimilar circumstances and conditions. All discriminations and preferences are not forbidden or made unlawful; but only such as are unjust, or undue, or unreasonable, are prohibited. In each and every case, therefore, the question whether a discrimination is unjust, or a preference is undue or unreasonable, either as to the common carrier or the commerce it may transport, involves a consideration of the circumstances and conditions, under which such discrimination or preference is made or given. Our conclusion upon this fourth proposition is that said Seventh street and Magnolia avenue connection is not a

proper, suitable, and convenient point for the interchange of freights between respondent and petitioner and railroads using its tracks, and that in declining to deliver and receive freight at that point to and from petitioner respondent is neither discriminating improperly against petitioner and the carriers using its tracks, nor giving the roads with which it does interchange traffic at the Ninth and Broadway yard any undue or unreasonable preference or advantage.

Upon the fifth question presented, viz.: Does the law impose upon respondent the duty of making an interchange with petitioner at said connection, if such interchange of traffic involves the use by petitioner and the roads using its bridge of the tracks and terminal facilities of respondent, or subject respondent to expense over and above what it incurs in interchanging traffic with other railroads at its regular and established yards in Louisville?—little need be said. An interchange at that connection in its present situation, with no buildings, sheds, platforms, or any facilities whatever for the proper care, protection, and handling of freight, and with no clerks or employes stationed there to look after and attend to the business, cannot possibly be carried on without requiring respondent either to concede the use of its tracks and terminal facilities to petitioner and the roads using its tracks, or without imposing upon respondent the trouble, inconvenience, and expense of handling such traffic, both that received and delivered, in the manner above stated,—that is, transferring it to said Ninth and Broadway depot, and then re-handling, reloading or placing it into proper trains. Petitioner's superintendent, A. J. Porter, properly states that it is a physical impossibility to carry on an interchange of traffic at that point between the parties without using each other's tracks. It does not admit of any question that neither the commission nor this court have any authority to require respondent to concede the use of its tracks and terminal facilities in order to accomplish the desired interchange. Nor can this court or the commission impose upon respondent the duty of making such interchange at its own expense, over its own tracks, with its own engines, at its own yard, and with its own employes. Other railroads connecting with respondent, and interchanging traffic with it at its regular yards, contribute their proportion of the expense incident to such interchanges, and compensate respondent for its services in handling their freight in a less inconvenient way, and for a shorter distance, than respondent would be necessarily compelled to handle the traffic received from or to be delivered to petitioner. The terms under which other railroads connecting and interchanging with respondent at said Ninth and Broadway yard are allowed to use its tracks and terminal facilities, and have their freights handled and transferred, are arranged by mutual agreements, which secure to respondent compensation for services and for use of its improvements, and provide for prorating the expense incident to such interchanges. Is it either legal or equitable to require respondent to handle traffic for petitioner upon terms less favorable? And, if the parties cannot themselves agree upon such terms, can this court make an agreement or contract for them in the matter? We think this is beyond

the province of any court or commission, under existing law, and under circumstances such as exist in this case. An interchange on the main line or tracks of a railroad is essentially different from such an interchange at its regular yard, where such business is usually transacted, and where suitable conveniences and facilities are provided. If respondent is required "to allow and afford" to petitioner at said Seventh street and Magnolia connection "the same equal facilities" which it affords to railroads connecting with it at its established yards, without prescribing the terms, conditions, and considerations under or upon which such facilities shall be afforded, it is manifest that petitioner will secure not equal, but exceptional, advantages over all other connecting lines; and it is furthermore clear from the foregoing statement of facts that such exceptional advantages will involve either the use of respondent's tracks and terminal facilities by petitioner, or will impose upon respondent expenses and inconveniences, and the performance of services without compensation, such as it does not perform or incur in effecting its interchanges with the carriers connecting with it at the Ninth and Broadway yard. If, under such circumstances, an interchange can be demanded and enforced at a physical connection with respondent's main track, one mile and seventeen one-hundredths of a mile from its regular depot, at what distance from such depot may such an interchange be properly refused? If the principle involved in the requirement of the commission, or asserted in the claim of petitioner, is correct, as applied to the present case, where shall the line be drawn in respect to the distance from its regular yards at which respondent can be compelled to allow and afford to other roads intersecting or joining its main track "the same equal facilities" which it affords to other connecting lines, which reach and interchange business at such established yards? The law furnishes no answer to those questions; and, if the right herein asserted is well founded, this court could not fix the limitation upon its application to any distance.

The sixth inquiry suggested above is: "Does the interstate commerce law, rightly construed, require respondent not only to interchange traffic at said point of connection (Seventh street and Magnolia avenue) with petitioner and the railroads using its tracks, but also to afford and concede to them on such interchange of business the same through routeing, and upon the same joint through rates which respondent has, by contract, arranged and agreed upon with certain railroads entering Louisville from the north side of the Ohio river? In other words, does said act require that, if respondent has entered into traffic arrangements with one or more railroads connecting with it over the Louisville bridge for the joint through routeing of business at and upon joint through rates, to be apportioned between them, it shall concede to or make with any and all other roads engaged in interstate commerce, and connecting with it at other and different points, and running in different directions, the same or similar arrangements for through traffic, and upon the same joint through rates? And, if this is required by the law, is such requirement valid, and within the constitutional power and authority of congress to

regulate commerce among the states? Aside from the place at which the interchange of traffic is sought, the present controversy clearly involves the question as to whether such interchange shall be effected at local Louisville through rates, or at such through joint rates as respondent has arranged with the roads connecting and interchanging with it over the Louisville bridge. Respondent is now, and has always been, willing to interchange freights with petitioner and the Ohio & Mississippi Railway Company, when such freights are tendered at its proper yards, and it is allowed to charge for the transportation thereof its local Louisville rates to destination. The petitioner, and the Ohio & Mississippi Railway Company, since the latter's abandonment of the Louisville bridge and its contractual relations with the Louisville & Nashville Railroad Company, has not been willing to concede to respondent the right of charging local Louisville rates on the freight they sought to have interchanged. Duncan, the general freight agent of the Ohio & Mississippi Railway Company, states that his company could not interchange traffic with the Louisville & Nashville Railroad Company on these terms, which would leave the Louisville & Nashville Railroad Company in position where it could decline "to pay any of our charges on freight that we offered them at Louisville rates." The agents and officers of petitioner also state that they expected respondent to accept and carry at through joint rates the freight as to which interchange was sought. Petitioner claimed before the commission, for itself and the railroads using its tracks, that it was entitled, at its said connection, to an interchange of freight upon the same terms as to through routeing and through joint rates which respondent made with other railroads using the Louisville bridge, and that respondent, in refusing such routeing and rating, was discriminating against it. If, therefore, the question of rates was not passed upon by the commission, or covered by its report and order, one of the real points in controversy between the parties was not disposed of. To leave it open, as suggested by counsel for petitioner, will only be to invite and necessitate further litigation between the parties; for if this court were to issue its mandate requiring respondent to obey the award of the commission, expressed in the general and indefinite terms of "ceasing its refusal to receive traffic offered at said connection, and of allowing and affording to petitioner at said point 'the same equal facilities' which respondent affords to other common carriers at the points of connection with their lines respectively," the question would come back to the court at once as to whether "the same equal facilities" included through routeing and through joint rates, such as respondent makes with other carriers connecting with it, or is satisfied with Louisville routeing and local Louisville rates, to destination of freight offered for interchange. Or if the court should be in error in its conclusions that said Seventh street and Magnolia avenue connection is not a proper, suitable, and convenient point for the interchange of traffic between the parties, and that such an interchange at that connection could not be effected without either the use by petitioner of respondent's track and terminal facilities, or the imposition upon respondent of expenses and burdens such as it is

not required to incur in conducting its interchanges of business with other railroads reaching its Ninth and Broadway yard, then the question of through routeing and through joint rating is a necessary and material matter for determination in the present controversy.

The first section of the act to regulate commerce provides that "all charges" for services rendered by common carriers subject to the provisions of the law "shall be reasonable and just," and prohibits and declares unlawful "any unjust and unreasonable charge." This is the sole requirement of the law upon the subject of rates which common carriers subject to the provisions of the law may demand for the transportation of interstate traffic. The second section of the act clearly defines what shall constitute the "unjust discrimination" which is prohibited. The third section prevents the making or giving of any undue or unreasonable preference or advantage to any firm, company, person, corporation, locality, or traffic, or the subjecting of any person, company, firm, corporation, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage; and by its second clause requires common carriers to afford all reasonable and proper and equal facilities for the interchange of traffic, and for the receiving, forwarding, and delivering of passengers and property between their lines and those connecting therewith, and prevents them from discriminating in their rates and charges between such connecting lines, but without requiring any such common carrier "to give the use of its tracks and terminal facilities to another carrier engaged in like business." Now, under this last limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities for the interchange, or for the receiving, forwarding, and delivering of traffic to and from and between connecting lines, it is clearly left open to any common carrier to contract or enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in, such arrangements. No common carrier can therefore justly complain of another that it is not allowed the use of that other's tracks and terminal facilities, upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines. It is equally clear from the provisions of section 6 of the act that two or more common carriers may lawfully enter into contracts or agreements for the establishment and operation of through routes at or upon joint through rates. Copies of such contracts and agreements have to be filed with the commission. "And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates, or fares, or charges, for such continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with said commission." Such joint rates, fares, or charges on such continuous lines are to be made public when directed by the commission; and the failure of any common carrier to comply with such requirements

will authorize this court, upon the application of said commission, to restrain such common carrier from receiving or transporting property among the several states, etc. If, in the exercise of the right thus impliedly, if not expressly, recognized, a common carrier, by private arrangement, forms a through route, and establishes joint through rates, fares, or charges, with certain connecting lines, is it compelled to concede to all other connecting railroads the same or equal through rates on traffic which the latter may offer for transportation? It is settled by the case of *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 668, 4 Sup. Ct. Rep. 185, that neither at common law nor under the constitution of Colorado, (section 6,) providing that all individuals, associations, and corporations shall have equal rights to have persons and property transported on any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, does the refusal of a common carrier to make through traffic arrangements at or upon joint through rates with one connecting railroad company, such as it makes or enters into with another connecting line, constitute any undue or unreasonable discrimination in charges or facilities. That decision is conclusive of the present question; unless some provision of the act to regulate commerce has expressly or by clear implication provided otherwise. It is insisted for petitioner that such is the case, and the second clause of section 3 of that act is relied on, in connection with section 5258, Rev. St. U. S., (embracing the act of June 15, 1866,) as establishing a different rule and regulation from that announced in the above decision. We think it is very manifest that section 5258, Rev. St., which imposes no duty, but merely permits or authorizes the carriage of traffic from one state to another, and, to that end, the formation of continuous lines, evidently by mutual agreement, does not sustain petitioner's proposition. That section was in full force when the case of *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, and *Railway Co. v. Richmond*, 19 Wall. were decided, and was not considered by the supreme court as conferring any right to a through route and a joint through rating. Is it a public duty imposed by the act to regulate commerce that every common carrier, subject to the provisions of that law, shall concede or afford through routeing and through rates to all connecting lines, whenever and so long as it voluntarily makes or enters into such arrangements with any connecting lines?

After a careful examination of the act, and the arguments of counsel, and authorities cited, we fail to discover any such requirements. In the report of the commission in the case of *Railroad Co. v. Railroad Co.*, 1 Interstate Commerce Com'n Rep. 94, it is well and properly said, in reference to through tickets, that "such tickets very evidently are a great convenience to travelers, and perhaps to connecting roads; but they are a part of the voluntary arrangements for business purposes, like joint tariffs, interchange of cars, and common use of depots. It being, therefore, under our statute, matter of mutual agreement, whether coupon or through tickets shall be sold by a railroad company over roads of other companies, it follows that the form of such tickets, and the manner of

their sale, are also matters of agreement by the companies interested. If companies can agree upon their tariffs, the form of their tickets, and how they shall be sold, they have the right to do so, and by such agreement become interstate-carriers; but if they cannot agree, the act does not undertake to coerce them to do business together upon terms that may be justly objectionable or injurious." It will hardly be insisted that a different rule applies in respect to through freight traffic, and joint through rates or charges, the arrangement for which, as well as the forms of the bills of lading, and the apportionment to be made of such joint tariff rates, and of losses or damage to freights in course of transit, are all matters of private agreement. Such arrangements, which usually include the reciprocal interchange of cars and the use of each other's tracks and terminal facilities, are prompted by considerations varied and complex, as shown in the above statement of facts. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases, and with other connecting lines, they might be prejudicial and injurious to the interest of one or both. Can companies in the latter situation properly claim as matter of right what the former have acquired under and by virtue of private contract and arrangement? No provision of the law, rightly construed, sanctions or supports such a proposition. The statute does not undertake to create between connecting lines such an agency or *quasi* partnership relation as is necessarily involved in agreements or arrangements for the establishment of through routes, and the making of through rates. As such arrangements exist by contract, express or implied, the fact that a common carrier enters into them, with one or more connecting lines, does not impose upon such carrier the duty or obligation to make the same or like contracts with all other lines. The law possesses no such elastic or expansive quality as to reach or bring within its operation, in favor of all common carriers subject to its provision, every varying right and privilege which any other carrier may acquire or concede by private contract not in conflict with the act. No authority is conferred upon common carriers of interstate commerce to issue through tickets to passengers, or through bills of lading for property, at through rates, over connecting lines, in the absence of such arrangements between the companies. Neither is the commission invested with authority to establish through routes, or to fix through rates, between connecting lines. The English act of 1873, amendatory of the act of 1854, did confer such authority, in providing that "the said facilities to be afforded are hereby declared to, and shall, include the due and reasonable receiving, forwarding, and delivering by any railway company and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company, at through rates, tolls, or fares;" but in the apportionment of such through rates said act required the commissioners "to take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or making of the route, or any part of the route, as well as any special charges which any company may have been en-

titled to make in respect thereof." Our act to regulate commerce contains no such provision, and confers no such authority. The English cases under the act of 1873, cited by counsel, cannot therefore have any bearing upon the present case, and need not be referred to.

Looking at this question from another standpoint, we find that the law was intended, primarily, for the benefit of the interstate traffic, rather than for the advantage of the designated common carriers engaged in its transportation; and the latter, as the instrumentalities and agencies of commerce, can hardly assert rights and privileges under the statute, which could not be properly or lawfully claimed by such commerce itself. Let us, then, by way of illustration, and to bring out more distinctly the question under consideration, take the case of a shipper or consignor at Nashville, Tenn., wishing to have his goods transported to Cincinnati, Ohio. Could he legally require the Louisville & Nashville Railroad Company, not only to accept such shipment, but to route it over or via the petitioner's bridge and the Ohio & Mississippi Railway, and at the same through rates from Louisville to Cincinnati as respondent's own *pro rata* charge between said points would be if it carried the goods direct from Nashville to Cincinnati? Or could such shipper require respondent to route his goods in the way stated, at the same or equivalent through rates which respondent has established with connecting roads leading north from Louisville to Indianapolis, St. Louis, or Chicago? The Louisville & Nashville Railroad Company could not decline to accept and carry such goods to Louisville at its regular rates between Nashville and Louisville; but could it not properly decline the demand to route and rate them beyond Louisville to Cincinnati, on the ground that it had a direct line of its own to Cincinnati, over which the property could be carried by itself; that it had no arrangement or agreement with the Kentucky & Indiana Bridge Company and the Ohio & Mississippi Railway Company for such through routeing and through joint rating; and that between Louisville and Cincinnati it was a competing, and not a connecting, line with the Ohio & Mississippi Railway Company? Could the Nashville shipper successfully urge in support of his demand for such through routeing and rating that the Louisville & Nashville Railroad Company had existing arrangements with lines (other than the Ohio & Mississippi Railway Company) crossing the Louisville bridge, under which interstate traffic was carried at through rates between certain points? There can be but one answer to these questions. The law confers no such right upon the shipper, and imposes no such duty upon the common carrier. If Cincinnati is made the point of shipment, and the Ohio & Mississippi Railway Company is taken as the initial carrier, it is equally clear that, in the absence of any through traffic arrangement between the Louisville & Nashville Railroad Company and the Ohio & Mississippi Railway Company, a shipper at Cincinnati could not lawfully require the Ohio & Mississippi Railway Company to accept his goods, and issue a through bill of lading therefor to Columbia, Tenn., via the Kentucky & Indiana bridge, and via the Louisville & Nashville Railroad, at the same through rates from Louisville to Columbia which

the Louisville & Nashville Railroad Company would charge from Louisville to Columbia under its through rate from Cincinnati to Columbia. What the shipper of interstate commerce may not lawfully demand, the common carrier engaged in transporting such commerce may not lawfully require, of connecting lines. In the absence of traffic arrangements between respondent and petitioner and the railroads using its tracks, the former has a right to treat freights tendered it at Louisville as local Louisville business, and charge for the transportation thereof its Louisville rates to destination; and in doing this no discrimination is made against said parties or the traffic they carry; nor does respondent make or give any undue or unreasonable preference or advantage to other lines, or the traffic they handle, with whom it has agreements for through routing, and at through joint rates, which may be lower than its Louisville rates to the same points. The service in the two cases is not the same or identical, as was settled in the case of *Railway Co. v. U. S.*, 117 U. S. 355, 6 Sup. Ct. Rep. 772, where the supreme court held that the service rendered by a railway company in transporting a local passenger from one point on its line to another is not identical with the service rendered in transporting a through passenger over the same rails. There is nothing in the commerce act of congress to change this rule. The effect of a through traffic arrangement between different companies is to extend a railroad's line, during the existence of such arrangement, to the point or points agreed upon; and over such extended routes it may charge, as a through rate, less than for transporting local traffic from one point to another on its own line, provided that in so doing the fourth section of the act is not violated. The Louisville & Nashville Railroad Company is under no legal duty or obligation to extend its line across the petitioner's bridge to New Albany; and, if it was, petitioner has, by its contract of September 29, 1836, with the Ohio & Mississippi Railway Company, shut itself off from affording to respondent the same or equal facilities in the use of said bridge by having given the locomotives, cars, and trains of the Ohio & Mississippi Railway Company a preference over those of a similar class of other railroad companies that may use said bridge; so that it is not in a position, while that contract is in force, to grant or concede such traffic arrangements as it demands for itself and the railroads using its bridge.

While the Ohio & Mississippi Railway Company is not an actual party to this controversy, which this court is required "to hear and determine as a court of equity," it is, however, perfectly manifest that this proceeding, as well as that before the commission, is intended for the private benefit, not merely of petitioner, but of the Ohio & Mississippi Railway Company; and its object is to relieve the latter from the contract of June 5, 1872, in order that petitioner may secure from it the rental stipulated to be paid for the use of its bridge; the Ohio & Mississippi Railway Company not being bound by the contract of September 29, 1836, to pay petitioner "any tolls" thereunder until its liability for tolls, charges, or rentals under the contract of June 5, 1872, with the Louisville Bridge Company, is removed. Now, the contract of June 5, 1872,

which the Ohio & Mississippi Railway Company entered into with the Louisville Bridge Company and other railroad companies, including respondent, and in the maintenance and enforcement of which respondent has a direct business and pecuniary interest, was neither abrogated nor annulled by the act to regulate commerce. The provisions of that contract are not in conflict, but in strict conformity, with both the letter and spirit of the act of congress. Under the terms and operation of that contract, which is still in full force as against the Ohio & Mississippi Railway Company and all parties thereto, the Ohio & Mississippi Railway Company had and enjoyed all reasonable, proper, and equal facilities with any and every other railroad company entering Louisville from the north side of the Ohio river, and interchanging traffic with respondent. It voluntarily abandoned these facilities in 1888, changed its business to the petitioner's bridge, not in the interest of the public or of the interstate commerce it handled, but for its private benefit and advantage; and petitioner now seeks to secure for it, as well as for itself, the same terms and facilities which existed under the contract of June 5, 1872, and without subjecting either to the obligation of compensating respondent, or sharing in the expense of an interchange, as provided in the contracts of May 22, 1873, and May 16, 1888. The act to regulate commerce, no more than the act of June 15, 1866, (section 5258, Rev. St. U. S.,) was never intended to invade the domain of private contracts between common carriers, which were valid when made, and are not in conflict with the provisions of the law. In *Railroad Co. v. Richmond*, 19 Wall. 590, the supreme court says of such contracts, "that the observance of good faith between parties, and the upholding of private contracts and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences, than the public policy sought to be established in the facilitation of commercial intercourse among the states, which the act of June 15, 1866, aimed to promote." Under such circumstances as surround the parties, neither the Ohio & Mississippi Railway Company nor the petitioner, who, for private advantage, is co-operating with the Ohio & Mississippi Railway Company in trying to escape from the obligations of said contract of June 5, 1872, are in a position to commend themselves to the favorable consideration of a court of equity, and no strained construction of the law should be made in order to afford them or either of them, the relief they seek at the hands of the court. The law should be as liberally construed in favor of commerce among the states as its language will permit; but, when complaint is made, or relief is sought, solely or mainly in the interest of the common carriers engaged in the transportation of such commerce, the act complained of, or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred. But under no construction which can properly be placed upon the present case can it be maintained that a public duty is imposed upon respondent of interchanging traffic with petitioner and the railroads using its tracks, upon the same terms as to through routeing and through joint rates which it has, by private

agreement, established with other connecting roads using the Louisville bridge.

Having reached the conclusion that the act to regulate commerce, rightly construed, does not sanction nor support the affirmative of the proposition presented, it is not deemed necessary to go into any discussion as to the power of congress over the subject of rates which common carriers may charge on interstate commerce, or whether congress, under the power conferred by the constitution, to regulate commerce among the states, could require all connecting lines engaged in transporting such commerce to establish through routes, and make through joint rates, which should be equal between all such companies. No court has attempted to define the extent, limit, or scope of the power conferred by the constitution upon congress to regulate commerce among the states. The power is undoubtedly sovereign and exclusive. Prior to the passage of the interstate commerce act, this power and exclusive authority over the subject was only exercised—with the exception of regulations for the protection of passengers upon navigable waters, and the transportation of live-stock by railroads—through the judicial department of the general government in the way of restraining or annulling state legislation or action which undertook to interfere with, obstruct, or impose burdens or restrictions upon, interstate commerce. But the power is manifestly not confined or limited to this negative form of action upon the states. It clearly admits of affirmative exercise on the part of congress, as much as any other power granted by the constitution to the federal government. Chief Justice MARSHALL, in *Gibbons v. Ogden*, 9 Wheat. 1, gave this comprehensive definition of this power:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself; may be exercised to its utmost extent; and acknowledges no limitations other than are prescribed in the constitution. * * * If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

Possessing such sovereign and exclusive power over the subject of commerce among the states, it is difficult to understand why congress may not legislate in respect thereto to the same extent, both as to rates and all other matters of regulation, as the states may do in respect to purely local or internal commerce. But we are not called upon in the present case to say what would or would not come within this regulating power, for the existing law does not undertake to prescribe anything more upon the subject of rates than that they shall be reasonable and just. It does not undertake to require a common carrier, subject to its provisions, to establish through routes and through rates with all connecting lines, if it does so with one or more lines; and does not, as we construe its provisions, entitle petitioner to the relief which it seeks in this proceeding. For the foregoing reasons our conclusions upon the whole case are that

the order of the commission was not a lawful requirement, such as respondent is bound to obey; and that petitioner is not entitled to the relief which it seeks in this court. It is accordingly ordered and decreed that petitioner's bill or petition be dismissed at its cost, to be taxed, including in such costs an allowance of \$600 to the referee, as compensation for his services in taking proof and making report herein.

BARR, J. I agree with so much of his honor's—Judge JACKSON'S—opinion as decides the interstate commerce act constitutional, and that this court has original jurisdiction in this cause. I also concur with him in the opinion that the complainant is not a common carrier of interstate traffic, within the meaning of the interstate commerce act, and that there are not proper and suitable facilities for the interchange of traffic at the intersection of Seventh street and Magnolia avenue; but I do not concur in so much of his opinion as seems to indicate that complainant, or the railroads using its bridge, must bring their freight for interchange to one of the established depots of the Louisville & Nashville Railroad Company. On the contrary, I think the intersection of Seventh street and Magnolia avenue is a proper place for the interchange of traffic, if suitable platforms and other structures were erected. These necessary facilities should be furnished by the complainant or those demanding the interchange of traffic at that point, as they have no right to use either the track or terminal facilities of the Louisville & Nashville Railroad Company without its consent. Having concurred in the opinion that the complainant cannot obtain an interchange of traffic with the Louisville & Nashville Railroad Company, and that the petition must be dismissed, I do not wish to give an opinion as to the rates which should be charged as between common carriers in the interchange of traffic under and by virtue of the interstate commerce act, until a case arises which requires a decision.

UNITED STATES v. TOZER.

(District Court, E. D. Missouri, E. D. February 6, 1889.)

1. CARRIERS—INTERSTATE COMMERCE ACT—INDICTMENT.

The offense of "unjust discrimination," under section 2 of the interstate commerce act, (24 U. S. St. at Large, p. 379,) is not confined to discrimination by means of some device, as by a special rate, rebate, or drawback, but is committed by directly giving different rates to different persons; and an indictment under that section need not aver by what particular device the discrimination was accomplished.

2. SAME.

Under section 3 of the act, making it unlawful for a carrier "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality * * * in any respect whatever, or to subject any particular person, company," etc., "to any undue or unreasonable prejudice or disadvantage," a count in an indictment is suffi-

cient if it shows with requisite certainty that the defendant has committed an act giving one shipper or class of shippers an advantage, or subjecting others to a disadvantage; and it need not allege that the discrimination was committed "under substantially similar circumstances and conditions," as required under section 4, containing the "long and short haul" clause.

8. SAME.

A count whose language is so uncertain as to leave it in doubt whether it means to charge that defendant demanded of merchants in Hannibal greater compensation for carrying goods from that city to Helper, Kan., than he demanded of another railroad company for carrying goods between the same points, or greater than he demanded of that company for carrying goods from Chicago to Helper, is bad on demurrer.

4. SAME.

A count under section 6 of the act, charging that on a day named defendant, as agent, etc., charged and collected of another railroad company a less rate of compensation for carrying goods between Hannibal and Helper than 46 cents per 100 pounds, which rate had been "established and published" between those points prior to the day named, and that said rate was "in force on that day," negatives a reduction by defendant's company prior to or on the day in question.

5. SAME—AGENCY OF DEFENDANT.

Under section 10, making any agent of a railroad company subject to the provisions of the act amenable to its penalties, who willfully does any of the prohibited acts, an allegation that defendant, at the time the offense was committed, was agent of a certain railway company, and had general charge of its freight office at Hannibal, sufficiently shows that the offense was committed under color of his office or agency; and it is not necessary to allege or prove that the particular act complained of was done under the direction or authority of the principal.

Indictment of George K. Tozer for violation of the Interstate Commerce Act. On demurrer.

Thomas P. Bashaw, U. S. Dist. Atty., and *C. C. Allen*, for the United States.

Thomas J. Portis and *W. A. Martin*, for defendant.

THAYER, J. This is an indictment containing five counts founded on the interstate commerce act, approved February 4, 1887. 24 U. S. St. at Large, p. 379. A demurrer has been filed to the several counts, which raises the various questions to be decided.

The first count charges the defendant, who is alleged to be an agent of the Missouri Pacific Railway Company, with unjust discrimination, in that he charged the Hayward Grocery Company, or suffered and permitted it to be charged, at the rate of 46 cents per 100 pounds on sugar shipped from Hannibal, Mo., to Helper, Kan., over the line of the Missouri Pacific Railway, whereas at or about the same date he charged the Chicago, Burlington & Quincy Railroad, for the transportation of sugar between the same points and over the same line, at the rate of only 34 cents per 100 pounds. The particular objection made to this count appears to be that the count does not show whether the discrimination was accomplished by granting to the Chicago, Burlington & Quincy Railroad a "special rate, rebate, or drawback," or by some other device. The point is obviously not well taken, as section 2 of the act, under which the count is framed, makes it utterly immaterial how the discrimination was effected,—whether by a special rate accorded to one shipper and de-

nied to another, or by a "rebate, drawback, or other device." The offense defined by the second section consists in an "unjust discrimination," no matter how it is effected, whether directly or indirectly; and for that reason it is unnecessary to aver in an indictment by what particular device the defendant managed to discriminate in favor of a particular shipper.

The second, third, and fourth counts of the indictment are founded on the third section of the act, which declares it to be unlawful for a carrier subject to the provisions of the act "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, * * * in any respect whatever, or to subject any particular person, company, * * * to any undue or unreasonable prejudice or disadvantage in any respect whatever." The second count charges that defendant willfully and unlawfully gave an undue and unreasonable preference and advantage to the Chicago, Burlington & Quincy Railroad Company, in that he charged the Hayward Grocery Company at the rate of 46 cents per hundred for the transportation of one barrel of sugar from Hannibal, Mo., to Helper, Kan., and at or about the same time only charged the Chicago, Burlington & Quincy Railroad Company at the rate of 34 cents per hundred for the transportation of two barrels of sugar between the same points. The third count is of the same tenor as the second, except that it charges the defendant, by the same act mentioned in the second count, with subjecting the Hayward Grocery Company "to an undue and unreasonable prejudice and disadvantage." The fourth count charges the defendant with subjecting a locality, to-wit, the city of Hannibal, to an undue and unreasonable prejudice and disadvantage, by demanding and collecting of divers merchants doing business in Hannibal, greater compensation for transporting property from Hannibal to Helper, Kan., than he demanded and collected of the Chicago, Burlington & Quincy Railroad "for the transportation of property transported for divers persons in the City of Chicago * * * over the lines of railroad of said Chicago, Burlington & Quincy Railroad Company and said Missouri Pacific Railway Company to said town of Helper." It is insisted that the second, third, and fourth counts are each bad, because the pleader does not aver in the language of the statute that the service referred to as having been rendered for the parties named, and charged for at a different rate, was rendered "under substantially similar circumstances and conditions." If these counts were framed under the fourth section, for violation of the long and short haul clause of the act, in which section the words "under substantially similar circumstances and conditions" are used to describe the offense, the point made would be well taken. But in framing a count under the third section it is not necessary to use the language last quoted. A count under the third section is sufficient if it shows with requisite certainty, by any apt language, that the accused has committed an act which gives one shipper or class of shippers an advantage, or subjects others to a disadvantage. The second and third counts of the present indictment clearly show that defendant charged and received of the Hayward Gro-

cery Company a greater rate of compensation than he charged and received of the Chicago, Burlington & Quincy Railroad Company for transporting the very same class of goods between the same points, and over the same route. These counts are sufficient in law, although the pleader does not aver that the service rendered to each party was rendered "under substantially similar circumstances and conditions." The fact that it was so rendered sufficiently appears without that averment. The fourth count, in my opinion, lacks the requisite precision of statement; and, as it is demurred to on that ground, as well as on the ground last mentioned, it will be adjudged insufficient. It is uncertain whether the pleader intended to charge that defendant demanded of merchants doing business in Hannibal greater compensation for the transportation of goods from that city to Helper than he demanded of the Chicago, Burlington & Quincy Railroad Company for the transportation of goods between the same points, or greater compensation than he demanded of the latter company for transporting goods from Chicago to Helper. The fourth count appears to be susceptible of either construction, and for that reason, if for no other, the demurrer ought to be sustained.

The fifth count of the indictment is based on the sixth section of the act, and alleges, in substance, that the defendant on June 15, 1887, as agent of the Missouri Pacific Railway Company, charged and collected of the Chicago, Burlington & Quincy Railroad a less rate of compensation for the transportation of goods from Hannibal to Helper than the "established and published" rate of freight charges over the Missouri Pacific Railway, between those points. To this count the objection is made that it is not averred that the Missouri Pacific Railway had not on that date reduced its published freight rate between Hannibal and Helper, as it was privileged to do under the sixth section, without notice. This objection is not tenable for the reason that the pleader does allege that a given freight rate of 46 cents per 100 pounds between the two points last named had been "established and published" prior to June 15, 1887, and that said rate "was in force on that day," when the unlawful charge is said to have been made. This averment deprives the objection of the force it would otherwise have. It shows that no reduction in the established rate had taken place, and that the rate accorded to the Chicago, Burlington & Quincy Railroad was not given in conformity with a general reduction in freight rates, but was an advantage allowed to it over other customers.

A further and final objection made to the whole indictment is that it does not show that the defendant, as agent of the Missouri Pacific Railway Company, had any authority to do the acts charged in the various counts. This objection does not strike me with any force. It is alleged in each count that defendant was agent of the Missouri Pacific Railway Company, and had general charge of its freight-office at Hannibal, Mo. Section 10 of the interstate commerce act renders any agent of a railroad company that is subject to the provisions of the act amenable to the penalties denounced therein, if he, either alone or with any other person or corporation, willfully does any of the acts prohibited or

declared to be unlawful. When an agent of a railroad is prosecuted under the statute for an unlawful act, it is not necessary, in my opinion, either to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal, or by its direction. It is sufficient to show that the accused was in fact an agent of a railroad subject to the provisions of the act, and that the wrong was committed under color of his office or agency. Whether, in the particular matter complained of, the agent exceeded his power, is certainly immaterial in a prosecution against the agent. If it has any bearing on the question at issue, the fact that the agent has exceeded his powers in violating the law ought to aggravate the offense, rather than excuse it. The demurrer is overruled as to all the counts except the fourth, as to which it is sustained for the reasons before stated.

McGUINN v. FORBES *et al.*

(District Court, D. Maryland. January 24, 1889.)

CARRIERS—OF PASSENGERS—DISCRIMINATION AGAINST COLORED PERSONS.

Plaintiff, an educated colored clergyman, the holder of a first-class ticket on defendants' steam-boat, when the supper bell rang, seated himself at the table, and, on the captain requesting him to move to another table because the other passengers had complained of his presence, he refused. The captain then had another table fixed up for the other passengers, and plaintiff was left alone, his supper being furnished him. *Held*, that there was no discrimination against plaintiff on which to base a libel for damages against the owners of the boat.¹

In Admiralty. Libel for damages.

Libel by Robert A. McGuinn, colored, against Georgeanna Williams and Matilda S. Forbes, owners, and Thomas J. Cooper, captain, of the steamer Mason L. Weems, in which \$2,000 were claimed as damages for the treatment to which Mr. McGuinn was subjected on account of his color. McGuinn, who is the pastor of a colored Baptist church at Annapolis, alleged in his bill that on the 6th of July, 1887, he purchased a ticket by the Mason L. Weems for Millenbeck, Va. When

¹ Under the *Nebraska* statute, barber-shops cannot discriminate against a negro, and deny him any rights therein to which a white person would be entitled. *Messenger v. State*, 41 N. W. Rep. 638. A skating-rink carried on without any license is not such a place of public amusement as to give one excluded therefrom because he is colored a right of action against the proprietor. *Bowlin v. Lyon*, (Iowa,) 25 N. W. Rep. 766. The *Kentucky* homestead act of 1866 is void so far as it excludes negroes from its benefits. *Custard v. Poston*, 1 S. W. Rep. 434. See, also, note, *Id.* A state law making it a misdemeanor to exclude citizens of the state from places of amusement by reason of race, color, or previous condition of servitude, is a valid exercise of the police power of the state. *People v. King*, (N. Y.) 18 N. E. Rep. 245. A state law directing the distribution of taxes levied for school purposes, so as to discriminate in favor of the schools for white children, and against the schools for colored children, is void. *Claybrook v. Owensboro*, 16 Fed. Rep. 297, 23 Fed. Rep. 634. Separate schools may be provided for colored children, but they must afford substantially equal advantages with those for white children. *U. S. v. Buntin*, 10 Fed. Rep. 730. See, also, for a discussion of civil rights laws and legislation, extensive note, *Id.*; *Smoot v. Railway Co.*, 13 Fed. Rep. 337; *The Civil Rights Cases*, 3 Sup. Ct. Rep. 18.

the supper bell rang, he seated himself at the table, and, upon his refusal to move, the food and dishes were removed to another table, the passengers all taking seats at that table, and leaving him alone. Afterwards the passengers threatened him, which was the cause of his leaving the boat eight hours before reaching his destination. Mr. McGuinn testified that he was not told any arrangements had been made for supper, and he went to the table in response to the supper bell. A waiter motioned him to a seat, and took his order. The captain requested him to move to another table, and attempted to move his chair, but he refused to allow this, as he had purchased a first-class ticket. The captain then requested the other passengers to take the other table, which they did. The captain told him the passengers had complained of his presence, and had it not been for him (the captain) they would have handled him roughly. Afterwards McGuinn was assaulted by one of the passengers, and threats were made to pitch him overboard. In consequence of this he did not retire for the night, but remained in the saloon, and got off at Monaskon instead of at Millenbeck, whence he took a vehicle to his destination. He was told when he bought his ticket that the boat did not stop at Millenbeck on the up-trip, but would stop coming down. As he had plenty of time, he had intended to remain on the boat. He saw no officers of the boat after supper. Henry Williams, colored, who was steward of the steamer at the time, saw McGuinn when he took his seat at the table. There were two gentlemen and one lady also at the table. He saw the captain speak to McGuinn, and he removed the others to another table by the captain's orders. Afterwards McGuinn came to him, and inquired if there was any protection for passengers, and asked for the captain. All the tables on the boat were the same, and no difference was made. Capt. Cooper, who commanded the Mason L. Weems at the time, but who now has charge of the Theodore Weems, said he saw McGuinn at the table, and wondered why so few passengers were taking supper. Complaint was made to him that a colored man was at the table. He asked McGuinn if he would please move to another table, and, upon his refusing to do so, he instructed the steward to fix the other table for the rest. McGuinn told him he had paid first-class fare. The captain said he was unaware of any indignity offered McGuinn, and told the passengers to let him alone. The boat only stops at Millenbeck on the down-trip. A passenger for Millenbeck can get off at Monaskon between 6 and 7 o'clock in the morning, and get to Millenbeck in a couple of hours by walking, which is the usual way; otherwise they would not arrive until 3 or 4 o'clock in the afternoon. John Dare, the clerk of the boat, testified that three or four passengers came to him, and told him a colored man was at the table, and they would not sit down, and he acquainted the captain with the fact. A. W. Creet, a passenger at the time, saw the saloon full of passengers, and saw them move to another table, but witnessed no trouble. Manager Williams, of the Weems Line, testified that no difference is made in the treatment of passengers, although the colored passengers are assigned certain seats, and it is endeavored to keep them to themselves.

E. J. Waring, for libelant.

I. H. Thomas, for respondents.

MORRIS, J. In cases of a similar class which have come before this court I have decided that when a first-class price is demanded and paid, the persons paying that price must have the same accommodations, and there must be a *bona fide* effort on the part of the carrier to furnish the same accommodations. *The Sue*, 22 Fed. Rep. 843. When public sentiment demands a separation of the passengers, it must be gratified to some extent. While this sentiment prevails among the traveling public, although unreasonable and foolish, it cannot be said that the carrier must be compelled to sacrifice his business in order to combat it. Within reasonable limits the carrier must be allowed to manage his own affairs. In this case, although the petitioner suffered some discomfort and humiliation, he was not obliged to leave the table, and his supper was served, and I do not find that he was discriminated against in any manner which can be made the ground of a legal action. It was foolish and unreasonable, as I have said, in the other passengers to object to sit at the same table with this libelant, who is a well-behaved, educated minister of the Christian religion, simply because he may have negro blood in his veins, but the owners of the steam-boat cannot be held responsible in damages for that. There is some ground for a suspicion that the petitioner was not sufficiently protected by the officers of the steam-boat from the threats and indignities at the hands of certain passengers, but the proof fails to establish it, and they testified that they did all they could to prevent it. I therefore must dismiss the libel, but without costs.

WESTERN MANUF'G CO. v. THE GUIDING STAR.

(Circuit Court, S. D. Ohio, W. D. January 28, 1889.)

1. CARRIERS—OF GOODS—LIABILITY FOR LOSS—BURDEN OF PROOF.

On a libel for damage to butterine during transportation, respondent has the burden of proving defective cooerage of the tubs containing it, or its nature or quality, and the action of the weather upon it, from which respondent alleges the damage resulted.

2. SAME—EVIDENCE—SUFFICIENCY.

The defense that the damage resulted from the nature of the butterine under the action of the weather, is not established where it is shown that the butterine was manufactured with special reference to the temperature at the points of shipment and delivery, and had withstood a test of 92 deg., and was in good condition when shipped, and that other shipments of similar quality and cooerage, on the same and other vessels, made at and about the same time, in the same state of weather, were delivered in good condition, and where proper ventilation is not shown.

3. SAME—PRESUMPTION.

The tubs having been in good condition when shipped, and in bad condition when delivered, many of them being broken in, proper stowage, which is a part of the obligation to carry safely, will not be presumed, though the place of stowage may have been selected without fault.

4. SAME—DAMAGES.

The difference between the price for which the article was sold and its market value at the place of delivery on its arrival, had it been in good condition, with interest, is the proper measure of damages.

5. SAME.

The expenses of libellant's agent in going to the place of delivery to investigate as to the butterine which had been rejected, are not a proper charge against respondent.

In Admiralty. Libel for damages. On appeal from district court.

Libel by the Western Manufacturing Company against the steamer Guiding Star, for damage to goods in course of carriage. Decree for respondent, and libellant appeals.

Lincoln, Stephens & Lincoln, for libellant.

Follett, Hyman & Kelley, for respondent.

JACKSON, J. The evidence in this case clearly establishes that the butterine consigned by libellant to C. H. Dolson and Smith Bros. & Co. was of good quality, in good condition, and put up in good tubs or packages, suitably and properly coopered. The bills of lading issued by the respondent admit that the consignments were received in good order, and were by it to be delivered to the consignees at New Orleans "in like good order," "dangers of fire, navigation, explosion, and collision excepted." It is also clearly shown by the testimony, and not controverted by the respondent, that when the butterine arrived at New Orleans it was in a damaged condition, unmerchantable, and its market value reduced about 50 per cent. It is neither claimed by respondent, nor shown by the proof, that this loss or damage to the butterine, which occurred while in transit, was caused or occasioned by any one or all of the excepted dangers mentioned in the bill of lading. The defenses set up and relied upon by respondent in the court below and in this court are: *First*, that libellant selected the place on the steam-boat where the packages of butterine should be stowed, and where the same were in fact stowed, as the coolest and best position on the boat; and, *secondly*, that the tubs in which the butterine was packed were insecure, and insufficient for the purpose, and that the loss or damage resulting to the butterine during its transportation to New Orleans was occasioned by the construction or cooperage of the tubs, in connection with the heat of the weather at the time of shipment and during the transit.

The proof does not establish that libellant or its agent selected the place of stowage for the freight; libellant's agent only requested that it should be stowed in the coolest place on the boat, and the clerk (Jones) and mate (Harrison) both designated and selected the forward hold, near the hatches or breast-hooks, as being the safest and coolest place on the boat, assigning as a reason for that opinion and that selection, "that the scuttle-hatch would be open, and a current of air would be passing through, which would keep that part of the hold cool." But while this first ground of defense is not sustained, it does not appear that this selection was improperly made, or that respondent is chargeable with fault as to the place of stowage, since it is shown by the evidence that the for-

ward part of the hold, in hot weather, is the coolest location or position on the boat for articles of a perishable character, or such as need and require protection from the sun or heat, provided the scuttle-hatch is kept open, to give it proper ventilation.

In respect to the second ground of defense the burden of proof rests upon respondent to establish that the loss or damage to the butterine was caused or occasioned by the insecure and insufficient tubs in which it was packed, or by the defective cooperage of such tubs, as alleged in its answer, in order to exempt itself from liability. It is not claimed in the answer that the loss or damage to the butterine complained of resulted from any intrinsic or inherent quality of the article itself, but only from the defective character of the tubs in which it was packed. In the argument of the case, however, counsel for respondent have insisted that the loss or damage occurred from the character of the butterine, which it is claimed melted, and became liquefied, by reason of the temperature of the atmosphere, and in that condition, with defective coopering of the tubs, was lost or injured. Without stopping to consider whether respondent can have the benefit of this latter claim, not relied on in its answer, we may say that this, as well as the defense of defective cooperage of the packages, casts upon respondent the burden of proof, in order to escape liability for the loss or damage to the freight occurring while in transit. As stated in *Hastings v. Pepper*, 11 Pick. 43, cited with approval by the supreme court in *Nelson v. Woodruff*, 1 Black, 160, the well-settled rule of law is that, when loss or damage occurs to freight transported by a common carrier, "the presumption of law is that it was occasioned by the act or default of the carrier, and of course the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible." It is also settled that a common carrier is not responsible for the ordinary evaporation of liquids occurring in course of transit, or for leakage arising from secret defects in the casks, which existed, but were not apparent, when received for carriage; nor for loss or injury occasioned by the peculiar nature of the article carried at a particular season of the year, such as that resulting from the fermentation of molasses, or the leakage of liquid lard from barrels, although the bill of lading issued therefor describes the freight as received in good order, and undertakes to deliver the same at destination in like good order; but in all such cases, when loss or damage does occur during the course of transportation, it is incumbent upon the carrier to establish by satisfactory proof that such loss or injury was occasioned by causes which he could not control, resulting from the nature and condition of the article,—as secret defects of the casks, barrels, or vessels, in which it is packed. *Nelson v. Woodruff*, 1 Black, 158-163, and cases there cited, fully illustrate these general principles. When the loss or damage results or is occasioned by any of the excepted perils or dangers mentioned in the bill of lading, the shipper must *prima facie* bear the loss; but he may impose it upon the carrier by proving negligence, or that it might have been avoided by the exercise of reasonable care, skill, and attention on the part of the carrier. Reasonable care, diligence, and skill

are demanded and required of carriers even in respect to losses resulting from dangers and perils excepted in bills of lading. When the carrier shows that the damage complained of was occasioned by an excepted peril, the burden of proof then rests upon the shipper to establish negligence or want of proper care and diligence on the part of the carrier in order to hold him liable. But when the damage is not occasioned by one of the perils from which the carrier has exempted himself by the bill of lading, as in the present case, the shipper is not called upon to show actual blame, fault, or negligence on the part of the carrier in order to hold him liable. In such cases the loss or injury to the shipper's goods while in course of carriage is sufficient proof of negligence or misconduct, and of *prima facie* liability, and the *onus probandi* is then on the carrier to exempt himself. Everything is negligence on the part of a common carrier which the law or his express contract does not excuse. It is enough for the shipper to show that his goods reached their destination in a damaged condition in order to render the common carrier liable, and the burden of proof is then on the carrier to show, and show satisfactorily, that it was occasioned by, or resulted from, such causes as will exempt him from liability. These principles are very clearly laid down in *Clark v. Barnwell*, 12 How. 280; nor is there anything to the contrary announced in *Nelson v. Woodruff*, 1 Black, 158, cited and relied on by counsel for respondent.

Now, testing the present case by the foregoing rules, the question, and the only question, presented is, has the respondent satisfactorily established its defense, either that libelant's butterine was damaged by the insecure or defective cooerage of the tubs containing the same, or that such damage resulted from the nature or quality of the butterine itself under the action of the weather, while being transported, so as to exempt it from liability for the injury? After a careful examination of the evidence, we think neither of said defenses is sustained. The testimony shows no defective cooerage in the packages; on the contrary, it is affirmatively established that the tubs in which the butterine was packed and shipped were of good and proper material, were well made, and in all respects secure and sufficient. They were such as libelant habitually used in shipping butterine, and in all other instances, with perhaps one exception, proved secure and sufficient. They were in fact, as recited in the bill of lading, in good order when received by the respondent, but when delivered they were in bad order and condition,—many of them were broken in at the heads or ends, and their contents entirely gone, showing that they had been subjected to rough handling, or improper stowage, by contact with, or pressure from, other freights. Mere melting or liquefaction of the butterine might have occasioned leakage, but would hardly have caused the breaking or the bursting in of the heads or ends of the tubs. In this connection it is important to notice that, while the place of storage may have been selected without fault, respondent has not shown or stated any fact or facts as to the stowage itself, or how the tubs of butterine were placed or deposited in respect to other freights, whether beneath or above such other freight; whether properly or improperly stowed

does not appear from the evidence. The court is not to presume, in the absence of proof and in favor of the carrier, that the freight was properly stowed. Its character was known to respondent when it was received for carriage, and respondent's duty to stow it properly in the place selected was certainly a part of its obligation to carry safely. No examination was made during the trip to ascertain the condition of the tubs or their contents, or to see whether the freight was being injured or damaged from any cause. In *Nelson v. Woodruff*, 1 Black, 158, the carrier showed affirmatively that the barrels of lard were deposited, not only in a suitable place, but that they were carefully and properly stowed in that place. If we look to the opinions expressed by the witnesses, only one suggests that the damage to the butterine resulted from defective coo-
perage, while the great majority of them, and those most competent to judge, being dealers in butterine, express the most decided conviction that the injury resulted from bad or improper stowage. But, without reviewing the evidence in detail, it is sufficient to say that it falls short of establishing, in any satisfactory way, respondent's defense of insecure, insufficient, or defective coo-
perage as the cause of the damage to the butterine.

How stands the case on the other defense relied upon in argument, that the loss or injury resulted from the nature or quality of the butterine, under the action of the hot season of the year in which it was shipped? It is clearly shown that this butterine was specially manufactured to stand the temperature of summer heat, both at Cincinnati and at New Orleans; that it was subjected to an actual test of 92 deg. to 93 deg. of heat, and remained solid; that it was firm and solid when delivered to and received by the carrier; that other shipments of butterine, prepared in the same manner, and subjected to the same tests, and consigned to New Orleans, were made by libelant a few days before and a few days after the consignment in question, and when the weather was just as warm, and that they all reached their destination in good order and condition, and were received by the consignees without complaint. In one instance,—a shipment made a week later,—the boat was stranded on the way down, and subjected to unusual delay in arriving at New Orleans, yet the butterine reached there safely, and in good order. It furthermore appears that other consignments of butterine similar in quality and coo-
perage were shipped by libelant on respondent's boat on this same trip, consigned to Vicksburgh and New Orleans, which reached their destination in good order. The fact that other butterine of the same character and quality, manufactured and packed in the same way, went through the same trip on the same boat in good order, without melting or becoming liquefied, goes far to establish that the injury on the lots consigned to Dolson and Smith Bros & Co. was not occasioned by the intrinsic quality or inherent defects in the nature of the butterine itself, developed by the state of the weather when shipped and during the transit. It certainly does not establish the defense relied on by respondent, nor bring the present case within the decision of *Nelson v. Woodruff*, 1 Black, 158-163, where the lard was actually shipped in bad condition,

being melted and in a liquid state or shape, liable to loss from leakage, when delivered to and received by the carrier, in hot weather. The present is clearly distinguishable from that case in its material and controlling facts. Again, it is shown that, in transporting articles of a perishable character, or such as require protection from the sun or heat when stowed in the forward hold of a steam-boat, the scuttle-hatch, or forward hatchway, should be kept open as much as possible, in order to give such freight proper ventilation; and it is in proof that respondent's proper officers assured the agents of libelant that "the scuttle-hatch would be open, and a current of air would be passing through, [the for wardhold where the butterine was stowed,] which would keep that part of the hold nice and cool." It is not only not shown that this proper ventilation was given by opening or keeping open the scuttle-hatch during the trip, but the contrary is fairly inferable from the testimony. The necessity of keeping the butterine cool, or as cool as its place of stowage would permit or allow without injury to other freights, was not only understood by, but was incumbent upon, respondent in the performance of its transportation service; and it has failed to show that such care as it represented would be taken, in having the hold ventilated by keeping the scuttle-hatch open during the trip, or as much so as possible, was carried out and observed on its part. Under such facts and circumstances, the cases cited and relied on by counsel for respondent do not support its defense that the injury resulted from causes over which it had no control. We do not deem it necessary to review those cases in detail. They are not in conflict with the well-settled rules of law stated above; and, applying those principles to the facts of the present case, we are of the opinion that respondent's defenses have not been made out or satisfactorily established, and that on the showing made the *prima facie* case in favor of libelant is not rebutted. The conclusion of the court is, therefore, that respondent is liable to libelant for the injury which the butterine sustained while in transit to New Orleans. The proof shows that the butterine in question was worth in the New Orleans market on June 19, 1879, from 15 to 16 cents per pound, had it arrived there in good order. In its damaged condition it sold for 7½ cents per pound. Respondent is liable for this difference, amounting to \$580.20, on which interest is allowed from June 19, 1879. The expenses of libelant's agent in going to New Orleans to look after the rejected butterine are not allowed as a proper charge against respondent. The decree of the district court is reversed, and a decree will be entered in this court in favor of libelant and against respondent for said sum of \$580.20, with interest from June 19, 1879, and respondent will be taxed with the costs of the cause in this court and in the court below. Let a judgment be accordingly so entered.

INGHAM *et al.* v. PIERCE *et al.*

(Circuit Court, W. D. Michigan, S. D. July 30, 1888.)

COSTS—ATTORNEYS' FEES FOR DEPOSITIONS.

Rev. St. U. S. § 824, allowing solicitors \$2.50 fees "for each deposition taken and admitted in evidence in a cause," includes as well depositions taken in the ordinary way under equity rule 67 as those taken otherwise. Overruling *Tuck v. Olds*, 29 Fed. Rep. 883.

Appeal from Taxation of Costs in District Court.

In this case, a decree having been entered dismissing the bill with costs to the defendants, the clerk, on the application of the defendants being required to tax them, disallowed an item for solicitor's fees of "23 depositions at \$2.50, \$57.50," on the authority of *Tuck v. Olds*, 29 Fed. Rep. 883. The depositions were taken at various places, some within and some without the district, before notaries public, under a stipulation that they should be treated as of the same force and effect as if taken under the sixty-seventh rule before regularly appointed special examiners. An appeal having been taken from this disallowance, the district judge, then presiding, reserved the question until the circuit judge should be in attendance.

Ross Shinn, (*Dryenforth & Dryenforth*, of counsel,) for complainants.

Taggart & Denison, for defendants.

Before JACKSON and SEVERENS, JJ.

JACKSON, J., (*orally.*) The district judge, in deciding the present point in *Tuck v. Olds*, 29 Fed. Rep. 883, followed the course of practice indicated by Judge TREAT in *Strauss v. Meyer*, 22 Fed. Rep. 467. In the latter case the language employed by the judge was somewhat wider than the decision. We do not think it is necessary to criticise that case, however, for it is made to appear to us that throughout this circuit, at least, and as it would seem in the others generally, the practice has been, and is, to allow such costs in like circumstances. Rev. St. § 824. And among the reported cases, see *Jerman v. Stewart*, 12 Fed. Rep. 271; *Stimpson v. Brooks*, 3 Blatchf. 456; *Factory v. Corning*, 7 Blatchf. 16; *Wooster v. Handy*, 23 Blatchf. 112, 23 Fed. Rep. 49. Without examining the question on its original merits, we are satisfied that the practical interpretation of the statute in the other direction has been generally in the courts of this circuit so long established, and for the sake of uniformity, as well, we should overrule the decision in *Tuck v. Olds* in this particular, and allow this item to be taxed. Ordered accordingly.

SEVERENS, District Judge, desires that I should express his concurrence in this opinion.

*In re McLEAN, Acting Commissioner of Pensions.*¹*(District Court, E. D. New York. December 23, 1888.)*

WRITS—SUBPŒNA—WITNESS—ATTENDANCE BEFORE PENSION EXAMINER.

The power of a district court of the United States cannot be invoked to secure, by its subpoena, the attendance of a witness before a special examiner of the pension bureau in the matter of a pension claim.

Application of William McLean, acting commissioner of pensions, for an order upon a witness.

BENEDICT, J. On the 23d day of November, 1888, there was presented to me a request in the following words:

"DEPARTMENT OF THE INTERIOR, BUREAU OF PENSIONS.

"WASHINGTON, D. C., November 19, 1888.

"*To any Judge or Clerk of the United States having Jurisdiction*—SIR: In pursuance of sections 184, 185, 186 of the Revised Statutes, and the act of July 25, 1882, I have the honor to request that a subpoena may issue commanding Mr. Patrick Callahan, a draw-bridge tender, foot of Manhattan avenue, Brooklyn, New York, to appear at a time and place named therein, and make true answers to such written interrogatories and cross-interrogatories as may be submitted to him by Mr. J. W. G. Atkins, a special examiner of this bureau, and be orally examined and cross-examined upon the subject of the claim for pension of John Horton, Navy, No. 10,977.

"Very respectfully,

WILLIAM E. McLEAN,

"Acting Commissioner."

The presentation of this request has raised for decision the question whether the statutes referred to in the request furnish the court authority to issue its process for the purposes mentioned. It will be observed that the subpoena is not required for conducting an investigation into the facts of any case pending in this court, or in any other court. The request—which is assumed to be in conformity with the statutes referred to in it—shows that the subpoena was desired for the purpose of enabling the bureau of pensions to make an examination into the facts bearing upon a certain claim for a pension pending in that bureau. To secure this end, the commissioner of pensions asks this court by its process to compel the person named to appear before a special examiner of the pension bureau, and there submit to an examination by such examiner touching the claim referred to in the request. For such purpose the aid of this court cannot in my opinion be invoked. The pension bureau is not a court, nor can any officer thereof be vested with judicial functions. The proceeding in aid of which the process of this court is asked is an executive examination, pending in an executive department of the government, not a judicial inquiry, pending before a court. In cases or controversies pending before the courts of the United States those courts have power to compel the attendance of persons as witnesses, but, in my opinion,

¹Reported by Edward G. Benedict, Esq., of the New York bar.

congress is not authorized to permit that power to be invoked in aid of an executive examination pending in an executive department. The principles and reasoning set forth in the opinion delivered by the circuit court of the United States at San Francisco, August 29, 1887, in *Re Railway Commission*, 32 Fed. Rep. 241, for an order upon a witness, appear to me to be applicable in a case like this, and it is sufficient for me to refer to the opinion of that court in that case for the grounds upon which the present application should be denied. Request denied.

In re TERRY.

(Circuit Court, N. D. California. February 1, 1889.)

1. CONTEMPT—PUNISHMENT—COMMUTATION FOR GOOD BEHAVIOR.

One undergoing imprisonment for contempt is not "a prisoner convicted of an offense against the laws of the United States," within the meaning of the act of Congress, March 3, 1875, (1 Supp. Rev. St. 184,) which allows to such a prisoner, confined "in any prison or penitentiary of any state or territory which has no system of commutation for its own prisoners," a deduction of five days in each calendar month during which no charge of misconduct has been sustained against him.

2. SAME.

Besides, the act is not applicable to one confined in a county jail in California, which has a system of commutation for its own prisoners, though that system does not allow deductions for prisoners confined in jail.

3. SAME.

Nor is such prisoner entitled to the credit under Rev. St. U. S. § 5544, which provides that "in other cases all prisoners now or hereafter confined in the jails or penitentiaries of any state, for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary," as the California commutation act of March 14, 1881, relates only to state-prisons, and has no application to prisoners in county jails.

4. SAME.

Even if the California act applied to prisoners in county jails, one imprisoned for the term of six months would not be entitled to a credit, as it provides that one entitled to credit "shall be allowed from his term, instead and in lieu of the credits heretofore allowed by law, a deduction of two months in each of the first two years," etc., and contains no credits for months or fractions of a year.

Order on W. E. Hale, Sheriff, to Show Cause.

On September 3, 1888, D. S. Terry was adjudged guilty of contempt, and to be imprisoned therefor for the term of six months in the Alameda county jail. 36 Fed. Rep. 419. He claimed credits, and the sheriff declared his intention to allow the credits, and discharge the prisoner on January 31, 1889. This coming to the knowledge of the United States attorney, that officer filed a petition stating the facts, and obtained an order upon the sheriff to show cause why he should not detain the prisoner in custody for the whole term prescribed in the judgment. The facts as stated in the petition being admitted, the question was whether the defendant was entitled to the credits claimed.

J. C. Carey, U. S. Dist. Atty.

J. C. Martin and George W. Reed, for Sheriff Hale.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

SAWYER, J. D. S. Terry having been adjudged guilty of contempt, and to be imprisoned therefor, for the term of six months from September 3, 1888, now claims that, in consequence of good behavior, he is entitled to certain credits, which, if allowed, would entitle him to be discharged from further imprisonment. He claims credits under the act of congress of March 3, 1875, (1 Supp. Rev. St. 184,) which reads as follows:

"All prisoners who have been, or shall hereafter be, convicted of any offense against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction, in any prison or penitentiary of any state or territory which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison penitentiary of such deduction shall be entered on the warrant of commitment."

The first question that arises is, is Mr. Terry, adjudged guilty of contempt of court, a "prisoner convicted of any offense against the laws of the United States and confined, in execution of the judgment or sentence upon such conviction in any prison or penitentiary" of the state, within the meaning of this statute? It is freely conceded that a contempt is a violation of law, and is of a criminal nature, and that the proceedings to punish for contempt are not civil proceedings, but of a criminal character. But that does not necessarily make a contempt an "offense against the laws of the United States," within the meaning of the terms as used in the statute. A contempt is *sui generis*. All courts, independently of statutory provisions, have an inherent power to punish for contempts. Such power is absolutely necessary to their existence, and the effective exercise of their jurisdiction and the performance of their functions. Bouvier defines "offense:" "The doing that which a penal law forbids to be done, or omitting what it commands; in this sense it is nearly synonymous with crime. In a more confined sense it may be considered as having the same meaning as a misdemeanor, but it differs from it in this, that it is not indictable, but punishable summarily by forfeiture of a penalty." It is in the larger sense of a crime, or misdemeanor, defined and expressly made a specific offense by the statute providing a general system of criminal law, indictable, and to be tried, and a conviction had by a jury, that the term is used in this statute. All offenses against the United States are statutory. And the party entitled to credits is one convicted of an offense against the laws of the United States—that is to say, convicted by a jury upon indictment, or information, of an act that is expressly made an offense by the statute—an offense under the general Criminal Code, or system of criminal law of the state. If this is not the correct view, then no judgment could be ren-

dered for a contempt under the constitution without a trial and conviction by a jury. Article 3, § 2, of the constitution provides that "the trial of all crimes, except in case of impeachment, shall be by jury." And article 6 of the amendments provides that—

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Nobody has ever claimed, so far as we are aware, that a party is entitled to a trial by jury in a proceeding for contempt. In this case the judgment was rendered summarily by the court upon its own observation of what took place before it and of its own motion, without any witnesses at all, or any indictment, information, or written complaint, and without the aid or intervention of counsel, and the judgment has been sustained by the supreme court. Some of the acts performed, it is true, constitute specific offenses against the general criminal statutes of the United States for which the prisoner may yet be indicted, tried, convicted, and punished. And indictments are, in fact, pending for those statutory offenses. Should the prisoner be convicted and imprisoned for those offenses he would undoubtedly be entitled to any credits that might be allowed to parties in his condition, "convicted of an offense against the laws of the United States." A party may be imprisoned for a contempt until he shall perform some act required by the court, and such imprisonment of a contumacious party might extend through years—even during life. How could any rule of credits be applied to such a case? Yet, if the statute covers any contempt, as being an offense, it must cover all contempts. Summary contempt proceedings are absolutely necessary to enable a court to protect its own dignity and even preserve its existence; and, to enable it to effectively discharge its proper functions, the proceeding must be at all times under the control of the courts. The proceedings as before stated are *sui generis*, especially provided for in separate acts, and are not intended to be included in the ordinary general provisions embraced within the Criminal Code, or system, within which the party is entitled to all the guaranties provided by the constitution. We are of opinion that the party undergoing imprisonment is not "a prisoner convicted of an offense against the laws of the United States," within the meaning of the statute allowing credits for good behavior.

2. But if this were an offense against the United States within the meaning of the act, although we think it is not, the credits could not be allowed for the following reasons. The act under which the prisoner claims to be entitled to five days' credit for each month—and it is the only act providing for such credits—is wholly inapplicable to this case. The act itself, in terms, limits its application to a "state or territory," which has no system of commutations for its own prisoners." 1 Supp.

Rev. St. p. 184, § 1, (18 St. p. 479.) But the state of California has a "system of commutation for its own prisoners." In *U. S. v. Schroeder*, 14 Blatchf. 345, the prisoner had been regularly convicted for an offense and sentenced to be imprisoned for 12 months. After serving his term, less credits claimed under this same act of congress of 1875, he applied to the court for his discharge, and the court, in deciding the case, said:

"An examination of the terms of the act of March 3, 1875, shows, that the deduction there provided for can be allowed only to persons confined in a state which has no system of commutation for its own prisoners. The state of New York has a system of commutation for its own prisoners, (Laws 1863, c. 415; and Laws 1864, c. 321,) and, therefore, the deduction of five days per month prescribed by the act of 1875, cannot be allowed. The fact that the state system of commutation does not allow any deduction to prisoners confined in jail does not affect the question. There is still a state system of commutation, and the fact of the existence of such a system, takes the case out of the scope of the act of 1875, without regard to the particular provisions of that system."

We fully concur in this construction of the act. It admits of no other. So California has a system of commutations for its own prisoners. And "the fact of the existence of such a system, also, takes the case out of the scope of the act of 1875, without regard to the particular provisions of the system."

3. The only other provision of an act of congress under which credits can be properly claimed is found in section 5544, Rev. St., and is as follows:

"In other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any state for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary."

The only system of commutations for the state of California is found in "An act to define, regulate, and govern the state-prison of California" passed in 1880, as amended by the act of March 14, 1881. The provisions of that act relate only to state-prisons, their officers and duties, and to the convicts therein confined, their government, discipline, rights, etc. They have no application to county jails, or to prisoners therein confined. The system does not include credits for minor offenders confined for short periods of time in county jails or otherwise. The provisions, therefore, do not reach this case.

4. Again, if the system included prisoners confined in county jails they still fall short of covering the case now in hand. The provision is that those entitled to credits "shall be allowed from his term, instead and in lieu of the credits heretofore allowed by law, a deduction of two months in each of the first two years, four months in each of the next two years, and five months in each of the remaining years of said term." Now, there are no credits here at all for months, or fractions of a year, or of a month, or for days. The shortest term for which any credits are allowed is one year. Mr. Terry was sentenced for six months only. The time is insufficient to entitle him to any credits under the state sys-

tem. For each and all of these reasons, we are fully satisfied that the prisoner is not entitled to any credits whatever, and it is so adjudged. And the sheriff of Alameda county is adjudged and directed to hold the prisoner in confinement for the full term specified in the judgment for contempt, without any deductions or credits.

ALEXANDER H. MALL & Co. v. ULLRICH.

District Court, N. D. Ohio, W. D. December Term, 1888.)

BANKRUPTCY—DISCHARGE—FRAUD—LIMITATION OF ACTION.

The period of two years, within which a petition to vacate the discharge of a bankrupt for fraud must be filed under Rev. St. U. S. § 5120, begins to run from the date of the discharge, and not from the discovery of the fraud.

In Bankruptcy.

The petition was filed by the petitioner, who was a creditor of and had a provable claim against the defendant, a bankrupt, to set aside a discharge granted to him in February, 1879, on the ground that the bankrupt had been guilty of fraud in his application for the benefit of the bankrupt law. The petition was filed in this case on the 27th of August, A. D. 1888. The defendant filed a demurrer on the ground that the petition to set aside the discharge was not filed within two years from the discharge. It was claimed that the limitation began to run only at the time the frauds were discovered.

J. A. Chase, for petitioner.

A. Farguharson, for defendant.

WELKER, J. Section 5120 of the Revised Statutes (bankrupt law) provided an absolute bar, where the petition was not filed within two years from the date of the discharge. The limitation is not in any way controlled by the discovery of the fraud; and the limitation provided by law in actions by or against assignees in bankruptcy founded upon frauds, and providing that the limitation begins to run from the discovering of the fraud does not apply in this class of proceedings. The demurrer is therefore sustained, and petition dismissed, with costs.

CARY *et al.* v. LOVELL MANUF'g Co., Limited.

(Circuit Court, W. D. Pennsylvania. January 26, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES—LICENSE FEE.

Two licenses for the future use of a patented process at a specified rate per pound of springs shown to have been regularly paid by the licensees, although one of said licenses was granted only a few days before the bill in this case was filed, and the other was granted during its pendency, and in each instance there was also the payment of a gross sum for past infringement, *held* to be admissible in this suit as evidence tending to show an established license fee; and sufficient, in connection with evidence of a previous settlement between the patentee and his firm at the same rate for the permitted use of said process, and other evidence of the reasonableness of said rate, to charge the defendant with damages on that basis.

In Equity. Bill for infringement of patent. See 31 Fed. Rep. 344.
On exceptions to master's report.

Witter & Kenyon, for complainants.

John K. Hallock and W. Bakewell & Sons, for respondent.

Before **McKENNAN** and **ACHESON**, JJ.

PER CURIAM. The master, being of opinion that the license for the future use of the patented process at the rate of two cents per pound of springs, granted to R. H. Wolff & Co., Limited, on March 2, 1885, and the like license, at the same rate, granted to Gibson, Parish & Co., on November 14, 1885, were inadmissible as evidence, refused to hold the defendants liable for damages upon the basis of an established license fee. And as he has found that there is no satisfactory evidence disclosing what part, if any, of the defendants' profits was due to the use of the patented process, or to show that the plaintiffs had sustained a loss of trade, or any other special damage, the up-shot of the matter is that, if the master's report stands, the plaintiffs will receive nothing but nominal damages for the defendants' infringement. Is this a just conclusion to this litigation? The only reason assigned by the learned master for his rejection of the licenses as items of proof is that "they were practically settlements of pending litigations between the complainants and the parties taking said licenses," and (unless in the case of the Wolff license) were "made after the commencement and during the pendency" of this suit. But to determine properly the question of the admissibility of these licenses as evidence, and the effect to be given to them, it is, we think, necessary, not only to consider more closely than the master seems to have done the licenses themselves, and the circumstances under which they were executed, but also to take a somewhat broader view of the case as a whole than his report presents. And reversing the above order of procedure, we first remark that this record throughout exhibits proof of the real merit of the Cary invention, and it is clearly shown that the patented process had great money value. For example, in each of the four proved instances in which there were settlements for past infringements, substantial damages therefor were paid to the plaintiffs.

Again, it appears that the West, Bradley & Cary Manufacturing Company—of which the plaintiff Cary was a member—manufactured springs under a verbal license from him, and that that company, besides discharging large liabilities connected with the litigation touching the patent, in a settlement made with Cary in April, 1876, allowed him for the use of the patent the sum of \$14,000, which Mr. Cary testifies was arrived at by computing two cents a pound on all springs they had treated by the patented process. Furthermore, it is shown that from June, 1881, to the latter part of 1883, the defendants made large purchases from the plaintiffs of springs tempered by the patented process, and there is evidence that the plaintiff's profits upon those springs, due to said process, considerably exceeded two cents per pound. We are, then, of opinion that, aside from the two particular instances of license in question, the proofs tend strongly to the conclusion that a royalty of two cents per pound was a reasonable and just rate during the period of the defendants' infringement.

Now, the defendants began their infringing manufacture in March, 1884, and they pursued it until March 28, 1885, when they were restrained by preliminary injunction. But the court, by an order made in February, 1886, having suspended the injunction upon the defendants giving security to pay to the plaintiffs such amount as might be adjudged to them on springs thereafter manufactured by the defendants, the latter resumed their infringing operations, and continued the same until the final injunction was granted in July, 1887. As we have seen, the license to R. H. Wolff & Co., Limited, was executed on March 2, 1885, which was 12 days before the bill in this case was filed. Gibson, Parish & Co. were licensed while the preliminary injunction was in force, and about four months before the second period of the defendants' infringement began. Both those licenses, it will be perceived, were in full operation when the defendants elected to resume their infringing manufacture, and they took the risk of being compelled to pay damages on the basis of the rate of license thus established. We have carefully examined the provisions of those instruments, and all the evidence on the subject, and we are unable to discover anything which casts the slightest doubt on the good faith of either transaction. They seem to have been fair business arrangements, voluntarily entered into by the respective parties. R. H. Wolff & Co., Limited, had never been sued at all. That company had infringed to a very limited extent, and at the time it was licensed paid \$500 therefor; but it was not bound to take a license for the future. Gibson, Parish & Co., indeed, had been sued and settled for past infringement by paying \$1,000; but they were under no sort of coercion to take a future license. Both those licensees regularly paid the stipulated royalty of two cents a pound on the springs manufactured by them under the patent from the dates of their respective licenses down to the expiration of the patent in June, 1888. Why, then, are those licenses not competent evidence as bearing upon the fair market value of a privilege which an infringer has wrongfully undertaken to exercise? We have critically examined the decisions referred to by the

master, and the other cases cited by the defendants' counsel, but cannot concur in the view that they warrant the exclusion of said licenses from consideration. We think that this case, in its facts, is plainly distinguishable from all the cases relied on to sustain the ruling of the learned master, and we are constrained to hold that he was in error in deciding that said licenses were inadmissible "as evidence showing or tending to show an established royalty for the use of the Cary patent."

But it is contended that the license granted by the plaintiffs to the Domestic Spring Bed Company, on March 19, 1886, for the sum of \$2,500, to cover past infringement and future use, shows that there was, in fact, no uniform or established license fee. But the right thereby granted to that company was exclusively a shop-right to temper by the patented process only such springs as the company had used or might thereafter use in their own beds. That company was not making springs for the market, and hence the case was exceptional, and materially different from the cases of R. H. Wolff & Co., Limited, Gibson, Parish & Co., and the defendants. In addition to the two instances of license at the royalty of two cents per pound, we have the settlement already discussed between the patentee and the West, Bradley & Cary Manufacturing Company at the same rate, and also the other recited corroborative evidence as to the reasonableness of that rate; and, taking the proofs altogether, we are of opinion that the defendants are justly answerable to the plaintiffs in damages upon that basis. In *Clark v. Wooster*, 119 U. S. 326, 7 Sup. Ct. Rep. 219, which like the present case was a suit in equity, the court, speaking of an established license fee and the sufficiency of the proof thereof, said:

"It is a general rule in patent causes that established license fees are the best measure of damages that can be used. * * * The complainant proved several instances of licenses given by him to large sewing machine companies, the fees on which were regularly paid, and corresponded with the rate allowed by the master. We think that the defendants have no occasion to complain of the amount awarded."

How many instances of license were there shown does not appear, but we think the language of the court fully justifies the conclusion we have reached here upon the proofs before us.

The plaintiffs ask the court, under the statutory authority, to increase the damages, but this we must decline to do. The master reports that the defendants have manufactured by the patented process 437,267 pounds of springs, which, at two cents per pound, amount to \$8,745.34; and for this sum the plaintiffs are entitled to a decree. Let a decree be drawn in favor of the plaintiffs in accordance with the foregoing opinion.

FIRST NAT. BANK v. MERCHANTS' BANK *et al.*

(Circuit Court, N. D. Georgia. June 16, 1888.)

1. REMOVAL OF CAUSES—CITIZENSHIP—NON-RESIDENTS OF DIFFERENT STATES.

Where, in a cause removed from a state court to the circuit court of the United States for the Northern district of Georgia, it appears that the complainant is a citizen of the state of Alabama, and the real defendant having an interest in the controversy is a citizen of the state of Ohio, removal having been made by the citizen of Ohio, on motion to remand upon the ground that the citizenship of the parties was not such as to give the circuit court jurisdiction, *held*, that the cause was removable.

2. SAME—PROCEDURE.

If it is irregular to file an affidavit and bond for removal the day before taking a formal order making movant a party and removing the cause, such irregularity is cured by an order the next day making him a party and reciting the fact as to the filing of the bond and removal of the cause.

Hoke & Burton Smith, for the motion.

Hopkins & Glen, and *Julius L. Brown*, *contra*.

NEWMAN, J. This is a motion to remand, and, in order that the question presented may be understood, a brief statement of the case is regarded as necessary. On the 13th day of July, 1887, the First National Bank of Sheffield filed its bill in equity in the superior court of Fulton county, Ga., against the Merchants' Bank of Atlanta, on the following statement of facts: On the 14th and 15th days of June, 1887, complainant had on deposit \$8,000 with the defendant. Prior to that time complainant had been dealing with the Fidelity National Bank of Cincinnati, Ohio, forwarding checks to said bank, and said bank depositing in place of said checks currency to the credit of complainant in New York. Prior to said time the Fidelity National Bank had been perfectly solvent, and was a bank which did an immense business, and complainant had dealt with it quite a length of time. Just before or about the 14th day of June, 1887, said bank, through its officers, had squandered its money in sudden wild speculations in wheat and "futures" of different characters, and it had become totally insolvent; yet it continued to deal with complainant without giving complainant any notice of its changed condition, and fraudulently concealed such changed condition from complainant with full knowledge of the fact that complainant was not informed of said changed condition. By reason of said fraud the said Fidelity National Bank induced complainant on the 14th and 15th days of June, 1887, to send it two checks for \$4,000 each on the Merchants' Bank of Atlanta. The Fidelity National Bank received the said checks two or three days later, and fraudulently sent the same to the Merchants' Bank of Atlanta, without forwarding the currency to New York, to be deposited to the credit of complainant, and said checks reached Atlanta on or about 20th day of June, but the Merchants' Bank has never paid out said \$8,000 to the said Fidelity National Bank, and still has the same.

The prayers in the bill are for a decree requiring the Merchants' Bank to pay complainant \$8,000, and enjoining them from paying it to the Fidelity National Bank. Temporary injunction was granted. On October 8, 1887, an order was passed making David Armstrong, receiver of said Fidelity Bank, party to the cause, and thereupon, on the same day, upon petition of said Armstrong, an order was passed by said superior court removing the cause to the circuit court of the United States. It is said in favor of this motion, in the first place, that the petition for removal, together with the bond and affidavit, was filed in the state court on the 7th day of October, 1887, and that David Armstrong, as receiver, was not made a party defendant until the next day, the 8th day of October. An examination of the record shows this to be true. It further shows that on the 7th day of October, the attorneys for complainant consented in writing that Armstrong, as receiver, be made a party defendant to said cause, and on the 8th day of October the court passed an order in which it is recited that Armstrong, as receiver, having been made a party in the cause, and having caused his appearance to be entered by his solicitor, and having made and filed a bond and affidavit as required by law, said cause is removed to the circuit court of the United States. I think that by this order the discrepancy in dates and the irregularities alluded to were cured. It seems that on the 7th, when the receiver filed his petition for removal, he had not by formal order been made a party; but I do not think that filing would have the effect to take from the court all jurisdiction to proceed further in the same, for it would seem that this proceeding by Armstrong to remove, when he was really not a party to the cause, would have no effect, and it required the order of the court, passed on the next day, making him a party, to give the proceedings any force and effect whatever. I do not think, therefore, the position of counsel for complainant that the matter alluded to requires the cause to be remanded can be sustained.

It is said in the next place that the location of the Merchants' Bank, it being a Georgia corporation, defeats the right of removal in the case. This would be true if the Merchants' Bank was a party to the controversy in the case, having an interest therein to be determined, but the record shows that it is only a nominal party. In the language of the petition, it is "but a stakeholder" of the fund in controversy, and it is apparent that the entire litigation and contention will be between the other two parties. The Merchants' Bank having no interest whatever therein, it simply holds the money to abide the judgment of the court as between the other two parties. *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. Rep. 3. But it is said that, even if this be true, that the real and only controversy in the case is between the Sheffield Bank and Armstrong as receiver of the Fidelity Bank, then the citizenship and residence of the parties is not such as to give this court jurisdiction by removal. In that aspect of the case it is a controversy between citizens and residents of different states, neither of whom is a citizen or resident of Georgia. The decision of this question depends upon the construction that should be given the act of March 3, 1887. By the first section of that act, the circuit courts of the United States are given "original cognizance, con-

current with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, in which there shall be a controversy between citizens of different states." By the second clause of the second section of this act "any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being non-residents of that state." In the latter part of section 1 is this provision: "And no civil suit shall be brought against any person by original process of (or) proceeding in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." It has been assumed by some courts, without any discussion of the subject, and without any reason given therefor in their published opinions, that the language quoted from section 2, as to removals, applies to the language last quoted from section 1. *Yuba Co. v. Mining Co.*, 32 Fed. Rep. 183; *Foundry Co. v. Howland*, 5 S. E. Rep. 745; *Mining Co. v. Markell*, 33 Fed. Rep. 386; *Harold v. Mining Co.*, 33 Fed. Rep. 529;¹ *Tiffany v. Wilce*, 34 Fed. Rep. 230.

In the case of *Gavin v. Vance*, 33 Fed. Rep. 84, Judge HAMMOND, after stating that "the contrary view is neither impossible nor improbable nor yet unreasonable," concludes that section 2 refers to the latter part of section 1. See, also, *Tiffany v. Wilce*, 34 Fed. Rep. 230. In all the cases that I have just cited, with one exception, the plaintiff was a resident of the district in which the suit was pending, and a decision of the question presented here was unnecessary. My conclusion as to the proper construction of these two sections is different. I do not think that it can be said that jurisdiction is given by the language quoted from the latter part of section 1. It relates to the locality in which suits may be brought by original "process or proceeding," and is intended for the benefit of defendants. It provides where they may be required to answer suits originating in the federal courts. Jurisdiction is conferred on the circuit courts by the first part of section 1, and that jurisdiction, when founded on citizenship, is between citizens of different states, provided the jurisdictional amount is involved; and it is to that portion of the section, instead of the latter part, fixing the place where suits may be brought by original "process or proceeding," section 2 refers. "Removal of Causes," by Judge SPEER, of the Southern district of Georgia, § 21 *et seq.*, and analysis C; *Fales v. Railway Co.*, 32 Fed. Rep. 673; *Short v. Railway Co.*, 34 Fed. Rep. 225, (approving the *Fales Case*;) *Vinal v. Improvement Co.*, 34 Fed. Rep. 228.

¹Since this opinion was filed, Judge BREWER, in the case of *Railroad Co. v. Lumber Co.*, 37 Fed. Rep. 3, has announced a different view from that announced in his concurrence in the case of *Harold v. Mining Co.*, 33 Fed. Rep. 529.

Counsel for Armstrong, receiver, have argued that the court may retain jurisdiction of this case because of the fact that Armstrong is a receiver of a national bank; and they further urge that it is a suit for "winding up the affairs" of a national bank, within the meaning of section 4 of the act of 1887. I would not be inclined to concur in this view of the matter, but as jurisdiction of the case is retained for reasons hereinbefore expressed, it is unnecessary to pass upon this question. My conclusion is that the motion to remand this case must be denied.

HILLS v. RICHMOND & D. R. Co.

(Circuit Court, N. D. Georgia. June 16, 1888.)

1. COURTS—JURISDICTION—CARRIERS—INJURIES TO PASSENGERS.

A railroad company, whose road extends from Atlanta, Ga., through South Carolina to Charlotte, N. C., the office of its division superintendent being in Atlanta, may be sued in the Georgia courts by a citizen of Georgia, for personal injuries received while traveling on its road in South Carolina, especially where it appears that the train on which the accident happened was being operated under the superintendent's control.

2. RAILROAD COMPANIES—ACTIONS—SERVICE OF PROCESS.

Under Code Ga. § 3407, which provides that the lessee of a railroad shall be liable to suit of any kind in the same court or jurisdiction as the lessor before the lease, service of summons in an action against a lessee-railroad company by leaving a copy at the office of the superintendent in the county in which the declaration alleges were and are situate the principal offices of the lessor and lessee, is good.

N. J. & T. A. Hammond, for plaintiff.

Pope Barrow and Jackson & Jackson, for defendant.

NEWMAN, J. The demurrer filed in this case makes the question that the cause of action did not originate in the county of Fulton or state of Georgia, but did originate in the state of South Carolina; therefore the Georgia courts have no jurisdiction. That foreign corporations may be sued in Georgia is well settled. *Berry v. Railroad Co.*, 39 Ga. 554; *Insurance Co. v. Carrugi*, 41 Ga. 660; *Wilson v. Danforth*, 47 Ga. 676; *Railroad Co. v. Railroad Co.*, 51 Ga. 458. The qualification to this rule is stated to be that it cannot be sued for wrongs done or contracts made in another state. This is said to be decided in the case of *Bawknight v. Insurance Co.*, 55 Ga. 194. That was a suit on a foreign judgment against a foreign insurance company. The decision of the court is that "Georgia courts have no jurisdiction of suits *in personam* against a foreign corporation unless the contract sued on has been made in Georgia, or the Georgia agent is connected therewith within the scope of his authority as the maker of such contract." It is said by defendant's counsel that the same rule applies to torts as is here laid down as to contracts. Conceding all this, and following this decision, can it be said that the Geor-

gia agent of the Richmond & Danville Railroad, who is served here, had no connection with the cause of action? The whole record shows that E. Berkeley, who was served, was the superintendent and manager of a continuous line of railroad running from Atlanta to Charlotte, N. C., through the state of South Carolina, and that plaintiff, while aboard a train of cars running over this line, through, and while in, the latter state, was injured by what is alleged to have been the bad condition of the track. Of this track the official served was in charge as the division superintendent of the defendant corporation. Moreover, he is not merely an agent, as in the *Bawknicht Case*; he is a division superintendent, operating and controlling an extensive line of railroad. I do not think, conceding that the rule laid down in that case is correct, that it is applicable to the facts of this case.

It appears, in addition to this, that the plaintiff is a citizen of Georgia. Shall it be held that a citizen of this state is required to leave the principal place of transacting the business of that division of a road on which he was injured to go into another state to serve a subordinate officer who would, presumably, immediately forward papers served to the superintendent in Atlanta? I think not. The plea to the jurisdiction in this case sets up substantially the same defense as the demurrer, while the language of the plea attempts to bring the case within the case in 55 Ga., *supra*. I think the whole record, taken together, shows that the track on which the alleged accident happened, the train which was derailed, and the employes in charge of the train, were under the superintendent's charge, and consequently the matter in which the cause of action originated was within the scope of his authority as such superintendent. This view of the subject controls the further question made, —that a railroad company in Georgia can only be sued in the county where its principal office is located, or where the wrong was committed. It is a foreign corporation, the lessee of the Atlanta & Charlotte Railway. The declaration alleges that the principal office of the lessee is, and that of the lessor was, in Fulton county, Ga. Service is made by leaving a copy at the office of the superintendent in Atlanta, Fulton county, Ga. Code, § 3407; Acts 1884-85, p. 49.¹

I think that the court has jurisdiction, and that the service is good. The demurrer to the declaration must be overruled, and the plea to the jurisdiction held insufficient. As to jurisdiction of the United States courts in cases of this character, see *Sayles v. Insurance Co.*, 2 Curt. 212; *Block v. Railroad Co.*, 21 Fed. Rep. 529; *U. S. v. Telephone Co.*, 29 Fed. Rep. 17.

¹"The lessees of any railroad * * * shall be liable to suit of any kind in the same court or jurisdiction as the lessors or owners of the railroad were before the lease."

FREEMAN v. THE UNDAUNTED.

(Circuit Court, N. D. California. February 15, 1899.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—PILOTS—HALF PILOTAGE.

Pol. Code Cal. § 2466, imposes half pilotage on vessels when a pilot is declined, but section 2468 exempts "from all charges for pilotage, unless a pilot be actually employed, all vessels coasting between San Francisco and any port in Oregon, or in Washington or Alaska territories, and all vessels coasting between the ports of this state." Rev. St. U. S. § 4237, provides that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half pilotage, between vessels sailing between the ports of one state, and vessels sailing between the ports of different states." *Held*, that the California statute is void for unlawful discrimination, and half pilotage cannot be collected under it.

In Admiralty. Appeal from district court.

Libel by E. M. Freeman against the ship *Undaunted*, for half pilotage. The district court dismissed the libel and libellant appeals.

P. G. Wigginton, for appellant.

Milton Andros, for appellee.

Before SAWYER, Circuit Judge.

SAWYER, J. This is a suit for half pilotage, the captain of the *Undaunted*, a registered American vessel, having refused to employ a pilot when leaving the port of San Francisco, for the port of New York.

The only question is, whether the statute of California allowing half pilotage, is not in conflict with the statute of the United States upon the subject, and therefore, void. Under section 2466 of the Political Code of California, vessels of her class are required to pay "five dollars per foot draft, and four cents per ton for each and every ton registered measurement," and half pilotage when a pilot is declined. But section 2468 "exempts from all charges for pilotage, unless a pilot be actually employed, all vessels coasting between San Francisco and any port in Oregon, or in Washington, or Alaska territories, and all vessels coasting between the ports of this state," thereby excepting them from the operation of the general provision of section 2466. Thus by the express provisions of the state statute, a discrimination is made between "vessels coasting between San Francisco and any port of Oregon, or in Washington, or Alaska territories, and all vessels coasting between the ports of this state," and "vessels sailing between the ports" of California and any of the other states of the Union—the discrimination being against all the last-named vessels, the latter being required to pay half pilotage when they decline the services of a pilot, while the former are wholly exempt from half pilotage under the same circumstances and conditions. But section 4237 of the Revised Statutes of the United States provides that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half pilotage, between vessels sailing between the ports of one state, and vessels sailing between the ports of different states * * * and all existing regulations, or

provisions making any such discrimination are annulled and abrogated." Thus this express provision of the statute, renders void the statute of California cited. It is claimed, however, that as this vessel sails around Cape Horn to New York, and may touch at some foreign port on the way, it is not "coasting" between the two ports of San Francisco and New York. But, if this be so, the provision of the Revised Statutes cited, does not say "coasting," but "vessels sailing" between the ports of the states. This vessel is, clearly, within the terms of the provision. The provision is constitutional and valid under the clause of the national constitution authorizing congress to regulate commerce between the states. The case of *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. Rep. 988, is in point, and covers this case. The ship Undaunted, therefore, is not liable for half pilotage, and the decree of the district court must be affirmed and the libel dismissed, and it is so ordered.

DEGUIRE *et al.* v. ST. JOSEPH LEAD CO.

(Circuit Court, E. D. Missouri, E. D. February 9, 1889.)

ADVERSE POSSESSION—ACTION FOR WIFE'S LAND DURING COVERTURE.

It is the law in Missouri that the adverse possession for the statutory period which will defeat the husband's sole right of possession of his wife's land will likewise defeat an action of ejectment therefor brought by the husband and wife jointly.

At Law. Ejectment by Emily Deguire and Paul W. Deguire against the St. Joseph Lead Company. On motion to strike out part of reply. *Reynolds & Relfe* and *Samuel L. Isbell*, for plaintiffs.
Carter & Weber and *Charles Nagel*, for defendant.

BREWER, J. This is an action of ejectment. The plaintiffs are husband and wife. Their title, as alleged, is by deed to the wife from her father, on March 7, 1848, she being then unmarried. For one defense the answer pleads the 24 years of limitation. As a reply to that defense plaintiffs allege that they were married in October, 1848, and that ever since that date, and at the date when her right of action accrued, she has been, and is now, a married woman, the wife of the other plaintiff, and under the disability of coverture. This part of the reply defendant moves to strike out, and that motion presents the question under consideration. In the case of *Vulle v. Obenhause*, 62 Mo. 81, the supreme court held in a case like this that the seisin of husband and wife was joint, and therefore her as well as his right of action was barred by the 24 years' statute. In *Dyer v. Wittler*, 89 Mo. 81, the doctrine of the former case was overruled, and it was held that during coverture the wife had no right of entry, and therefore the statute of limitation was not running against her; that the husband had the exclusive right of possession of his wife's

lands, and therefore could alone maintain an action for possession. Applying the doctrine of either case, and the marriage does not obviate the defense of the statute of limitations. If the doctrine of the former case were to be followed, then both his and her rights were barred years ago. If the latter case, then she has now no right of action, never has had one, and his right of action was barred by the statute. It is the duty of this court to follow the rulings of the supreme court of the state in a matter of this kind, and of course the later decision is the law of the state, and must be followed here. This brings about this curious result: The title of the land is in her, yet neither she nor her husband can now recover the possession; yet this is the logical result of the law as now affirmed by the supreme court. During coverture the right of possession is in the husband. He could convey away that right. He alone could sue for its recovery; and the statute of limitations may run against the enforcement of that right as against any other. That I have not misconstrued the rulings of the supreme court, I note the fact that in the first case Judge HOUGH dissented, and prepared a vigorous dissenting opinion, in which he affirms just the propositions that I have laid down. I quote this language:

"It has been held, too, in this state, and it is the rule generally, in the absence of statutory provisions on the subject, that the marital interest of the husband may be sold under execution for the debts of the husband, and that the purchaser of said interest will be entitled to the possession of the entire estate to the exclusion of the wife. *Ellenmann v. Thompson*, 10 Mo. 587. Now, I am wholly at a loss to comprehend how it is that a purchaser at an execution sale can acquire an estate which the execution debtor does not possess; and it is equally beyond my comprehension how, under our law, a man can convey that to which he has no right, so as to confer title upon his grantee. For, if the husband has no exclusive right to the possession, he can confer none. It must be that the husband is entitled *jure mariti* to the possession of his wife's fee-simple lands, and it was so held by this court in the case of *Bledsoe v. Simms*, 53 Mo. 305. Surely the person who is for the time being entitled to the possession is the only person who can be disseised. Such person alone has a right of entry, for a right of entry cannot exist where there is no right to the possession. If the wife were entitled jointly with her husband to the possession, a sale under execution of the husband's right, or a conveyance by him of such right, would make the purchaser at the sale in the one case, and his grantee in the other, a tenant in common with the wife of the right of possession. But such is not the effect of either. I conclude, therefore, that when it is said that husband and wife are jointly seised in right of the wife, reference is made to the whole estate, as held by them both, and not to the interest of the husband alone. Husband and wife are jointly seised in fee in right of the wife. When his interest is said to be in right of his wife, it is intended simply to mark the derivation, as well as the extent, of his interest, but it does not amount to an assertion that such interest is to be shared with any one, or that it is a joint interest. It is apparent, at all events, from text-books and the adjudged cases, that his interest is separable from hers, both by his own act and by operation of law, and that, when so separated, she has no right of entry until its determination. Such being the case, it would seem logically to follow that his is an interest in land which is subject to the statute of limitations, and will pass to one who holds it adversely for the prescribed period as effectually as it would by an execution sale or a quitclaim

deed. Now, his right of entry would be barred in 10 years. Being thus barred, and his right of possession having thereby passed to the adverse occupant, how could the wife maintain an action of ejectment during the coverture? If the husband is in her right—that is, through her title and by virtue of the marriage—solely seised of the right to the possession, it is clear that she could not sue; and, if it be true that a disseisin of both, and that a suit for the recovery of the wife's lands from one who holds them in adverse possession, must be brought in the joint names of husband and wife, and that neither can sue alone, as is maintained by some authorities, how can an action be maintained by them after the husband has been barred by the ten years' adverse possession?"

And in the later case the supreme court expressly declares that it adopts the views in the dissenting opinion of Judge HOUGH in the earlier case. It is unnecessary to add more. The law of the state of Missouri is thus clearly disclosed in the quotation above made, and, being the law of the state court, is the law of this. The motion to strike out that part of the reply will be sustained. I deem it unnecessary to consider the other questions presented by counsel in their motions and demurrer, for this is fatal to plaintiffs' action.

UNITED STATES v. STARNES.

(District Court, D. South Carolina. February 7, 1889.)

1. INTERNAL REVENUE LAWS—OFFENSES—RETAIL LIQUOR DEALER—MEDICINAL PREPARATIONS.

One who sells a medicinal preparation, knowing that it contains an intoxicating quality, to be used as a beverage, or with the knowledge that it was purchased to be used as a beverage, is a retail liquor dealer, within the meaning of the United States statutes providing for the punishment of persons carrying on the business of retail liquor dealers without payment of the special tax.

2. SAME.

Where the dealer, after having sold such preparation to a customer, who, in his presence, or with his knowledge, used it as a beverage, continues to sell it to the customer, the jury may find him guilty of such offense.

3. SAME.

So, also, if the preparation is but a disguised form of spirituous liquors, intended for use as a beverage.

Indictment for Carrying on the Business of a Retail Liquor Dealer Without Having Paid the Special Tax.

L. F. Youmans, U. S. Dist. Atty.

W. J. Cherry and *I. B. Bell*, for defendant.

SIMONTON, J., (*charging jury*.) The defendant, a merchant of Lancaster, is indicted for carrying on the business of a retail liquor dealer without having paid the special tax. He sold by the bottle a compound known as "Burton's Bitters," not having paid the special tax as a retail liquor dealer. The jury, from the evidence, must

answer these questions: Burton's Bitters, are they a genuine medicine, designed solely for medicinal purposes, or were they, as charged by the government, a disguised form of spirituous liquors, intended for use as a beverage? If Burton's Bitters were intended as a medicine, did they contain enough alcoholic material to give an intoxicating quality? Did the defendant sell them as a medicine, for medicinal purposes, and none other? Did he sell them as a beverage, or did he know that they were purchased from him to be used as a beverage? Were they used by purchasers in his presence, and with his knowledge, as a beverage; and did he continue to sell them to such purchasers after that knowledge was acquired? If the bitters are simply an intoxicating drink in disguise, and defendant knew this, you can find him guilty. If the bitters contain an intoxicating quality and are really a medicine, or are intended for medicinal purposes, and defendant, knowing that they could intoxicate, sold them to be used as a beverage, or with the knowledge that they were purchased to be used as a beverage, you may find him guilty. If he sold the bitters to any of his customers, and they, in his presence, or with his knowledge, used the bitters as a beverage, and with the knowledge thus acquired he continued to sell to them, you may find him guilty.

UNITED STATES v. HOWARD.¹

(District Court, S. D. Alabama. February 13, 1889.)

1. PERJURY—AFFIDAVIT FOR COMMUTATION OF HOMESTEAD ENTRY.

Defendant entered a homestead claim, and on application to commute his entry to a cash entry he made affidavit, July 30, 1887, that he had actually moved on the said land in December, 1886; that his actual residence had been on the land up to taking said oath; that his residence thereon had been continuous; and that he had not resided or boarded elsewhere than on said land since commencing his residence thereon. Defendant's oath was made before a judge of probate. *Held*, that the statements sworn to were not such as are required or authorized by law to be made by an applicant for a pre-emption, homestead, or a homestead commutation entry, under Rev. St. U. S. §§ 2282, 2289-2291. They were irrelevant and immaterial, and perjury could not be predicated on them.

2. SAME—COMPETENCY OF TRIBUNAL—PROBATE JUDGE.

Under Rev. St. U. S. § 5392, denouncing the crime of perjury, and declaring that the oath must be taken before some "competent tribunal, officer, or person," as the judge of probate had no authority to administer such oath, an indictment for perjury will not lie.

Demurrer to Indictment for Perjury.

Defendant entered a quarter section of land in Escambia county, Ala., under Rev. St. U. S. § 2289, and afterwards, under section 2301, commuted his homestead entry into a cash entry. The willfully false declarations or statements which the defendant is charged to have made are con-

¹Reported by P. J. Hamilton, Esq., of the Mobile bar.

tained in his affidavit of July 30, 1887, made at the time his application and proof to commute his homestead to cash was made, and to the truth of which declarations or statements the defendant made oath before the judge of probate in and for the county of Escambia, in this state. These declarations or statements, as set out in the indictment, are, in substance, that defendant actually moved on said land in December, 1886; that his actual residence has been on said land up to the filing or taking said oath; that his residence thereon has been actual and continuous; and that he has not resided or boarded elsewhere than on said land since commencing his residence thereon,—which statements the indictment alleges were material, and were willfully false, and contrary to what defendant believed to be true. The indictment contains two counts, which, as respects any matter now to be determined, do not substantially differ, except that the second count alleges that the statements were subscribed and sworn to, and that the defendant therein stated he had built a house, and had a half acre of land fenced and in cultivation.

John D. Burnett, U. S. Dist. Atty.

J. M. Davison, M. B. Kelly, J. J. Parker, and Wm. D. McKinstry, for defendant.

TOULMIN, J., (after stating the facts as above.) The controlling questions raised by the demurrers are—*First*, as to the authority of the judge of probate to administer the oath upon the falsity of which the indictment is laid; and, *second*, whether the oath was one required by law of defendant in the particular matter to which it relates. To constitute perjury it is essential that the oath was administered in the manner prescribed by law, and by some person duly authorized to administer the same in the matter or cause wherein it was taken. *U. S. v. Deming*, 4 McLean, 3; *U. S. v. Babcock*, Id. 113; *U. S. v. Wilcox*, 4 Blatchf. 391; *U. S. v. Curtis*, 107 U. S. 671, 2 Sup. Ct. Rep. 507; 3 Whart. Crim. Law, §§ 2244, 2245. And the oath must be one required by law in such a case. *U. S. v. Nickerson*, 1 Spr. 232; *Linn v. Com.*, 96 Pa. St. 285; *People v. Fox*, 25 Mich. 492; *State v. Crumb*, 68 Mo. 207; *Gibson v. State*, 44 Ala. 17; *White v. State*, 1 Smedes & M. 156. In making final homestead proof under section 2291, Rev. St. U. S., the homestead settler may make the affidavit and proof required by that section in support of his claim before the register or receiver, or before the judge, or, in his absence, the clerk of some court of record. If the homestead settler does not wish to remain five years on the land, the law permits him to pay for it with cash, and to obtain a patent therefor from the government. In other words, he may abandon his rights under the homestead law, and avail himself of the benefits of the law granting pre-emption rights. See sections 2301, 2259, Rev. St. When this is done it is called a “commuted homestead entry.” The affidavit required to be made by the settler in such case shall be made before the register or receiver, or before the clerk of the county court, or some court of record of the county and state or district in which the land is situated. See act of congress of June 9, 1880, (1 Supp. Rev. St. U. S. 542,) and section 2262, Rev. St.,

which prescribes the oath of the pre-emptionist. "It is fundamental in the law of criminal procedure that an oath before one * * * who, although authorized to administer some kind of oaths, but not the one which is brought in question, cannot amount to perjury at common law, or subject the party taking it to prosecution for the statutory offense of willfully false swearing." *U. S. v. Curtis, supra*. The statute declares that the oath must be taken before some "competent tribunal, officer, or person." It means that the oath must be permitted or required by the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer an oath in respect of the particular matters to which it relates. Section 5392, Rev. St. A person cannot be convicted of perjury for taking a false oath before one not empowered by law to administer the oath. *State v. Phippen*, 62 Iowa, 54, 17 N. W. Rep. 146. So the question is whether the judge of probate was, at the time of the oath taken by defendant, authorized by the laws of the United States to administer such oath. The matter on which the perjury is assigned grew out of an affidavit made by the defendant on his application for a commutation of his homestead entry under section 2301, Rev. St. U. S. The statements sworn to, and which are alleged to be false in the indictment, are not the statements required or authorized by law to be made in the affidavit of an applicant for a pre-emption, a homestead, or a homestead commutation entry. See sections 2262, 2289-2291, Rev. St. U. S. They were therefore wholly irrelevant and immaterial. Perjury cannot be predicated upon them, however false they may be. Oath as to mere surplusage and immaterial statements cannot support a conviction for perjury. The officer before whom the oath was taken had no power to construct a new oath, different from that prescribed by the statute. My conclusion is that the judge of probate had no authority in law to administer the oath charged in the indictment, and that the said oath was not one required by law in such a case as that set out in the indictment. The indictment is therefore fatally defective, and the demurrer to it should be sustained. It is so ordered.

In re COSENOW.

(*Circuit Court, E. D. Michigan. February 6, 1889.*)

1. **ARMY AND NAVY—ENLISTMENT—MINORS—DISCHARGE—CONFINEMENT FOR DESERTION.**

A minor soldier of the army, in confinement under a charge of desertion, will not be discharged from military service until he has been released from such confinement.

2. **SAME.**

A minor's contract of enlistment is not void, but voidable.

3. **SAME.**

It seems that if he be over 16 years of age he can only be discharged upon the application of his parent or guardian; otherwise, if he be under 16, or if he were insane or intoxicated at the time of his enlistment.

(*Syllabus by the Court.*)

Habeas Corpus.

The petitioner sought the discharge of his son, Carl Cosenow, from the army of the United States, upon the ground of his infancy at the time of his enlistment. From the return of the commanding officer it appeared that Cosenow was enlisted at Fort Wayne, Mich., under the name of Fred. Smith, on the 16th day of March, 1887, for the term of five years; that on the 3d of May following he deserted from the service, and remained away until his apprehension, on the 28th of December, 1888; that a charge of desertion was preferred against him, and he was tried by a court-martial; and at the time of filing the petition, the court-martial had sent its proceedings to the reviewing authority for action, and that he was then held in custody awaiting the result of such action. It further appeared from the return that, after the desertion in May, 1887, he again enlisted under the name of Kasenow, and was discharged on May 10, 1888. At the time of his enlistment he swore he was 21 years and 7 months old. From the testimony of his parents, however, it appeared he was still a minor.

J. B. McCracken, for petitioner.

Charles T. Wilkins, Asst. Dist. Atty.

BROWN, J. By Rev. St. § 1117, "no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control." The power of the federal courts to discharge soldiers who have been enlisted in violation of this section is now so well settled that a citation of authorities is unnecessary.

The only complication in this case arises from the fact that the soldier has been tried upon a charge of desertion, and is now in custody, awaiting the disposition of his case by the reviewing authority. By the forty-seventh article of war "any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall * * * suffer, * * * in time of peace, any punishment, excepting death, which a court-martial may direct." Petitioner claims that if it be once conceded that his son's enlistment was in violation of law, he was never duly enlisted, and a court-martial had no jurisdiction to try him for desertion. In our opinion, however, section 1117 refers only to such recruits as have gone through the form of an enlistment, and have thereby become subject to the rules and articles of war. The prohibitory language used in section 1117 is repeated in section 1118, which declares that "no minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony, shall be enlisted or mustered into the military service." The enlistment of a recruit in violation of either section is equally illegal, and the proposition of the petitioner amounts to this: that any soldier who conceives he has been illegally enlisted, either by reason of his minority, or by reason of his insanity or intoxication at the time of enlistment, or

by reason of a prior desertion from the military service, or of his having been convicted of a felony, may take the law into his own hands, and desert the service without any other liability than that of establishing his disability, if he happen to be apprehended as a deserter. We are not prepared to adopt so dangerous a doctrine. Carried to its legitimate extent, it would authorize any recruit, upon the eve of an important battle, or after the commission of any military offense, to abandon his colors, perhaps in the very face of the enemy; and the officer who should order his arrest would be liable as a trespasser. To our minds the very statement of this proposition is its own answer. There is no doubt whatever of the power of congress to authorize the enlistment of minors, even without the consent of their parents, and to that extent to abrogate the common-law disability of the infant to contract. *U. S. v. Bainbridge*, 1 Mason, 71; *In re Davison*, 21 Fed. Rep. 618. In case of an illegal enlistment, the rights of the soldier and of his parents are abundantly protected by an appeal to the secretary of war under the fourth article of war, or by a writ of *habeas corpus* issuing from any federal court. An enlistment contrary to law is not void, but voidable. If the soldier and his guardian both consent to his serving, the enlistment is binding, and the only object of obtaining the consent of the guardian in writing is that it cannot be retracted. So long as the verbal consent of the parent or guardian is not withdrawn by the commencement of proceedings to obtain his release, the recruit is bound to military service, and is subject to the rules and articles of war. There is a marked distinction between the language used in sections 1117 and 1118. By an express proviso in the former, the enlistment of the minor is valid, in the absence of parents or guardians entitled to his custody and control. Indeed, the decided weight of authority is that the recruit is estopped by his own oath of full age; that, as to him, the enlistment is valid and binding, and that no one but his parents or guardian can claim his discharge. *In re Hearn*, 32 Fed. Rep. 141; *In re Davison*, 21 Fed. Rep. 618; *U. S. v. Gibbon*, 24 Fed. Rep. 135; *In re Beswick*, 25 How. Pr. 149; *Menges v. Camac*, 1 Serg. & R. 87. It is true, there are one or two cases to the contrary, but the point does not seem to have been carefully considered, and in our opinion the position taken is unsound. *Re McNulty*, 2 Low. 270; *U. S. v. Hanchett*, 18 Fed. Rep. 26. Upon the contrary, if a minor under the age of 16 years be enlisted in violation of section 1118, we should have no doubt that such enlistment was voidable at the election of the minor himself. So, if he were insane or intoxicated, or were a deserter or a convicted felon, we see no reason to doubt that he could obtain his own discharge upon those grounds.

As to the liability of a minor to be tried by a court-martial for any military offense committed after his enlistment, the cases, with perhaps one or two exceptions, are uniform. In the case of *Grace v. Wilber*, 10 Johns. 453, it was held by the supreme court of the state of New York that if an infant, not liable to be enrolled in the militia, afterwards deserted the service, he could not be compelled to return, and an action of trespass would lie against a person who apprehended and detained

him as a deserter. In the court of errors, however, (12 Johns. 68,) the case was reversed, and it was held by a majority of the court that if a person not liable to military duty voluntarily entered the service as a soldier, he could be apprehended as a deserter. "The question is not whether the contract is valid or void; nor is it whether the soldier is entitled to be discharged from the service or not. The contract may be void; and he may be entitled to his discharge; but it does not follow that he is to be his own judge, and to discharge himself by desertion. Any person detained by military authority or military force may obtain his discharge, if he is entitled to it, by application to the proper civil authorities. But a soldier in actual service cannot be allowed to desert at pleasure." It is true that in *Com. v. Gamble*, 11 Serg. & R. 93, the enlistment of an infant in the marine corps was held to be valid, but the court remarked that there was another independent ground upon which he must be remanded, as the recruit was in confinement on a charge of desertion; "that the law is clear that he must abide the sentence of a court-martial before he can contest the validity of the enlistment. There would be an end of all safety if a minor could insinuate himself into an army, and, after having perhaps jeopardized its very existence by betraying its secrets to the enemy, escape military punishment by claiming the privileges of infancy." It is true, the authority of this case was somewhat shaken by the subsequent case of *Com. v. Fox*, 7 Pa. St. 336, but we regard the earlier case as declaring the sounder doctrine. The question was directly decided in 1865 by Mr. Justice DILLON, of the supreme court of Iowa, in *Ex parte Anderson*, 16 Iowa, 595, in which the court refused to inquire into the validity of an enlistment where the recruit was held to answer to a charge of desertion, and remanded him to the military court for trial. A like ruling was made by Mr. Justice BACON in the supreme court of New York in *Re Beswick*, 25 How. Pr. 149; by Mr. Justice MERRICK, of the supreme court of Massachusetts, in *Re Dew*, 25 Law Rep. 538; and, inferentially at least, by the supreme court of Massachusetts in *McConologue's Case*, 107 Mass. 170, and *Tyler v. Pomeroy*, 8 Allen, 480, 501; and by Judge LOWELL in *Re Wall*, 8 Fed. Rep. 85. It is true, in some of these cases the language of the statute was not as sweeping as that contained in section 1117, but the decisions were not put upon that ground.

The only case opposed to this view, to which our attention has been called, is that of *In re Baker*, 23 Fed. Rep. 30, in which it was held that a court-martial could not retain jurisdiction of an enlisted minor under charges of desertion. We have read this case with great care, but are unable to concur in the opinion of the learned judge, that the effect of the statute is to make the enlistment so absolutely void that the recruit could not commit the crime of desertion, and that a court-martial could not retain jurisdiction under the charge.

Our conclusion is that the court-martial had jurisdiction of the offense committed by the recruit, and that he must be remanded to await the result of his trial.

AMERICAN BELL TEL. CO. v. WALLACE ELECTRIC TEL. CO.

(Circuit Court, S. D. New York. February 4, 1889.)

1. PATENTS FOR INVENTIONS—VALIDITY—STARE DECISIS.

Former decisions of the circuit and supreme courts upon the validity and construction of the Bell telephone patents are to be followed in cases involving them in which there is no new evidence.

2. SAME—ANTICIPATION.

The Bell patents being for a process as well as an apparatus, they would not be invalid because the apparatus used in developing the process was previously known, and therefore the House patent of 1868 does not render them invalid.

3. SAME—EVIDENCE—ADMISSIBILITY.

The Bonta patent of 1887 having been introduced for the purpose of showing that articulate speech can be transmitted on the make and break principle, ought not to be considered, in the absence of expert testimony that the apparatus is operative upon that principle.

In Equity.

Bill by the American Bell Telephone Company against the Wallace Electric Telephone Company, for the infringement of complainant's patents.

E. N. Dickerson and *James J. Storson*, for complainant.

James A. Whitney, for defendant.

WALLACE, J. In directing a decree for the complainant in this cause it seems sufficient to state that the examination of the record, which has been made to ascertain whether the case now presented is distinguishable in essentials from the cases which have already been decided in this court and by the supreme court, does not disclose anything materially new. No useful purpose would be served by an extended discussion of the questions of law and fact which have been so exhaustively treated in the argument and brief of counsel for defendant, because nothing of interest can be added to what has already been said in the previous opinions of the courts. The construction which has been placed upon the Bell patent by the courts is, of course, to obtain now, unless it ought to be modified because something new in the state of the prior art has been shown. It would be strange if anything new, of value, could be shown after the thorough exploration and exposition of the subject made by the most competent experts and counsel in the efforts to defeat the patent, and escape the charge of infringement in former litigations. In the *Molecular Case*,¹ which was decided by this court, the defense was prepared with great care, and argued with the best ability; the record in other cases was introduced, including the testimony of the experts who testify for the defendant in the present case; and no point of attack or defense was neglected by the defendant. There is nothing in the present record bearing upon the nature of Bell's invention, the meaning of the claims of his patent, or what constitutes infringing apparatus, of any real im-

¹ 82 Fed. Rep. 214.

portance, which was not considered in that case. The House patent of 1868 was not brought forward in that case at the hearing, but may be disposed of by quoting a single remark in the opinion of the supreme court in regard to the Reis apparatus:¹ "His [Bell's] patent would be quite as good if he had used that apparatus in developing the process for which it was granted." The Bonta patent of 1887, which seems to have been introduced for the purpose of showing that articulate speech can be transmitted by a make and break current, ought not to be considered, in the absence of any expert testimony to show that the apparatus is operative or operates upon the make and break principle. So far as the case involves the charge that Bell by surreptitious changes in his application after it was filed in the patent-office pirated the invention of Mr. Gray, the charge has been considered by the supreme court² upon substantially the same evidence, and pronounced to be unfounded, although the issue was not presented by the pleadings. At the present hearing, after listening to the very ingenious and elaborate argument of the defendant's counsel, in which nothing was omitted that could assist his cause, the theory of fraud seemed to be so utterly unwarranted by the facts that argument in reply was deemed superfluous. The usual decree for an injunction, and for an accounting based on the infringement of claim 5 of patent No. 174,465, and of claims 3, 5, 6, and 7, of patent No. 186,787, is ordered.

ROOT v. THIRD AVE. R. Co.

(Circuit Court, S. D. New York. February 4, 1889.)

PATENTS FOR INVENTIONS—PRIOR USE.

The improvement in the construction of cable railroads, for which letters patent No. 262,162, August 1, 1882, were granted, was devised by the patentee in the expectation of being employed to build a certain road, and was utilized by the owner of such road at great cost, and was of a permanent nature. The patentee was superintendent of the road, but reserved no control of the invention, and suggested no change in it, and made no examination of the road for the purpose of ascertaining its efficiency. *Held*, that the use of the invention in such road after its completion and in its regular operation was public, and not experimental, though the patentee testified that he had doubts of its durability, he never having expressed them to the owner of the road; and such use having been for more than two years before the application for the patent, the patent is invalid.

In Equity. Bill for the infringement of a patent.
George Harding and George J. Harding, for complainant
Frost & Coe, for defendant.

WALLACE, J. The complainant sues for infringement of letters patent granted to him August 1, 1882, (No. 262,162,) for an "improve-

¹Dolbear v. Telephone Co., 8 Sup. Ct. Rep. 773, 785.

²Id. 773.

ment in the construction of cable railroads." His application for the patent was filed September 3, 1881. The California Street Railroad, a cable railway in the city of San Francisco, was built by the patentee, completed, and went into regular operation prior to April 11, 1878, and as constructed embodied the invention described in the patent in suit. The defendant insists that this is a public use of the patented invention more than two years prior to the patentee's application for his patent, and consequently invalidates the patent. The complainant contends that this was an experimental use of the invention, and that the application was filed within two years after the patentee became satisfied that his invention was a practical success. It is conceded that the road as built embodied the invention of the patent; that Mr. Root had complete charge of the construction of the road, and built it for the projectors; and that it has been operated ever since April, 1878, as built, without any changes or modifications in plan or details. The evidence is that in the early part of 1876 the projectors obtained a franchise to lay and operate a cable railway in California street, one of the public thoroughfares of the city of San Francisco. In the expectation of being employed as the consulting engineer to build the road, the complainant investigated the subject of cable roads, and matured the invention in controversy between May and September, 1876. In September, 1876, he disclosed the invention to the projectors; between that time and January, 1877, made a model of it; and in February, 1877, laid down an experimental section of the cable railway embodying the invention in the yard of the Central Pacific Railway Company in San Francisco. His invention was adopted by the projectors, and work was commenced upon the structure in July, 1877. The road cost, with the equipment, \$418,000. It was about two miles in length, and the road-bed and tunnel construction cost about \$225,000. From April 9, 1878, the structure has been in regular, successful use as a street railway, carrying passengers for pay. Up to the time when the complainant made application for the patent in suit, and until 1883, the complainant was superintendent of the road for the owners. In explanation of his delay in making the application for the patent the complainant testifies that he did not wish to patent the invention if the structure proved weak or undesirable, and he did not feel sufficiently certain of its durability and general practicability until the year 1881; that there was no way but by trial in a public street, through a long period of time, to determine to what extent the moving of cars and the street traffic over a rail connected to iron work without the intervention of any wood would affect the durability of the structure, or to what extent changes of temperature and the effect of water and rust would tend to separate the iron work from the concrete in which it was imbedded; and that, while he believed there was more than an even chance of its proving a durable and desirable structure, he had some doubts in his own mind, and was influenced also by the doubts expressed by others in whose judgment he had confidence. He admits that he never expressed these doubts to the projectors, either while discussing with them the features

of his invention, or while the road was being built, or while he remained its superintendent, and after it was completed. In answer to a question whether he had any doubts of the durability of the structure after the road was completed, he states that in the spring of 1879, while making an extension of the railway, some parts of the structure were exposed, and he then saw some indications of the loosening of the yokes in the concrete, and "had some little fear at that time" that trouble might arise in that respect. Manifestly the complainant received a consideration for devising and consenting to the use of an invention which was designed to be a complete, permanent structure, which was to cost a large sum of money, and which he knew would not meet the expectation of those who had employed him, unless it should prove to be in all respects a practically operative and reasonably durable one. If he had entertained any serious doubts of its adequacy for the purpose for which it was intended, it would seem that he would not have recommended it in view of the considerable sum it was to cost. At all events, he did not treat it as an experimental thing, but allowed it to be appropriated as a complete and perfect invention, fit to be used practically, and just as it was, until it should wear out, or until it should demonstrate its own unsuitableness. He turned it over to the owners without reserving any future control over it, and knowing that, except as a subordinate, he would not be permitted to make any changes in it by way of experiment; and at the time he had no present expectation of making any material changes in it. He never made or suggested a change in it after it went into use, and never made an examination with a view of seeing whether it was defective, or could be improved in any particular.

In *Manufacturing Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. Rep. 122, it was held that when it is clearly established that there was a public use of the invention by the inventor for more than two years prior to his application for a patent for it, the burden is on him to show by convincing proof that the use was not a public use, in the sense of the statute, but that it was for the purpose of perfecting an incomplete invention by tests and experiments. And in defining the distinction between a public and an experimental use the court in that case used the following language:

"A use by the inventor for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible; and where, as an incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character; but where the use is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, the principal and not the incident must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for the purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition."

Tested by the rule thus stated the proofs do not show a use substantially for experiment, but show such a public use of the invention as must defeat the patent. The facts are in marked contrast with those in the

case of *Elizabeth v. Pavement Co.*, 97 U.S. 126. There the use was solely for experiment. In the language of the opinion in that case:

"Nicholson wished to experiment on his pavement. He believed it to be a good thing, but he was not sure; and the only mode in which he could test it was to place a specimen of it in a public roadway. He did this at his own expense, and with the consent of the owners of the road. * * * He wanted to know whether his pavement would stand, and whether it would resist decay. Its character for durability could not be ascertained without its being subjected to use for a considerable time. He subjected it to such use, in good faith, for the simple purpose of ascertaining whether it was what he claimed it to be."

A decree is ordered dismissing the bill with costs.

CELLULOID MANUF'G Co. *et al.* v. RUSSELL *et al.*

(Circuit Court, S. D. New York. February 4, 1889.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—CELLULOID—PRINTING FROM ENGRAVED PLATE.

Claim 2 of letters patent No. 348 222, granted August 31, 1886, to the Celluloid Manufacturing Company, is for the improvement in the art of printing with engraved plates on pyroxyline compounds, consisting in (1) inking the plate with an ink containing or consisting of a solvent of pyroxyline and a pigment, and (2) in subjecting the material to heat and pressure while in contact with the inked plate. The testimony of one of two witnesses by whom it was sought to prove anticipation was based on hearsay, and none of the products printed in his establishment, and showing the alleged anticipation, were produced. That of the other was contradicted in many important particulars by the inventors and another. The exhibits in support of alleged anticipations were all made after the patent. In previous attempts to print on celluloid the ink blurred, and was easily erased, while the printing by means of the patented process resembles the finest engraving on ivory. *Held*, that the process is a novel and valuable invention; though the materials previously existed, they had not been used before in the combination claimed; and that the patent is valid.

2. SAME—SPECIFICATIONS—SUFFICIENCY.

The mere failure of the specification to disclose fully the nature of the ink, the evidence showing that various inks containing a solvent of pyroxyline cannot be successfully used, does not avoid the patent under Rev. St. § 4920, providing that defendant may plead that for the purpose of deceiving the public the specification was made to contain less than the whole truth. It must be shown in addition that the omission was with a fraudulent intent.

3. SAME.

It is unnecessary, also, in the specification, to caution against an ink with a solvent of such volatility as to make it useless.

In Equity.

Bill by the Celluloid Manufacturing Company and others against Benjamin Russell and others for the infringement of a patent.

W. D. Shipman and *J. E. Hindon Hyde*, for complainants.

B. F. Thurston and *H. M. Ruggles*, for defendants.

COXE, J. This is an equity action for the infringement of letters patent No. 348,222, granted to the Celluloid Manufacturing Company, as

the assignee of M. C. Lefferts and J. W. Hyatt, the inventors, August 31, 1886, for an improvement in the art of printing upon pyroxyline compounds. The invention consists in printing upon celluloid by means of engraved plates; the celluloid being subjected to the action of heat and pressure while in contact with the inked plate, which, preferably, should have a highly burnished surface. Any ink which contains a solvent of pyroxyline may be used, but one in which the coloring matter is in the form of a pigment, and which contains a binding agent, is recommended. The celluloid is subjected to heat, from 180 deg. to 230 deg. Fahrenheit, to soften its surface; and to pressure, to cause the material to flow into the engraved lines. Thus a clear and permanent impression is obtained, a result unknown prior to the invention. The second claim only is involved. It is in these words:

"(2) The improvement in the art of printing with engraved plates on surfaces of celluloid or other pyroxyline compounds, which consists in—*First*, inking the plate with an ink containing or consisting of a solvent of pyroxyline and a pigment; and, *second*, in subjecting the material to heat and pressure while in contact with the inked plate."

The defenses are lack of novelty, non-infringement, and that the patent is invalid because it contains less than the whole truth relative to the invention.

Celluloid is a hard, non-fibrous, non-porous substance, and for a long time defied the efforts of the most experienced experts to print successfully upon it. The well-known methods of printing on paper and other similar material produced no satisfactory result when applied to celluloid. The ink would blur. It was not indelible. The impression was not permanent. It could be easily rubbed off. It was like attempting to print on glass, porcelain, or ivory. The efforts to reach a satisfactory result were long continued, and were only crowned with success after many experiments had been tried. To devise such a process required invention. A mechanic would have suggested the ordinary method of printing, but it required genius and the originating faculty to bring in the element of the synchronous use of heat, sufficient to soften the celluloid, and uniform pressure, in conjunction with an ink containing a solvent of pyroxyline. The inventors were not only mechanics, but experts, possessing an uncommon and peculiar knowledge of the properties of celluloid. One of them was, in addition, proficient in the art of printing, having had an experience of 10 years; and yet the idea which now seems obvious did not occur to them until after months of effort.

It was stated on the argument, and not denied, that there is not in the record a single specimen of printing upon celluloid made prior to the patent. A number of exhibits have been introduced to illustrate and explain the testimony of the witnesses as to what was known prior to 1884, but the fact is undisputed that they were all made after the patent was issued. This is an unusual, and a most significant fact. On the other hand, the exhibits introduced by the complainants as illustrating their process are, many of them, of great beauty and artistic merit. It is not pretended that anything at all approximating them in appearance

existed before. They resemble the finest engraving upon ivory. Many men were striving to reach this result, but the process of the patent was the first one successfully employed. It is apparent now that the step was a simple one. But six years ago the obstacles seemed insurmountable, even to the most learned and skillful. A traveler who, surrounded by darkness and mist, has lost his way amid Alpine snows, may perish within a few steps from the friendly shelter which he seeks. The rising sun shows how easily he might have been saved if he had pressed on for a moment longer. So this record shows how near many prior searchers were to the patented process, but it also shows that they did not know it until the truth was revealed by the light thrown on the art by the inventors. The conviction is forced upon the mind that they have taken a step in advance; that they have given something valuable to the public; and therefore that they are entitled to liberal treatment in a court of equity. To all the able and ingenious arguments of the defendants may well be opposed this single fact—no one, prior to the invention, ever produced any printing upon celluloid which is worthy to be compared to the exhibits of the complainants.

The record fails to show anticipation by that high class of evidence required in such cases. The testimony of the witnesses Hart and Lee, standing alone, might be sufficient, but the force of their statements is greatly weakened and impaired by the evidence in rebuttal. The testimony of Lee, in its important particulars, is based upon hearsay, and although several thousand dials, which exhibited the alleged anticipation, were printed in his establishment, not one of them is produced in court. Hart is not corroborated, except in non-essentials, and he is expressly contradicted in many important particulars by both the patentees and by Lockwood, to all of whom he refers as having knowledge that he printed on celluloid from engraved plates. It is so easy to be mistaken in such matters, and there were at the time referred to by Hart so many similar operations which he might have confounded with the patented process, that, even though it cannot be positively demonstrated that he is in error, there is at least sufficient doubt to prevent his assertions from overcoming the presumption of novelty arising from the patent itself. Some of the reasons for this doubt are stated with distinctness by one of the patentees. He says:

"In every instance these dials [referred to by Hart] were printed from wood blocks, or their equivalent, such as electrotypes or stereotypes, with an ink containing a strong dryer. This ink could be softened and rubbed from off the face of the celluloid, leaving no trace behind it. They were evidently not printed by the use of heat, as the scratches and marks left in the sheet by the process of sheeting it were not removed, which would have been the case had it been pressed against any surface while in a softened condition due to heat. This shows me that if Hart had printed any such dials from engraved plates I would have probably seen them among the samples sent to us from time to time. This and the fact that he never spoke to me in regard to such printing, and that he sent Mr. Gleason to me for the purpose of learning how to transfer impressions of watch-dials from paper to celluloid, which was necessarily an expensive, and only a partially successful process; and that, when I sent him samples of watch-dials printed on celluloid from engraved plates by myself

he acknowledged that they were very beautiful, and the handsomest things that he had seen on celluloid, and that he thought they were valuable, and that his company would purchase them, provided the celluloid were a little whiter; and yet that, during all this time, and even after the patent issued, he advanced no claim to the invention, or intimated that he had ever printed himself from engraved plates,—is conclusive to my mind that he never did so print, or that, if he did, the results were unsatisfactory, and of no value."

The patent being for a process, each ingredient and each step is necessary to make the operation a success. Omit one and failure ensues. Each separate step of the process may have been taken before. The ink described may have been known. All this is unimportant. It is enough that no one before had used the process. The materials may all have been ready at hand, but unless they were combined by others in the manner described by the inventors, there is no anticipation, and nothing which defeats the patent for lack of invention. Surely the prior art does not show beyond a reasonable doubt that the ink described by the defendants was ever used for printing upon celluloid from engraved plates by heat and pressure, or that any one knew that it could be so used.

Section 4920 provides that the defendant may plead that, for the purpose of deceiving the public, the specification filed by the patentee was made to contain less than the whole truth relative to his invention. It is seldom that a patent has been overthrown under this provision. It is not sufficient that the specification contains less than the whole truth, but the omission must have been made with intent to deceive the public. It now appears that the accusation under this defense is that the specification did not fully disclose the nature of the ink, the proof showing that various inks which contain a solvent of pyroxyline cannot be successfully used. The complainants were not advised of this particular charge by the allegations of the answer, which is general, and in the language of the statute, and it is insisted that the answer is defective in this particular. There is force in this objection, but it is unnecessary to consider it, for the reason that the proof fails to show that the omission referred to was made with a fraudulent intent. The burden is upon the defendants to prove the defense, and they have failed to do so. The specification is addressed to those having a knowledge of the art. To caution them against compounding an ink with a solvent of such high volatility as to make it useless in practice, would seem to be unnecessary. A formula intended for those skilled in pyrotechny, which states that any powder may be used, need hardly add the caution not to use dynamite. The common sense of the operator would teach him not to employ such high explosives. There is hardly a controversy upon the question of infringement. A construction of the patent which would enable the defendants to escape the charge would be illiberal, and one unwarranted by the proof. The complainants are entitled to the usual decree.

LEARY *et al.* v. HOHENSTEIN.

(Circuit Court, S. D. New York. February 9, 1889.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—SHADE-HOLDER FOR CANDLES.

The shade or globe holder for candles for which letters patent No. 257,027, April 25, 1882, to Daniel Leary, were issued, was not anticipated by the English patent of 1842, to Ward and Freeman, or of 1850, to W. H. Jones, or of 1864, to H. C. Stearn and another, or by the American patent of 1868, to W. H. Hinds, all of which have the cap-shaped piece fitting over the upper end of the candle, with a hole for the blaze, to support the structure, and a ring below to keep it upright, as described in the Leary patent, but none of which have a shade-holder or shade, or their equivalent.

2. SAME—INVENTION.

As it was required that the candle be permitted to melt and burn about the wick but not to melt below, and that the holder maintain an upright position notwithstanding the consumption of the candle, and as this had not been previously accomplished, and the device became extensively used, the device required patentable invention.

3. SAME—INFRINGEMENT.

Though the patent describes the supports of the shade as attached to the ring about the cap-shaped piece, and as being attached to that piece, a cap-shaped piece, with the supports attached directly to it, is an equivalent, and is an infringement.

In Equity.

Bill by Daniel Leary and others against Hugo Hohenstein, for the infringement of a patent.

H. Aplington, for complainants.

Louis C. Raegner, for defendant.

WHEELER, J. This suit is brought upon letters patent No. 257,027, dated April 25, 1882, and granted to Daniel Leary, for a shade or globe holder for candles. The defenses set up and relied upon are want of novelty and of patentability. No prior structures are produced, or shown by evidence to have existed, to bear upon the question of novelty. That defense rests wholly upon an English patent dated in 1842 to Ward and Freeman, and an American patent, dated in 1868, to William H. H. Hinds, for candlesticks, and an English patent, dated in 1850, to William Henry Jones, and another, dated in 1864, to Henry Charles Steane and Frank Alexander Steane, for apparatus to prevent candles from guttering. These patents do show parts of Leary's structure, and notably a cap-shaped piece fitting over the upper end of the candle, with a hole for the blaze, to support the structure, and a ring below to keep it upright; but none of them show a shade-holder for a shade above the blaze of the candle, nor anything like his complete apparatus, or that would answer its purpose. Therefore he was not anticipated by any or all of them. *Parks v. Booth*, 102 U. S. 96. These prior patents are also relied upon to limit the field open to Leary; and counsel for the defendant urges in support of the other defense that there was no room for patentable invention between them and his shade-holder; that a workman might, by the skill of his trade, put the shade-holder upon this cap-

shade piece. If the candle was to stand unchanged, this would be easier; but there was more to be done than to place the shade-holder upon a permanent standard. The candle must be of material which would melt with heat, and be consumed as it melted. The device must be so arranged as not only to hold the shade-holder upright in the beginning, but to maintain it so; and do this by means that would not melt the candle below, and weaken and waste it, and would let it melt about the wick, and burn. Apparatus which would extend down upon the candle without becoming hot enough to melt it, and extend above for the shade-holder, was to be contrived. This would seem to require calculation and ingenuity beyond that of a mechanic in the mere exercise of his calling. No mechanic or other person appears to have accomplished this before Leary did. When he had done it, his device went into extensive use. This shows that it was wanted; and that ordinary workmanship had not brought it. What he did appears to amount to invention which is patentable.

The patent describes the supports of the shade as being attached to a ring resting about the cap-shaped piece over the end of the candle, and as being attached directly to that piece. Both of the claims include that ring in the arrangement. Neither the plaintiffs' device made under the patent, nor the alleged infringement, has that ring. Generally, a patent for combination or arrangement of several parts is not infringed by taking less than the whole of them. *McMurray v. Mallory*, 111 U. S. 97, 4 Sup. Ct. Rep. 375; *Voss v. Fisher*, 113 U. S. 213, 5 Sup. Ct. Rep. 511. But taking some of the parts, with equivalents producing the same result for the others, is an infringement. *Meter Co. v. Desper*, 101 U. S. 332; *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. Rep. 507. The cap-shaped piece, with the supports of the shade attached to it, is the equivalent of the same and the ring with the supports attached to that, and accomplishes the same result in the same manner. The plaintiffs' device, therefore, appears to be made according to the patent. The defendant's device, which is a copy of the plaintiffs', appears for the same reasons to be an infringement. These conclusions have not been arrived at without noticing carefully the decision upon the motion for a preliminary injunction in this case. *Leary v. Hohenstein*, 32 Fed. Rep. 832. The case does not appear to have been so fully presented on proofs then as now. The question was somewhat different, and was in some measure reserved to final hearing. As the case is now understood, the patent is valid, and the defendant infringes; therefore the orators appear to be entitled to a decree. Let a decree be entered that the patent is valid, that the defendants infringe, and for an injunction and an account, according to the prayer of the bill, with costs.

UNDERWOOD *et al.* v. GERBER *et al.*

(Circuit Court, E. D. New York. February 13, 1889.)

PATENTS FOR INVENTIONS—ANTICIPATION—MANIFOLD PAPER.

The claim in letters patent No. 348,072, August 24, 1886, to John T. and Frederick W. Underwood, for a composition for transfer surfaces for producing copies of type-writing, is for the coloring composition therein described for the manufacture of a substitute for carbon paper composed of a precipitate of dye-matter in combination with oil, wax, or oleaginous matter, substantially as set forth. That in letters patent No. 348,073, issued the same day to the same persons, on an application bearing the serial number next succeeding that for the former patent, and the same date, for an improved reproducing surface for type-writing and manifolding, is for a sheet of material coated with a composition of precipitate of dye-matter, obtained as described, in combination with oil, wax, or oleaginous substance, substantially, etc. The composition in each is the same. *Held*, that the only advance of the latter patent is the spreading of the composition on paper, and that such patent is void for want of invention, and that a suit based solely upon it cannot be maintained.

In Equity.

Suit by John T. Underwood and Frederick W. Underwood against Henry Gerber and Anton Andreas to restrain the infringement of a patent.

James A. Hudson, for complainants, cited, to the point decided in opinion: *Manufacturing Co. v. Railroad Co.*, 22 Fed. Rep. 655; *McMillan v. Rees*, 1 Fed. Rep. 722.

Briesen, Steel & Knauth, for defendants, cited, to same point: *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174; *Lock Co. v. Mosler*, 127 U. S. 354, 8 Sup. Ct. Rep. 1148; *Suffolk v. Hayden*, 3 Wall. 315; *Morris v. Huntington*, 1 Paine, 348; *Mathews v. Fowler*, 25 Fed. Rep. 830.

LACOMBE, J. This is a suit brought to restrain the defendants from infringing letters patent 348,073, granted to the complainants August 24, 1886, for "an improved reproducing surface for type-writing and manifolding." The circumstances of the case are peculiar, and present what seems to be a novel question. On March 22, 1886, the complainants filed their application, (known as "Serial Number 196,200.") The patent issued thereon, and now sued on, sets forth that the invention relates to an improved reproducing surface adapted to be employed for obtaining copies of type-writing, or other printed or written impressions by means of a type-writer or other printing device, or by the employment of a stylus or other writing means; that the transfer surface is spread upon a sheet or vehicle, and, when so applied, is adapted to be employed in place of the articles of trade commonly known and designated as "carbon papers," or "semi-carbon papers." The specification then proceeds as follows:

"('Carbon papers,' or 'semi-carbon papers') are employed by type-writers and others to produce copies of impressions either obtained by a machine or by a stylus or other writing means. In carrying out our invention, we em-

ploy in the manufacture of our improved transfer surface dye-wood solutions, or their active principles, which we filter and precipitate with alkalies and mineral salts, or with alkalies, acids, and mineral salts, or with acids or alkalies alone. After the solution has been filtered, the precipitate is removed from the filtering device, and dried. The precipitate is then mixed with lard-oil and wax, or their equivalents, and the mixture is then ground together in a warm state. The dye solutions we prefer to employ are obtained from logwood or hæmatoxylin, the active principle of logwood, Brazil wood, sapan wood, peach-wood, madder, or its active principle,—alizarine. The proportions we find to answer well in producing our improved surface are as follows: Take one pound of extract of logwood and dissolve the same in one gallon of water. Then add to the solution one pound of soda and one pound of mineral salt, using one of the salts of iron or copper, preferably sulphate of copper. The mixture thus obtained is then placed in a filter. After the solution has been filtered, the precipitate is removed from the device employed for filtering, and then dried, after which the precipitate is ready for use. To every two pounds of precipitate thus obtained we add one pound of oil and one pound of wax, and then grind the mixture, in a warm state, in what is commonly known as a 'paint' or other suitable grinding mill. The heated mixture thus obtained is then applied to tissue paper or other suitable paper or fabric by means of a sponge or other suitable transferring device. The paper or fabric to which our improved surface is to be applied is placed upon a heated table, by preference formed of iron, and heated by steam; but this may be varied. In place of employing oil or wax, or both combined, we can employ any other suitable oleaginous matter or combination of oleaginous matter having equivalent or approximately equivalent properties."

The invention having been thus described, the patentees claimed "a sheet of material or fabric coated with a composition composed of a precipitate of dye-matter, obtained as described, in combination with oil, wax, or oleaginous matter, substantially as and for the purposes set forth." On the same day (March 22, 1886, serial number 196,199) complainants also applied for a patent for a "composition for transfer surfaces for producing copies of type-writing," and letters patent therefor (No. 348,072) were issued to complainants on the same day as those sued on, —August 24, 1886. The specification sets forth that the invention relates to the process of producing a transfer surface adapted to be employed upon a sheet or vehicle to take the place of the articles of trade commonly known and designated as "carbon papers" or "semi-carbon papers." It then states that these papers are employed by type-writers or others to produce copies of impressions either obtained by a machine, or by a *stylus* or other writing means, and proceeds to describe the invention in the identical words used in the other patent, and quoted above. Having thus described their invention, the patentees claimed:

"The coloring composition herein described for the manufacture of a substitute for carbon paper, composed of a precipitate of dye-matter, in combination with oil, wax, or oleaginous matter, substantially as set forth."

This novel method of manifolding an invention was adopted, as complainants state, in order to comply with recent decisions of the patent-office, interpreting rule 41 of that office, and holding that where a person has "invented something in an art, or, as it is ordinarily called, 'a process,' also a machine for carrying out the process, and also the man-

ufacture or article which is produced in the operation or the process by the machine," he must take out three separate patents,—one for the process, one for the machine, and one for the product. *Ex parte Blythe*, 30 O. G. 1321; *Ex parte Herr*, 41 O. G. 463. Before those decisions the patent would have contained the common specification above quoted with two separate claims,—one for the process and resulting composition; the other for its combination with the paper. The complainants insist that their position is precisely the same whether their invention is covered by a single patent with a double claim, or by two separate patents. Whether this is so, under the circumstances of the particular case here presented, must be now determined.

The defendants insist that no invention is set forth in either patent, and that they do not infringe. For the purposes of the argument upon the preliminary objection, however, the converse of these propositions will be accepted. The present application is to restrain the defendants from continuing to infringe; and, for some unexplained and unaccountable reason, the complainants sue only on a single patent, and that, too, the one whose number would indicate that it was, in time of application and of issue, subsequent to the other. Having taken their stand solely upon this patent, what is their position towards defendants, who make the composition of matter described in both patents, and combine paper with it, as indicated in the one sued on? When differentiated from each other, it is found that the only step in advance which the higher-numbered patent suggests is the spreading upon paper of the composition described in the lower-numbered patent. In view of the earlier patents and publications which have been put in evidence,—in fact, considering only what is within the common knowledge of all who have for upwards of a generation manifolded writing by the use of a paper coated or impregnated with some pigment,—it is difficult to see what novelty or invention could be detected in merely taking a coloring substance already known and applying it to paper. If the patent for the composition of matter forming the coloring substance had been granted to John Doe the day before complainants applied for their patent covering the application of that substance to paper, the latter would be clearly void for want of novelty or invention. It follows that if the first-numbered patent were held by an assignee of the complainants, near or remote, he could not be held an infringer of the second patent. Complainants conceded upon the argument that an assignee could not be so held except for the combination of paper with the coloring substance for the purpose named, and such a combination is clearly old. The complainants insist that their position is precisely the same is if they held a single patent with two claims,—one for the process or composition of matter producing the coloring substance; the other for the combination of that substance with paper. This might be so if they could be considered as holding both patents. But in this suit they have carefully abstained from declaring upon the first patent, or even in any way referring to it. Its issuance is only known to the court through the defendants, who set it up in defense. The complainants base their claim to a monopoly solely upon the second

patent. As that single patent, tried by the usual tests, may stand or fall, the case which they make out upon their complaint must also stand or fall. One who seeks to enforce the rights secured to him by a patent is an Ishmaelite,—his hand against every one, and every one's hand against him. His adversary may avail of every publication of the fruits of human invention—by letters patent, by printed books, by actual public use—as if they were his own. When offered in evidence they may prove not conflicting, not anticipatory, or be found otherwise immaterial; but, for what they are worth, they are the common property of all who are called upon to justify their acts in the face of a complainant patentee. The holder of the patent sued upon in this case must submit it to comparison with the first patent as if that first patent were outstanding. By not declaring upon it as its present owner, he leaves it to the defendants, to be availed of as if it were the property of a stranger.

What then is his position? At the very time when his patent was issued the composition of matter which enters into his combination with paper was known, and the right to exclude all persons from making it was conferred upon the holder of another patent. Upon the holder of the patent sued upon was conferred the right to exclude all others from combining paper with this composition, but in view of the state of the art such a grant was void. The cases cited by complainant (*Manufacturing Co. v. Railroad Co.*, 22 Fed. Rep. 655, and *McMillan v. Rees*, 1 Fed. Rep. 722) do not apply. There it was held that the additional combination which the original inventor sought to secure by his later patent was in fact a real step in advance. It was held that the description of his invention in the earlier patent would not preclude him from securing his additional claim, because that additional claim covered a patentable invention. "Whether two patents," says the court in the case last cited, "cover the same invention, must be determined by the tenor and scope of their claims, not by the description in the specifications." Here, as we have seen, the combination which the second patent sought to cover was not patentable. This suit, based upon it alone, must therefore fail. To the holder of the first patent, whoever he may be, alone belongs the right to exclude all others from making the new composition of matter, the only invention which (if the other issues in the case be decided against the defendants) was sufficiently novel to warrant the granting of letters patent. Usual decree for defendant.

H. TIBBE & SON MANUF'G CO. v. HEINEKEN.

(Circuit Court, S. D. New York. February 18, 1889.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—CORN-COB PIPES.

Letters patent No. 205,816, July 9, 1878, to Henry and Anton Tibbe, the claim of which is, "as a new article of manufacture, a smoking pipe made of corn-cob, in which the interstices are filled with plastic self-hardening cement," plaster of Paris being indicated in the specification as a suitable plastic cement, are void for want of invention; corn-cob pipes, the bowls of which were lined with plaster of Paris, or a plastic cement prepared from meerschaum dust, having been manufactured and sold more than two years before application for the patent.

2. SAME—ESTOPPEL TO DENY VALIDITY—FORMER LICENSEE.

One who has had a license to sell a patented article is not thereby estopped from questioning the validity of the patent in vindication of acts done since the license expired.

3. SAME—ATTORNEY IN FACT.

One who, under power of attorney from the patentees, conveys the patent-right, and who, under another agreement, receives a proportion of the proceeds of the sale, the patent being conveyed by the assignee, through mesne conveyances to the original patentees, who convey to another, is not thereby estopped, either by deed or *in pais*, from denying that the patent is valid.

In Equity.

On motion for preliminary injunction. Bill by H. Tibbe & Son Manufacturing Company against William L. Heineken for the infringement of a patent.

Paul Bakewell and Abram J. Rose, for complainant.

Louis C. Raegener, for defendant.

LACOMBE, J. This is an application for a preliminary injunction to restrain infringement of letters patent No. 205,816, of July 9, 1878, granted to Henry and Anton Tibbe for "improvement in pipes." There has been no adjudication in support of the patent, except a decree which, being on consent, need not be regarded. Complainant insists that the validity of the patent has been suitably acquiesced in by the public, showing that its sales of articles covered thereby have run up into the millions. The weight of this argument is greatly weakened by the facts shown in defense, viz.: That the defendant has been manufacturing the same pipes continuously, and to a considerable extent, since 1883; that the Tibbes, through their solicitor, threatened to prosecute him for infringement four years ago; that he then retained counsel, and insisted that he had a right to manufacture and sell, communicating that fact to their solicitor; and that he has ever since openly continued the manufacture and sale of his pipes undisturbed by complainant or his grantors. In view of the other facts disclosed by the papers, this branch of the subject need not be discussed. We may concede that the letters patent and proof of exclusive enjoyment make out a *prima facie* case, and proceed at once to determine whether defendant's answering affidavits are sufficient to defeat that case. The claim of the patent is: "As a new article of manufacture, a smoking pipe made of corn-cob, in which the interstices

are filled with plastic self-hardening cement." In the specification, plaster of Paris is indicated as a suitable plastic cement. Inspection of the specification and drawings indicates that the patentee contemplated securing a patent upon other features of his pipe, such as the shape, stem, etc., but these were all abandoned before issue, and the only claim retained in the patent is for filling the interstices, as above indicated. When a dry corn-cob is trimmed and hollowed out to a shape suitable for a pipe, it appears from an examination of the exhibits submitted with the papers that there are a great many interstices, both on the inside and the outside of the bowl. It further appears from defendant's affidavits that more than two years prior to the application for the patent one Charles F. Willis manufactured corn-cob pipes, known and advertised as "Jackson Pipes," which were extensively sold in New York and Philadelphia. The bowls of these pipes were lined with plaster of Paris, or a plastic cement prepared from meerschaum dust. This lining of course filled up the interstices on the inside of the bowl precisely in the same way as does the "plastic self-hardening cement" of the patent. Such being the state of the art, there was no invention in filling the outside interstices in the same way, and the patent is clearly void.

The complainant, however, contends that the defendant cannot be heard to deny the validity of the patent in suit. It appears that in May, 1879, the patentees Henry and Anton Tibbe gave to defendant an exclusive license to sell these pipes, agreeing not to appoint any other agents to sell, nor to sell or assign the patent without his consent; he to have 25 per cent. of all sales. This agreement expired by its own limitation May 14, 1885, and there is no authority for the proposition that a former licensee is estopped from questioning the validity of a patent, after his license expires, in vindication of acts done subsequent to its termination.

It is also shown that, the patent standing in the name of Henry Tibbe and Anton Tibbe, copartners, they executed a power of attorney to the defendant (June 13, 1879) to sell for them and in their names all their right, title, and interest in the patent. By some other agreement, not expressed in the power of attorney, he was to receive 25 per cent. of the proceeds of the sale of the patent-right. Acting under this power of attorney, and referring to it as his authority, the defendant conveyed the patent-right to one George Winzer. By various mesne conveyances it subsequently returned (November 5, 1882) to the firm of Henry and Anton Tibbe, into which partnership one Kauman had by that time been admitted. These last, with two other persons, subsequently organized the complainant corporation, and conveyed the patent to it February 1, 1887. Under these circumstances, the question arises whether the defendant is estopped, either by deed or *in pais*, from denying the validity of the patent. After examination of the documents submitted, and of the authorities cited by the complainant, I am inclined to the opinion that he is not. The power of attorney was, for all that appears, revocable at pleasure of the Tibbes; and the conveyance executed by defendant to Winzer was in law their conveyance, not his. It is therefore not his own grant that he seeks to derogate from. The circumstances that he

shared in the profit obtained from the sale to Winzer, and would thus be estopped *in pais* from questioning the character of what was sold, might be availed of by a subsequent grantee, who stood in Winzer's shoes, but no authority is cited which would secure the same benefit to the original circulator of an invalid patent, except perhaps the English case, *Chambers v. Crichtley*, 33 Beav. 374. On principle there is no more reason why the defendant should be estopped, as against the Tibbes, from questioning the validity of their patent because he has shared in the proceeds of its sale, than there would be because he has shared in the proceeds of the sale of the articles made thereunder. As the point raised, however, is a new one, and a restraining order was granted in the case, the defendant should only be relieved from its operation upon proper terms. Let the defendant give a bond for \$2,000, and file monthly statements of the number of infringing pipes sold, with leave to complainant to move for an increase of security as the facts may warrant. Upon these terms the motion to continue injunction is denied.

BRIGHAM v. COFFIN *et al.*

(Circuit Court, D. Massachusetts. February 15, 1889.)

PATENTS FOR INVENTIONS—INVENTION—PRINTING ON RUBBER.

The specifications in letters patent No. 283,057, August 14, 1883, to F. E. Aldrich, state that the invention consists in a fabric composed wholly or partly of rubber having useful or ornamental designs printed or stamped on one or both surfaces with an ink or compound of a different color, by means of rollers, blocks, or in any other suitable manner, the ink or compound preferably containing rubber, caoutchouc, or the like. The ink or compound is disclaimed. Rubber fabrics having ornamental figures printed on them are described in the Dunbar & Lothrop patent of December 14, 1875, and the patent of March 30, 1880, to Brigham and others. *Held* that, as the alleged improvement consisted only in printing upon the fabric with a different kind of ink, the patent is void for want of invention.

In Equity.

Suit by Wilbur F. Brigham, trustee, against Judson H. Coffin and others, for the infringement of a patent.

Thomas W. Clarke, for complainant.

James E. Maynard, for defendants.

COLT, J. The patent in suit is No. 283,057, dated August 14, 1883, and granted to Frank E. Aldrich, for an improvement in rubber cloths or fabrics. The specification states:

"My invention relates more especially to means for ornamenting the cloth or fabric; and it consists in a rubber cloth or fabric composed wholly or in part of rubber, having one or both of its surfaces provided with useful or ornamental designs or figures printed or stamped thereon with an ink or compound of a different color or shade from the body of the fabric by means of rollers, blocks, or in any other suitable manner, the ink or compound prefer-

ably containing rubber, caoutchouc, gutta-percha, or some analogous material, as hereinafter more fully set forth and claimed. In carrying out my invention I take an ordinary rubber cloth, preferably gossamer rubber cloth, or any fabric composed wholly or in part of rubber, and print or stamp its finished surface or surfaces with an ink or compound of a different color or shade from the body of the goods by means of engraved rollers, blocks, types, dies, or in any other suitable manner. I deem it preferable, however, to use rollers, one or more being employed, according to the number of colors to be applied, and the cloth passed in cuts through the printing-machine after the manner of printing calico and similar goods."

The prior Dunbar & Lothrop patent of December 14, 1875, exhibits a rubber cloth, having on its surface ornamental designs or figures. The patent issued to Brigham and others, March 30, 1880, was for an improvement in water-proof fabrics, and the specification states that the invention consists of a light, thin, woven fabric, covered with a water-proofing of rubber composition, printed with ornamental colors and figures to resemble ordinary dress or similar goods. The composition is spread upon the cloth in the manner well known in the art, and forms a basis for receiving the colors, and holding them in sharp, clear lines, without running or blurring, so as to make well-defined and ornamental figures. On this prepared surface there is printed, in colors suited thereto, such figures and shades as may be desired. From these two patents it is manifest that the printing of ornamental designs upon rubber cloth was old at the date of the Aldrich invention. If the patent can be sustained it must be on the ground that Aldrich was the first to print or stamp rubber cloth with an ink or compound containing rubber, gutta-percha, or some analogous material. In his specification he states that he does not claim the ink or printing compound, as he proposes to make it the subject-matter of another patent. Bearing in mind the prior state of the art, I do not think this patent can be sustained. The claims of the patent are not for an improved mechanism, but for an improved article of manufacture, which consists in printing ornamental figures upon a rubber fabric with a colored ink composed in part of rubber. Rubber cloth had previously been ornamented by printing upon it with one kind of ink, and in my opinion it cannot be said to constitute invention to print upon it with another kind of ink. The bill should be dismissed.

MALTBY v. GRAHAM *et al.*

(Circuit Court, S. D. New York. February 7, 1889.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—NAIL-EXTRACTOR.

Reissued letters patent No. 5,502, July 29, 1878, to George J. Capewell, describe a nail-extractor having a movable jaw worked by a long, hollow arm, in which is a heavy rammer against another jaw, shaped for a fulcrum. The jaws are driven by the rammer into the wood until they grasp the nail-head. The arm, which may be lengthened by drawing out the rammer, acts as a lever over the fulcrum, which tightens the grip. A nail-extractor having similar jaws
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was described in letters patent No. 107,121, September 6, 1870, to George C. Taft. A similar rammer in an arm was described in letters patent No. 54,852, May 22, 1866, for driving an ice-pick, and in letters patent No. 81,855, September 1, 1868, to John Willard, for driving a box-opener, which could be used as a nail-extractor. *Held*, that the combination of elements in the Capewell patent being new, it was patentable.

2. SAME—REISSUE—EXTENT OF CLAIM.

The claim of the reissue, which is for a nail-extractor provided with a movable jaw and fulcrum, in combination with a percussive device, constructed and operating substantially as described, is no broader than the claims of the original, which were for the combination of a rammer and a hollow stem provided with claws for extracting nails, substantially as described, and for the combination of the hollow stem, stationary and pivoted claws, fulcrum, fulcrum-spring, and sliding rammer, all operating substantially as described. There was therefore no abandonment in accepting the original; and, the reissue having been applied for within a few months, excuses for it are not necessary.

In Equity.

Bill by Douglass F. Maltby against John H. Graham and William A. Graham for the infringement of a patent. For opinion on motion for preliminary injunction, see 35 Fed. Rep. 206.

Francis Forbes, for complainant.

George H. Knight and *Harry E. Knight*, for defendants.

WHEELER, J. This suit is brought upon reissued letters patent No. 5,502, dated July 29, 1873, and granted to George J. Capewell for an improvement in nail-extractors. The defenses relied upon at the hearing are want of patentable novelty, abandonment in accepting the original patent, and want of foundation for the reissue. The nail-extractor of this patent has a movable jaw, working by a long, hollow arm, in which is a heavy rammer, against another jaw, shaped for a fulcrum. In use the jaws are placed over the nail-head, and driven by the rammer into the wood around the nail until they will grasp the head; then, by motion of the arm, which may be lengthened by drawing out the rammer, as a lever over the fulcrum, which tightens the grip, the nail is drawn without much bending. A nail-extractor with similar jaws, one acting as a fulcrum, and having an arm for a lever, was patented to George C. Taft in letters patent No. 107,121, dated September 6, 1870; and a similar rammer in an arm was described in letters patent No. 54,852, dated May 22, 1866, for driving an ice-pick, and in letters patent No. 81,855, dated September 1, 1868, and granted to John Willard, for driving a box-opener, which could be used as a nail-extractor. Counsel for the defendants claim that uniting this device to the jaws of Taft's nail-extractor was a mere aggregation of parts, not forming a patentable combination. This assumes that these parts do not work together to accomplish any result in a new way. But this assumption is not well-founded in fact. When brought together and arranged as was done by Capewell, they made a different machine for pulling nails from any that had existed before, and all the parts of it worked together to take hold of and draw nails in a manner different from that of any machine before. This seems to amount to a new combination and arrangement of parts constituting an invention of

a patentable combination. *Loom Co. v. Higgins*, 105 U. S. 580. Cape-well made four claims in his application for the original patent. These were reduced on adverse references and rulings to two. One was for the combination of a rammer and a hollow stem provided with claws for extracting nails, substantially as shown and described; the other was for the combination of the hollow stem, stationary claw, pivoted claw, fulcrum, fulcrum-spring, and sliding rammer, all operating substantially as described. In the reissue the claim is for a nail-extractor provided with a movable jaw and fulcrum, in combination with a percussive device, constructed and operating substantially as described. The specification of the reissue is substantially the same as that of the original, and the claims of both are for devices and operations of devices described. The names for devices in each must signify the same things. The percussive device of the claim in the reissue is the one described, and is the hollow stem and rammer of each of the claims of the original. The movable jaw and fulcrum of the reissue are the claws and fulcrum, including the spring, of the second claim of the original, and the claws of the first. The claims of the reissue do not appear to go outside of or beyond the original in any respect. The reissue, therefore, covers nothing which was left out of the original, and consequently nothing which was abandoned in accepting the original. No reason is shown for the reissue; but it was applied for within a few months, and was no broader than the original. Under these circumstances excuses for the reissue do not appear to be necessary. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073. These views accord with what are understood to have been those of Judge SHIPMAN in *Maltby v. Converse*,¹ and of Judge WALLACE in *Maltby v. Tool Co.*,¹ upon this same patent. Let there be a decree for a perpetual injunction and an account, according to the prayer of the bill.

NORTON DOOR CHECK & SPRING CO. v. HALL *et al.*

(Circuit Court, D. Massachusetts. February 5, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Letters patent No. 144,926, November 25, 1873, to F. H. Richards for an improvement in door-springs, describe a cylinder in which is fitted a piston, and at the end of which is a screw having a longitudinal groove of varying area. The pressure of the piston compresses the air in the cylinder, and partially checks the motion imparted to the door by a spring, but not entirely, owing to the slow escape of the air through the groove. The escape of air is regulated by adjusting the screw. Defendant's device consists of a cylinder and adjustable valve at its end, and a piston. A device prior to that of Richards consisted of a tube on the door in which was a piston. A hole at the end of the tube was covered, but not closely, by a valve resting on the end of a screw, the size of the vent being regulated by the screw. A weight on the piston was suspended from a cord which passed over a sheave to the lintel to

¹Not reported.

which it was attached. *Held*, that in view of such prior device, and of the Corliss dash-pot, the question of infringement was so doubtful that a preliminary injunction should be denied.

In Equity. On motion for preliminary injunction.

Suit by the Norton Door Check & Spring Company against Henry J. Hall and others to restrain the infringement of letters patent No. 144,926, November 25, 1873, to F. H. Richards for an improvement in door-springs. The invention is fully described in *Norton Door Check & Spring Co. v. Elliott Pneumatic Door-Check Co. et al.*, 26 Fed. Rep. 320, except that in the cylinder cap there is a threaded hole, in which is located a screw having a longitudinal V-shaped groove on one side. The area of the groove increases towards the point of the screw, so that the aperture formed by it may be increased or decreased by withdrawing or further inserting the screw, thus regulating the escape of air. In the Sargent door-check, manufactured by defendants, there is a cylinder combined with a piston adapted to move in it. As the door opens, the piston is entirely withdrawn from the cylinder, but as it closes, the piston enters the cylinder, and compresses the air in it. At the closed end of the cylinder is an adjustable valve, which permits the slow escape of the air. The door-check used in Colt's armory in 1863 consisted of a tube attached at about the middle of the width of the door on the side facing the jambs in closing. Within the tube was a weight suspended at the end of a cord, which passed over a sheave near the top of the door, and thence horizontally to the under side of the lintel to which it was attached. At the lower end of the weight was a piston, which fitted the tube so as to make it substantially air-tight, and at the bottom of the tube was a hole, covered by a poppet-valve, which, on the descent of the weight and piston, nearly closed the hole, so as to permit the air to escape slowly. A vertical screw, on the point of which the bottom of the valve rested when in its lowest position, prevented the valve from falling entirely to its seat, and by adjusting the screw the rapidity of the escape of the air could be regulated.

Chauncey Smith and George O. G. Coale, for complainant.

Benjamin F. Thurston and John K. Beach, for defendants

COLT, J. In the case of the complainant company against the Elliott Door-Check Company (26 Fed. Rep. 320) this court sustained the validity of the second claim of the Richards patent, No. 144,926, for an improvement in door-springs. The claim was as follows: "The grooved screw, I, for adjusting the vent, in combination with the packing, H, piston, G, tube, D, and coiled spring, F, or equivalent, substantially as herein shown and described." In the opinion in the *Elliott Case* the court said: "We must also bear in mind that Richards was the first to organize a machine to check the motion of a door before it closes, and thus prevent slamming; and that, therefore, his patent is entitled to a broad construction." In the present case I am referred to prior devices which were not before me in the *Elliott Case*. An examination of these devices has led me to the conclusion that I may have given too broad a construction

to the Richards patent in the other suit. Indeed, I may say that the Corliss air dash-pot, and the exhibit Colt's armory door-check, now for the first time introduced as evidence, have raised a doubt in my mind as to the soundness of the construction put upon the second claim of the Richards patent in the Elliott suit. From a working exhibit introduced by the defendants it would seem to make little or no difference so far as checking the motion of the door before slamming, whether the adjustable screw is placed at the side or bottom of the cylinder, provided the piston does not fit too closely the bore of the cylinder. In other words, I am not clear in my own mind that there is not found in the Corliss dash-pot the substance of what is described in the second claim of the Richards patent. Further, in the exhibit Colt's armory door-check it is admitted that the device consists of a cylinder, a piston, or equivalent, an adjustable vent, a weight, and a valve, which permits the air to enter the cylinder when the weight is raised by the opening of the door. If we substitute a spring for the weight, the combination of devices here shown comes close to those found in the second claim of Richards' patent. For the purpose of deciding this motion I am not called upon to critically compare the Richards device with the Corliss dash-pot or the Colt door-check. It is sufficient for me to say at this time that, after hearing the arguments of counsel, and upon a careful examination of the evidence and exhibits, a doubt is cast upon my mind whether, in view of the prior state of the art, the defendants infringe the second claim of the Richards patent. It is my duty, therefore, to deny this motion, and to postpone the determination of the questions now raised to final hearing. Motion denied.

STANDARD FOLDING BED CO. v. KEELER *et al.*

(Circuit Court, D. Massachusetts. February 20, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—TERRITORIAL RIGHTS OF ASSIGNEES.

One who purchases a patented article from the owner of the patent-right for a certain territory, has no right to sell the same in the course of trade in territory for which another owns the exclusive territorial right.

In Equity. On motion for preliminary injunction.

Bill by the Standard Folding Bed Company against C. P. Keeler and others for the infringement of a patent.

E. Y. Rice, for complainant.

J. H. Taylor and *Browne & Browne*, for defendants.

COLT, J. Under the agreed statement of facts it is admitted that the complainant is the owner of the exclusive right under letters patent granted to Lyman W. Welch, numbered 311,623 and 364,875, for improvements in folding beds, for certain territory, including the states of New York and Massachusetts; that the Welch Folding Bed Company, of

Grand Rapids, Mich., own the said patents for certain territory other than Massachusetts and New York, including the state of Michigan, and manufacture and sell the folding beds made under the patents in Michigan. It is further admitted that the defendants purchased a car-load of said beds from the Welch Folding Bed Company at Grand Rapids, Mich., for the purpose of selling them in Massachusetts, and that they afterwards sold, and are now engaged in selling, the said beds in Boston.

The sole question presented by this motion is whether the purchaser of a patented article sold by the assignee of a patent-right for a certain defined territory, can, in the course of trade, sell the article in another territory, for which another person has the exclusive territorial right. This exact question has not been as yet determined by the supreme court. In view, however, of the decision in *Adams v. Burke*, 17 Wall. 453, and of the decisions of the circuit courts since that time, I think it may be fairly said that the right to sell is not conferred upon such purchaser under the patent laws, and that therefore this motion for an injunction should be granted. The supreme court, in *Adams v. Burke*, expressly limit the case to the right of the purchaser to use, and they thereby restrict the opinion of Judge SHEPLEY in the court below (1 Holmes, 40) to that extent. "Whatever, therefore," says Mr. Justice MILLER, "may be the rule, when patentees subdivide territorially their patents, as to the exclusive right to make and to sell within a limited territory, we hold that in the class of machines or implements we have described, when they are once lawfully made and sold, there is no restriction on their use to be implied for the benefit of the patentee or his assignees or licensees." As thus restricted to the use, the supreme court were divided in opinion, Justices BRADLEY, SWAYNE, and STRONG dissenting. Mr. Justice BRADLEY, in his dissenting opinion, takes the position that the patent act gives to the patentee a monopoly of use as well as of manufacture throughout the United States, and that it authorizes not only an assignment of the whole patent, or any undivided part thereof, but to grant the exclusive right under any patent to make, use, and to grant to others to make and use the thing patented within any specified portion of the United States; and that the only consistent construction to be given to the whole act is to limit all the privileges conferred by it to the district marked out. The precise question now raised was before the circuit court in *Hatch v. Adams*, 22 Fed. Rep. 434, and Judge McKENNAN there held that the purchaser had no right to sell the article in the course of trade outside of the designated limits covered by the grant of his vendor. This case was followed by Judge WHEELER in *Hatch v. Hall*, Id. 438. See, also, the same case in 30 Fed. Rep. 613. I agree with the conclusions of Judge McKENNAN in *Hatch v. Adams* upon the precise point now raised as to the purchaser's right to sell. Both in the light of the more recent cases, and as a question of legal construction under the patent law, I think this motion should be granted. Motion granted.

INDURATED FIBRE CO. v. AMOSKEAG INDURATED FIBRE WARE CO.

(Circuit Court, D. New Hampshire. January 21, 1889.)

TRADE-MARKS—"INDURATED FIBRE."

The words, "indurated fibre," as applied to wares made of wood-pulp, which has been condensed and subjected to baths in linseed oil and resin and baked, designate wood fibre which has been subjected to a hardening process, and refer to ingredients, quality, and characteristics, and are not so arbitrary and fanciful as to authorize a preliminary injunction in an action to restrain their use as an infringement of a trade-mark.¹

In Equity. On motion for preliminary injunction.

Wilbur F. Lunt, for complainant.

Livermore & Fish, for defendant.

COLT, J. This is a motion for a preliminary injunction. The principal issue raised is whether the words "indurated fibre" are the proper subject of a trade-mark. The plaintiff corporation is called the "Indurated Fibre Company," and is located in Portland, Me., and the defendant corporation is called the "Amoskeag Indurated Fibre Ware Company, and is located in Manchester, N. H. Upon the papers before me, it may be said, I think, that the plaintiff is the owner of the words in question, provided they are the subject of a valid trade-mark, and also that the defendant stamps its wares with the same words, and further, that the wares made by the two companies are generally similar in composition and appearance. To grant a motion of this character I must be clearly satisfied of the plaintiff's legal rights. If I have serious doubt upon the question of the right of the plaintiff to a trade-mark in the words claimed, this motion should be denied, and the issues now raised should be left for determination upon final hearing. Upon consideration of the affidavits and the authorities referred to by counsel, I have a grave doubt whether these words can constitute a valid trade-mark. It seems to me that they do not sufficiently point either by themselves or by association, to the origin, manufacture or ownership of the article produced, but that they rather indicate the quality, class, grade, or style of such article; or, to express the distinction in another form, that they are not arbitrary or fanciful words, but are descriptive rather of the quality, ingredients, or characteristics of the manufactured article. Indurated fibre ware is made of wood-pulp. From the description given in the affidavits it appears that this process consists, in a general way, of first forcing the water out of the pulp and condensing it, then putting the article in a hot bath of linseed

¹ A name alone is not a trade-mark when it is understood to signify, not the particular manufacture of a certain proprietor, but the kind or description of thing which is manufactured. *Hostetter v. Fries*, 17 Fed. Rep. 620; *Battery Co. v. Electric Co.*, 23 Fed. Rep. 276. Anything descriptive of the properties, style, or quality of an article merely, is open to all. *Sewing-Machine Co. v. The Gibbens Frame*, 17 Fed. Rep. 623. The words "compressed yeast" indicate the character and composition of an article, and are not the subject of a trade-mark. *Fleischmann v. Newman*, 2 N. Y. Supp. 608. In general, as to what words will be protected as a trade-mark, see *Manufacturing Co. v. Stone Co.*, 35 Fed. Rep. 896, and note; *People v. Fisher*, 3 N. Y. Supp. 786.

oil and resin, and baking it at a high degree of temperature, which bath and baking are repeated several times; and finally dipping the article in linseed oil boiled down to a varnish, and again baking it. Now, it cannot be denied, I think, that "fibre," in the sense in which it is used by complainant, means "wood fibre," and that "indurated" designates the hardening process to which the article is subjected. It may be that the process accomplishes other results besides hardening the pulp, but that this is one, and perhaps the main, result, I think is quite evident. These words, then, "indurated fibre," denote, in a measure at least, the quality, ingredients, and characteristics of the article produced, and in view of this I do not think it can be fairly said that they are arbitrary or fanciful words, as understood in the law of trade-marks. The authorities cited by the plaintiff do not, to my mind, support his position. *Manufacturing Co. v. Manufacturing Co.*, 32 Fed. Rep. 98, was a case turning on the arbitrary name "Celluloid." So in *Selchow v. Baker*, 93 N. Y. 59, the fanciful names, "Sliced Animals," "Sliced Birds," "Sliced Objects," in connection with certain games or puzzles, were held capable of being appropriated as trade-marks; and the same is true of the other cases relied on by plaintiff. The cases cited are good law, but they do not apply to this case, because it seems to me that the words now sought to be appropriated as a trade-mark are indicative of quality rather than of origin or ownership. For these reasons I must deny the present motion.

THE AUGUSTINE KOBBE.

REVERE COPPER Co. *et al.* v. THE AUGUSTINE KOBBE.

(District Court, S. D. Alabama. December 22, 1888.)

1. MARITIME LIENS—SEAMEN—WAGES AFTER SEIZURE OF VESSEL.

Sailors who ship at New York for a voyage via Mobile to South America and return, are entitled, upon the seizure of the vessel under process at Mobile, only to wages then due, it appearing that they can obtain other similar employment at equal or better wages, and there being no proof of any special damage or of return expenses to their homes.

2. SAME—MATE—ASSISTANCE TO MARSHAL.

A mate who remains on the vessel after her seizure, and assists the marshal in handling her, acquires thereby no maritime claim to be enforced against the proceeds of the vessel.

3. SAME—STEVEDORES—STATUTORY LIEN—RANK.

Stevedore services do not constitute a maritime claim so as to impose a maritime lien on the vessel; and a state statutory lien for such services is inferior to liens conferred by maritime law.

4. SAME.

The services of a boss stevedore in unloading the cargo constitute a statutory lien ranking after maritime liens.

5. SAME—SUPPLIES—AFTER DISCHARGE OF CREW.

One who supplies meat to the vessel at Mobile, and who has been allowed therefor up to and after the seizure, cannot be allowed for supplies furnished after the discharge of the crew.

6. SAME—ADVANCES TO CAPTAIN.

One advancing sums to the captain for necessary disbursements of the vessel is entitled to a maritime lien, but not for sums advanced to him for his own purposes.

7. SAME—CAPTAIN'S DRAFTS.

Where the captain gives drafts on the consignee for necessary repairs, which drafts are accepted by the consignee, a statement by him that they had been paid, which he afterwards retracted by sending them to be presented against the vessel, does not prevent the enforcement of the claim against the vessel by one to whom the captain, to avoid seizure, had given a draft in payment of the former drafts when presented. Commissions and other charges above the actual loan should however be disallowed.

8. SAME—DAMAGES FOR BREACH OF CHARTER-PARTY.

If freight has advanced since the execution of the charter-party, the difference is an element of damage for breach; also commissions provided for in the instrument, which apply to advances made under it, are elements of damage; and the claim for these damages constitutes a maritime lien on the vessel.

9. SAME—PAROL AGREEMENTS.

Evidence of a parol agreement by charterers to advance sums to meet drafts made previous to the execution of the charter-party is inadmissible to vary or add to the written contract, which is held to have merged all previous agreements.

10. SAME—PRIORITY—LEX FORI.

The priority of liens against a vessel seized under process is governed by the *lex fori*; and a lien of a certain rank given by a state statute for repairs made in such state will be recognized as a lien, but not of the rank given by the statute.

11. SAME—WAIVER—ATTACHMENT IN STATE COURT.

An attachment of a vessel in a state court, as property, under a misapprehension, and a subsequent release, do not waive a maritime lien on the vessel.

12. SAME—MORTGAGE—REGISTER.

A mortgage on a vessel, to be effective against strangers, must be duly recorded at the port of her owner's residence.

In Admiralty. On exceptions to master's report.

The bark Kobbe was seized at Mobile September 12, 1888, under libel of the Revere Copper Company, for copper claimed to have been furnished at New York to her as a foreign vessel. The captain had given sundry drafts payable at Pensacola, whither, under a charter to Chiesa, (see *Chiesa v. Conover*, 36 Fed. Rep. 334,) the vessel was to have gone to take on a cargo of lumber for South America. Calling at Mobile to deliver freight, the master, Conover, whose wife was the owner, and aboard the bark, made what he conceived a more favorable charter than the South American one, and so abandoned that. He claimed that he had done this on the promise of the new charterers, Martin, Taylor & Co., of Mobile, in the presence of J. R. Edwards, to advance about \$3,000, to be sent holders of the drafts on Pensacola, being about 50 per cent. of these claims, and thus satisfy them. This agreement was not included in the charter-party signed August 31, 1888. The Revere Copper Company, learning that the vessel had not proceeded to Pensacola, libeled her at Mobile, and other claims were also sent to Mobile for collection. After fruitless negotiations Gokey & Son of Jersey City, N. J., libeled on September 17, 1888, for repairs made at that place as to a domestic vessel, claiming under the New Jersey statute of April 24, 1884, and alleging the home port of the vessel to be in New Jersey. This was the

allegation of all pleadings subsequently filed. C. E. Steelman and other sailors libeled September 27th, claiming wages for a round voyage from New York, where they shipped in July, 1888, for South America via Mobile and Pensacola, and return to the United States, alleging that this voyage had been broken up by the act of the master at Mobile. A large number of other claims against the vessel were then filed from time to time by libel or petition, covering the period from her purchase by the Conovers in the fall of 1886 down to the seizure at Mobile. During that time the vessel had been fitted out at Portland, Me., and made a long voyage to South America and return under Steelman as master, lasting from January, 1887, down to her arrival at Providence, R. I., May, 1888, and embracing sundry adventures and trading trips from point to point in South and Central America. At Providence a stevedore named Adamson discharged her cargo of logwood, and Gladding and Braley advanced \$1,000, which went to pay the seamen's wages for the past voyage. From Providence the Kobbe had been towed over to New York harbor, and had undergone coppering and general overhauling at Gokey's docks in Jersey City. This done, she started on the second voyage to South America, in pursuance of the charter Steelman had made with Chiesa at Rosario, shipping new sailors at New York for that voyage, and Conover, husband of the owner, taking charge as master, with Steelman as mate, calling at Mobile in August, where she was seized as above related. On October 1st a reference to Richard Jones as special master was ordered for the purpose of taking testimony and reporting on the various claims and their priorities. Pending its execution the Kobbe was sold under order of court for \$6,350, and the money paid into court by the purchaser, Edwards. The special master reported November 9, 1888, classifying the priority of the claims as follows: (1) Seamen's wages. (2) Maritime liens: (a) incurred on voyage from New York to Mobile; (b) voyages in South America and return; (c) voyage out to South America from United States. (3) Statutory liens for repairs and stevedores. (4) Mortgage. (5) Claims without lien, (including advances at Mobile by Martin, Taylor & Co., Adamson's Providence stevedore claim, and advances of Gladding & Braley there. (6, 7) Claims not proven, fictitious and prospective, (including seamen's wages for unfinished voyage, and the alleged damages of Martin, Taylor & Co.) To this general classification no exception was made, but numerous exceptions, passed on in the opinion, were filed by creditors to their own rank in this table.

G. L. & H. T. Smith, for Revere Copper Company.

Hamiltons & Gaillard, for Steelman *et al.*, sailors, and for sundry petitioners.

D. C. & W. S. Anderson and *Hamiltons & Gaillard*, for Gokey & Son.

Pillans, Torrey & Hanaw, for Martin, Taylor & Co., and sundry petitioners.

J. L. & T. H. Smith, for Doughty and Edwards.

R. I. Smith, for Gladding & Braley and Adamson.

W. D. McKinstry, H. Chamberlain, and *R. P. Deshon*, for sundry petitioners.

TOULMIN, J., (*after stating the facts as above.*) The undisputed evidence as to the seamen is that they duly shipped at New York on the American bark Augustine Kobbe for a voyage from New York via Mobile and Pensacola to South America and return, but that on the breaking up of the voyage at Mobile by seizure under the process of the court they were here discharged. Under the circumstances of this case, I cannot allow more than the wages due at the time of seizure. There is no proof of any special damage, and besides the evidence tends to show that they could have obtained other employment of like character and at as good or better wages. I might have allowed expenses of return to their homes, but there is no proof on this point. Their exceptions are overruled. *The Esteban De Antunano*, 31 Fed. Rep. 920.

Wagner supplied meat to the vessel at Mobile, and excepts to not being allowed for supplies after discharge of the crew. By analogy to the seamen he has been allowed for what was furnished up to and even after the seizure, and his exception must be overruled.

In my opinion the evidence sustains the master's report that Edwards paid \$40 to the captain for his individual use. This, therefore, is no lien upon the vessel. His exception to having his claim for money paid stevedores at the captain's request ranked after maritime liens cannot be sustained. In this circuit it is well settled that stevedore services do not constitute a maritime claim, and that if they are entitled to any lien at all it is under the state statute. *The Ilex*, 2 Woods, 229. The rule is equally well settled here that a state statutory lien is inferior to that conferred by the maritime law, and must rank after maritime claims. The exceptions of Edwards must therefore be overruled.

The special master erred in disallowing the claim of Martin, Taylor & Co., for damages sustained by them by reason of the breach of the charter-party made August 31, 1888. The master found that this breach was caused by their default in that they failed to advance sufficient funds to satisfy holders of drafts payable at Pensacola, (drawn on the faith of a charter previously made by the master with one Chiesa, which had been abandoned,) which Martin, Taylor & Co. verbally agreed to do previous to the execution of their charter-party, and that in consequence of such failure these creditors seized the vessel in Mobile, and thus the voyage to Europe, for which Martin, Taylor & Co. had chartered her, was broken up. But it does not appear from the evidence before the court that such breach was caused by their default. Any evidence of their failure (if there was a failure) to comply with an agreement made by them preliminary to the execution of the charter-party or contemporaneously with it and inconsistent with its terms, cannot be considered by the court. Such parol evidence is inadmissible to vary or add to a written contract, which must be held to have merged all previous agreements, if any. *Bast v. Bank*, 101 U. S. 93, 96; *The Delaware*, 14 Wall. 579.

But the evidence submitted on the subject is not sufficiently clear and definite to satisfy me as to the amount of damages to which they are entitled, or as to the items that go to make up their damages. As to this

I will permit further testimony to be taken. If freight has advanced since the execution of the charter-party, the difference of freight will be one of the elements of loss. The commissions provided for in the charter-party so far as they apply to advances made under it, will enter into the loss, and any sums advanced as advanced freight should also be included. But the claim for loss of dogs and chain and for timber furnished for a yard is a separate claim for supplies furnished, and is not a part of the damages for breach of the charter-party. I consider that Martin, Taylor & Co.'s claim for damages from breach of charter comes under the head of maritime claims, immediately after towage and pilotage on the last voyage into Mobile, and their exceptions are sustained. *The Maggie Hammond*, 9 Wall. 435; *The Director*, 34 Fed. Rep. 57.

Gokey & Son repaired the bark Kobbe on their docks at Jersey City, N. J., after her return from a long voyage to South America back to Providence, R. I. The master may have contracted for the copper in New York, but it is amply shown that none was delivered to the vessel until she was high and dry on Gokey's docks in Jersey City, when Gokey repaired and coppered her. The law of New Jersey gives repairers a lien next after seamen, and it is argued for Gokey & Son that this lien or priority entered into and was a part of their contract. Gokey & Son claim that without regard to what the rule would be in cases arising within the limits of this circuit, in their case, arising in a circuit where a statutory lien is ranked equal to maritime liens, their lien is a part of their contract, and must be enforced in any forum as superior to all claims except for seamen's wages. I have been much impressed with the able argument submitted by Messrs. Hamiltons & Gaillard on the Gokey claim, and must confess that I am not certain that my conclusion that the lien is a part of the remedy, and not a part of the right, is the correct one. If this be so, however, the law of this forum must govern, and that ranks statutory liens after maritime. So long as I am in doubt as to whether there is error in the master's report on the claim, I think it my duty to sustain it, and overrule the exception of Gokey & Son. If I felt free to follow my individual views on the questions presented, I would sustain the exceptions. While this court must recognize the lien given to this claim by the New Jersey statute, it can only recognize and treat it as a statutory lien, and, following the decisions in this circuit, must place it in a rank inferior and subordinate to maritime liens. The original libellants, the Revere Copper Company of Boston, furnished in New Jersey the copper that Gokey there put on the vessel's bottom. They originally claimed a maritime lien, but have now amended so as to claim a lien under the evidence without defining whether it is maritime or statutory. I consider this claim as in the same category with the Gokey claim, and the Revere Company's exceptions must likewise be overruled.

On the return of the vessel from South America, John S. Adamson, as boss stevedore, unloaded her cargo at Providence. The master properly classes the charge for that service as having a statutory lien ranking after maritime liens. Of the amount advanced to the captain by him \$93.06 was shown to be for necessary disbursements of the vessel, and this gives

a maritime lien; but the remainder of the advances were to the captain for his own purposes, and this could give no lien against the vessel. To enforce his claim, Adamson, like Gladding and Braley, who advanced at Providence \$1,000 that went to pay off the sailors of the South American voyage, attached the vessel in a state court as property, but, finding they were acting under a misapprehension, finally released her. This has been expressly decided not to waive a maritime lien. *The Boggs*, 1 Spr. 369. Gladding & Braley are entitled to rank as the seamen whom their money paid off would have done, and Adamson to claim the \$93.06 advanced the ship; but they are not entitled to claim as a part of their debts the costs of the attachment they procured and voluntarily released.

While in South American seas the Kobbe met with a severe storm, which drove her into Montevideo for repairs, to effect which Capt. Steelman borrowed \$570 from Stewart & Williams, giving a draft on one *Princesca* at Rosario, to be paid out of the freight on the cargo which the Kobbe loaded for that place. While at Rosario, *Princesca*, who was consignee, told Steelman that these drafts which he had accepted were paid; but upon discovering, as he claimed, a deficiency in the amount of the cargo, *Princesca* receded from that, and forwarded them, with additions, (making a total of \$716,) to Rio de Janeiro, to be presented to the vessel. Steelman took legal advice in the matter, and to avoid seizure recognized the claim, paid part, and gave a draft for the balance. This draft is now presented by J. F. Whitney & Co., who are in the same position as the original lenders. The master, in his report, has allowed the amount of the actual loan but refused to allow for the commissions and other charges above the actual loan. I sustain the report, and must overrule the exceptions seeking now to disallow any payment because of *Princesca's* statement at Rosario that the original drafts were paid. Capt. Steelman at Rio acquiesced in the claim when presented, and I cannot say he did not act wisely and within the general discretion the master must exercise in a distant foreign port.

Shortly after purchasing the vessel, the Conovers gave a mortgage on her to Richard Doughty for \$3,000, and he is shown to reside, like them, in New Jersey. The amount has been reduced now to \$2,000, and this is claimed out of the proceeds of the sale made under decree of this court. The mortgage was recorded at Portland, Me., while the home port of the vessel, being that of her owner, was in New Jersey. A mortgage on a vessel, to be effective against strangers, must be duly recorded at the port of her owner's residence. Rev. St. § 4192; *The Jno. T. Moore*, 3 Woods, 61. That not having been done in this instance, the mortgagee can claim nothing except out of remnants, if any, and his exceptions are overruled.

Steelman, who was mate on the voyage to Mobile, has remained on the Kobbe since her seizure, and files a petition seeking compensation for services in aiding the marshal in handling her. Of whatever merit the claim might be as a part of the marshal's expenses, if recognized by him, it certainly is not a maritime claim to be enforced against the proceeds of the vessel. His petition and motion must be refused. Except as hereinabove modified, the master's report is in all things confirmed.

THE AUGUSTINE KOBBE.

REVERE COPPER CO. *et al.* v. THE AUGUSTINE KOBBE.

(District Court, S. D. Alabama. January 5, 1889.)

1. MARITIME LIENS—ADVANCES—BY CHARTERER AFTER SEIZURE.

A claim for a sum advanced by the charterers after a vessel has been seized, and while in the custody of the court, cannot be allowed as a lien on the vessel where the advancements are not necessary for the due care and preservation of the vessel, and the charterers have actual notice of the seizure.

2. SAME—SUBROGATION.

The charterers are, however, subrogated to the rights of the stevedore, to whom they paid the money, and thus have a statutory lien therefor, to be satisfied out of the remnants, if any.

In Admiralty. On claim for damages for breach of charter-party.

The damages allowed by the court after amendment of the libel were calculated on the difference in freight rates between the violated charter and the one made after the filing of the libel, but under which the cargo had actually to be shipped at an advance. For main case, and full statement of facts, see same case, *ante*, 696.

Pillans, Torrey & Hanaw, for charterers Martin, Taylor & Co.

Hamiltons & Gaillard and others for sundry creditors, *contra*.

TOULMIN, J. A plaintiff cannot recover as principal a sum larger than he demands by his declaration, but interest may be added if the *ad damnum* be sufficient to cover it.

I have disallowed as damages under the breach of the Kobbe charter the item of \$343, advanced by libelants as charterers, and claimed as a part of such damages, because the same was advanced after the seizure of the vessel. From the evidence it appears that this claim arose while the vessel was in the custody of the court, and, as it was not necessary for the due care and preservation of the vessel, it cannot be recognized as a lien. *The Young America*, 30 Fed. Rep. 790. After the seizure the contemplated voyage was broken up and abandoned. There was then a breach of the charter-party. After such breach Martin, Taylor & Co. had no right to increase their damages; and ought not to have increased them, (as a matter of justice,) by making further advances, and I do not think their doing so can be recognized as a lien on the vessel. I think the principle laid down in the case of *The Young America*, 30 Fed. Rep. 790, and of the *Esteban de Antumano*, 31 Fed. Rep. 921, is a just one, and should be applied in this case to the item of \$343, claimed as a part of the damages sued for. That principle, as applied here, is that when the marshal seized and took into his possession, under process from this court, the vessel, she went into the custody of the law, and her contemplated voyage was broken up and abandoned, and thereby the authority of her owners and of their agent, the master, to thereafter affect the ship by any contract or conduct to

result in a lien on the ship, was ended. By the seizure all persons were notified of the change of control and possession. The proof shows that Martin, Taylor & Co. were actually notified. While the vessel was in the custody of the law it is doubtful whether on any account or for any service (except, perhaps, salvage or collision) any lien could arise on the vessel. I think, however, that Martin, Taylor & Co. are subrogated to the rights of the stevedore to whom they paid the money, and that they have a statutory lien therefor to be satisfied out of the remnants, if any.

WHITE v. THE EMMA.

(Circuit Court, E. D. Louisiana. January, 1889.)

MARITIME LIENS—SERVICES.

Libelant was employed by the owner of a boat to run it for her. He did not act in any particular capacity, but performed all kinds of services, sometimes hunting up business for the owner, and doing work not connected with the management of the boat. There was no contract as to how much he should be paid for his services. *Held*, that he did not have a lien on the boat for such services, as it was evident that he relied upon the credit of the owner for his pay.

In Admiralty. On appeal from district court.

T. M. Gill, for libelant.

Miller & Finney, for claimants.

PARDEE, J. Libel *in rem* for services as pilot and general mariner on board the tug Emma from on or about December 25, 1886, to on or about November 15, 1887. The steam-tug Emma is a vessel of three and three-quarter tons. The libelant's testimony is substantially as follows:

"I am a steam-boat man,—a pilot and carpenter. On the 25th of December, 1886, I was employed by Miss Theresa Mooney to go to the mouth of Little river, near the mouth of Black river, to recover the steam-tug Emma. I was to go and get it, overhaul it, repair it, and run it for her. I went up to make arrangements to buy her, and that night, when I was there, and made arrangements to buy her, she thawed out, her water-pipe burst, and she sank,—that was after I had made arrangements to buy her at a certain price, she sank,—and we had to haul her up on the bank. I did it with what assistance I could get there. After raising her, I found the rudder was broken. After getting up steam and repairing her, I had to overhaul her machinery. I did it with the assistance of a blacksmith. I then brought her over here at Free-town, in the port of New Orleans, just across the river. There we hauled her on the ways, and I helped to overhaul the engines. The painting I did all myself. After getting through with that, I took her to Bayou Sara, and I done very well. I was there one week, and I cleared sixty-five dollars, or something in that neighborhood. On the Sunday night after that she took fire, after I had been there a week; and through some of my friends, four or five of them, (it was late at night,) and myself, we saved the hull. The next

day I shoveled the cinders out of her, and overhauled the machinery again, and brought her back to Freetown, or McDonoughville, in this port of New Orleans. Here we hauled her on the ways again, and we rebuilt her again. After rebuilding her again, we took her to Donaldsonville, and we ran her there three or four weeks. I then brought the boat down to the port of New Orleans and McDonoughville, and laid her up for some time. After that there came a storm,—I think it was in August or September,—and on that day she came near going, too; but, through the exertions of myself and friends, we saved her. And Miss Mooney sent down that day to find if I was there to take care of her boat, and she found that I was there, and did save her. I got a tug to pump the water out of her. After the storm, I got her all right, and took her over the river. During all this time, I acted in the capacity, and was deckhand, engineer, pilot, head cook, carpenter, painter, or anything you want to call it; I done it all. My services continued up to about the neighborhood of the 10th of December; I don't say exactly. They were worth fifty dollars a month. During part of the time I worked under Miss Mooney's directions, on the ferry-boat Jerome Hanley,—about two weeks, I should think. Under the directions of Miss Mooney, I went all around town to see if I could find work for her; and further, under her directions, I helped her to sell the boat to the claimants. I represented to the claimants the condition of the boat. I did not represent to them that she was in debt. After I left the service of Miss Mooney, I saw the claimants' agent,—met him on the street. He said to me, 'That boat was in debt.' That was about the 15th or 17th of December, 1887. He said that boat was in debt, and I told him I knew that. That is the first he ever said about it. I remarked to him at the time that I thought the lady was responsible for all she owed. I never told him before nor after the sale that I had a claim upon the boat for services."

There is some evidence in the case which contradicts the libelant in some particulars; but, in my opinion, it is not necessary to consider it. The libelant's deposition may be taken as his case, and consideration of it shows that he was acting as the general agent and servant of Miss Mooney in all his transactions with regard to this steam-tug, and was relying upon her faith and credit for his pay, and not in any way upon any maritime lien upon the tug. I am clear that from his services no maritime lien resulted. According to his own statement, his services were of all kinds; he was master, crew, ship's husband. He had no contract fixing the amount he was to be paid. He was sometimes employed with the tug; sometimes off from the tug; sometimes in the city of New Orleans, hunting up business; and sometimes a mere watchman. Without regarding the question as to whether or not he could be estopped by his silence at the time of the sale from claiming a maritime lien, it is sufficient, to dispose of the case, that he had no lien. A decree will be entered dismissing the libel, with costs of both courts.

CITY OF MILWAUKEE v. THE CURTIS, THE CAMDEN, AND THE WELCOME.

(District Court, E. D. Wisconsin. February 5, 1889.)

ADMIRALTY—JURISDICTION—TORTS—INJURY TO BRIDGE—STATE LIENS.

A court of admiralty has no jurisdiction of a libel *in rem* against vessels navigating a river, for damage negligently caused by them to a swing-bridge resting on a pier, constructed on the bed of the river; nor can a state statute creating a lien for all injuries done by vessels to persons or property confer such jurisdiction.

In Admiralty.

Libel *in rem* by the city of Milwaukee against the steam-barge Curtis, the schooner Camden, and the steam-tug Welcome, for injuries to a bridge.

Eugene S. Elliott, for libellant.

Alfred H. Bright and M. C. Krause, for respondents.

JENKINS, J. The libellant, a municipal corporation, lawfully constructed and maintained a bridge spanning the navigable waters of the Milwaukee river. The structure was a swing-bridge, its center resting upon a stone pier constructed upon the bed of the river. On the 18th of October, 1888, the bridge was damaged by the alleged negligent conduct of the vessels, respondents, then navigating the river. The libel is *in rem* to recover the damages incurred. It is objected for the respondents that the court is without jurisdiction of the subject-matter. In cases of tort locality is the test of jurisdiction in the admiralty. The ultimate judicial authority has determined the principle that the true meaning of the rule of locality is that, although the origin of the wrong is on the water, yet, if the consummation and substance of the injury are on the land, a court of admiralty has not jurisdiction; that the place or locality of the injury is the place or locality of the thing injured, and not of the agent causing the injury. - *The Plymouth*, 3 Wall. 20; *Ex parte Insurance Co.*, 118 U. S. 610, 7 Sup. Ct. Rep. 25. Within this settled principle a tort is maritime, and within the jurisdiction of the admiralty, when the injury is to a vessel afloat, although the negligence causing the injury originated on land. *The Rock Island Bridge*, 6 Wall. 213; *Leonard v. Decker*, 22 Fed. Rep. 741. In the former case it was ruled that an action *in personam* would lie against the owners of the bridge, because the injury was consummate upon navigable waters, being inflicted upon a movable thing engaged in navigation; but that a proceeding *in rem* against the bridge was not maintainable, because a maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. And so an injury happening through default of the master to one upon a vessel discharging cargo at a wharf to which she was securely moored, is within the admiralty jurisdiction, (*Leathers v. Blessing*, 105 U. S. 626;) but otherwise, if the injury occurred to one upon the wharf, (*The Mary Stewart*, 10 Fed. Rep. 137.) In the latter case there is an in-

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advertent remark to the effect that both the wrong and the injury must occur upon the water,—a proposition not sustained by authority. It suffices if the damage—the substantial cause of action arising out of the wrong—is complete upon navigable waters. *The Plymouth, supra*. It is insisted for the libellant that because this injury happened in the midst of, or in space above, the water, it must be held to have occurred upon the water, and the bridge must be held to be personal property on navigable waters. This contention cannot be upheld. In legal signification land includes not only the surface of the earth, but all under it or over it. It is otherwise with respect to the sea. A suspension bridge is not upon the water, because sustained in space above the water. Nor in any juster sense is a bridge upon the water, because supported upon masonry resting upon the bed of a river. Bridges are merely prolongations over waters of highways upon land. They are not afloat. Like wharves and piers, they are connected with the shore. Unlike wharves and piers, they are obstructions, not aids, to navigation. They concern commerce upon land, not upon the sea. Within the intendment of the maritime law they are—equally with wharves and piers—structures upon or connected with the shore. They pertain to the land, not to the sea; and so are without the cognizance of the admiralty jurisdiction. An injury thereto cannot be said to have occurred upon water. The cause of the injury was a movable thing navigating the waters; but the consummation of the wrong was upon an immovable structure above the waters, attached to the land, and not afloat. The absence of admiralty jurisdiction over injuries to such structures is sustained by an overwhelming weight of authority. As to a bridge: *The Neil Cochran*, 1 Brown, Adm. 162; *The Savannah*, (U. S. D. C. Pa., CADWALLADER, J., not reported, but referred to in 1 Pars. Shipp. & Adm. 532.) As to a wharf: *The Plymouth*, 3 Wall. 20; *The Ottawa*, 1 Brown, Adm. 356; *The C. Accame*, 20 Fed. Rep. 642. As to a derrick resting on the soil at the bottom, and in the midst of the water: *The Marud Webster*, 8 Ben. 547. As to a marine railway: *The Professor Morse*, 23 Fed. Rep. 803. As to a boom of logs, anchored or fastened to the shore: *City of Erie v. Cunfield*, 27 Mich. 479. The latter is perhaps an extreme case, and seems opposed upon principle to the case of *The Ceres*, (E. D. Pa.) 7 Wkly. Notes Cas. 576, to the effect that the admiralty has jurisdiction of an injury by a tug boat to a dry dock floating on a navigable river and moored to a wharf. To deny jurisdiction for injuries to such structures by vessels, while asserting it with respect to injuries to vessels by such structures—as in *The Rock Island Bridge, supra*; *Etheridge v. Philadelphia*, 26 Fed. Rep. 43; *Atlee v. Packet Co.*, 21 Wall. 389—may seem a narrow construction of the admiralty jurisdiction. It is likened to the refusal of the admiralty at one time to assert jurisdiction of contracts of maritime insurance made on land and to be performed on land, but touching the perils of the sea, now held to be within the jurisdiction of the admiralty, (*Insurance Co. v. Dunham*, 11 Wall. 1;) or of contracts of affreightment, made on land, but to be performed upon water, now of undoubted admiralty jurisdiction, (*Navigation Co. v. Bank*, 6 How. 344; *Morewood v. Enequist*, 23

How. 493.) The distinction grows out of the peculiar and restricted nature of the admiralty jurisdiction as touching things "pertaining to the sea." In *The Arkansas*, 17 Fed. Rep. 383, 386, it is asserted that an injury to a bridge would be a marine tort, and that a proceeding *in rem* would lie against a boat causing the injury. No authority is cited in support, and I find none justifying the statement; probably because the case in the language of the court in *The Plymouth*, in answer to similar argument respecting wharves, "is outside the acknowledged limit of admiralty cognizance over marine torts, among which it has been sought to be classed." The statement by Judge LOVE is *obiter dictum*, and is difficult to be reconciled with his argument elsewhere in his opinion (page 389) in support of the cases denying jurisdiction. Notwithstanding my learned predecessor in the case of *The F. & P. M. No. 2*, 33 Fed. Rep. 511, 515, speaking *obiter*, approved the *obiter dictum* in *The Arkansas*, I am impelled to say with Judge NIXON in *The Professor Morse*, 23 Fed. Rep. 803, 807, that "however much I might be inclined, if the question were an open one, to follow this *obiter dictum* of the learned judge, I am constrained by the authority of *The Plymouth*, 3 Wall. 20, to hold in the present case that the libelants have mistaken their court, and that the remedy for the injury complained of is to be found only in the courts of common law." If it be expedient to clothe the admiralty with jurisdiction of all torts committed by vessels, whether the resulting damage occur upon land or water, as now it hath jurisdiction over damage to vessels whether the wrongful act causing damage originate on land or water, the object must be promoted—as it has come to pass in England—through the legislative, not the judicial, power. Courts sit *dicere et non dare legem*. Settled principles of jurisdiction may not be changed to meet individual notions of right. Nor can the jurisdiction be aided by the statute of the state creating a lien for all injuries done by vessels to persons or property. Rev. St. Wis. § 3348, subd. 4. A state statute cannot confer jurisdiction upon courts of admiralty. It is only when the subject is maritime, and so within the jurisdiction of the admiralty, that a lien granted by local law will be recognized. The libel will be dismissed for want of jurisdiction.

THE M. M. CHASE.¹

THE G. P. TRIGG.

HANSEN *et al.* v. THE M. M. CHASE.

SAME v. THE G. P. TRIGG.

(District Court, S. D. New York. February 6, 1889.)

1. SHIPPING—CARRIAGE OF GOODS—SEIZURE BY LEGAL PROCESS—DUTY OF CARRIER.

A carrier by sea, whose cargo is attached by legal process, is bound to interpose in the suit, and to protect the interest of a foreign cargo-owner, by all necessary and appropriate means under the local law, until the consignee is properly informed, and has reasonable opportunity to take on himself the burden of litigation; and to give prompt notice of the attachment, and any other necessary information.

2. SAME.

Bills of lading were issued for cargo taken on board two vessels. Drafts were drawn by the consignor against the goods, which were negotiated, and accepted on the faith of the bills of lading. The goods were afterwards attached at the port of loading in a suit against the consignor, and removed from the vessels against the master's protest; but prompt notice of the attachment was not given to the consignee, nor were such legal means taken as the state laws specially provided to defend the goods or to secure the consignee's interests, which means, if taken, might have averted the seizure. *Held*, that the vessels were therefore liable to the consignees for non-delivery of the goods.

3. SAME—BILLS OF LADING—IMPLIED EXCEPTIONS.

Semble, under the decision in *Stiles v. Davis*, 1 Black, 101, a seizure by judicial process of goods in the possession of a carrier, not brought about by laches or connivance on the part of the carrier, and of which he gives prompt notice to the owner, is one of the implied exceptions in the carrier's contract, limiting, *pro tanto*, the rule of the common law that the carrier is liable for non-delivery under the bill of lading through any causes not excepted therein; but this does not absolve the master of a vessel from his maritime duty to intervene for the protection of a foreign owner's interests.

In Admiralty. Libel for non-delivery of cargo attached under legal process.

In August, 1888, P. M. Kane, at Eastport, Me., shipped upon the above-named schooners three lots of sardines, consigned to the libelants in this city, for sale on commission; one lot on board the Trigg on August 9th, and two lots on board the Chase on August 13th and 16th. Bills of lading were delivered to the shipper on the same dates, making the goods deliverable to the libelants at this port. Kane, on the same days, respectively, drew upon the libelants against the goods consigned, notified them thereof by letter, inclosing the bills of lading, and on the same day got the drafts cashed at the Frontier National Bank, at Eastport. The drafts were each payable at five days' sight to the order of the cashier of that bank. They were presented in due course, and, upon the faith of the bills of lading previously received by the libelants,

¹Reported by Edward G. Benedict, Esq., of the New York bar.

were accepted as follows: August 14th, draft for \$450; August 16th, draft for \$400; August 20th, draft for \$200. The first draft was against the Trigg's bill of lading; the last two against those of the Chase. All were paid at maturity.

On August 20th, all the sardines in question were seized and removed from both schooners by the sheriff of the county, at Eastport, under a writ of attachment issued out of the supreme court of Maine, in a suit by Blanchard and others against Kane, the shipper, in an action of debt for the sum of \$1,100, upon which judgment was afterwards entered at the October term, and the goods sold. The sheriff received the attachment on Friday, the 17th, and his return states a levy about 3 P. M. of that day. On Saturday keepers were put in charge. The master protested against the attachment, stated the issue of bills of lading, and much talk ensued with the captains, managing owner, and attaching creditor. On Saturday afternoon, however, it was understood that the attaching creditor would give to the sheriff a bond of indemnity for the removal of the goods, which was done on Monday, the 20th. The first notice to the libelants was a telegram sent them by the managing owner between 11 and 12 o'clock on Monday, stating that Kane's shipments were attached that morning, and that the sheriff was removing the goods. The telegram was received by the libelants late in the afternoon, after the draft of \$200 had been accepted. The next morning they replied by telegram that they "held the bills of lading and had made full advances on the goods," adding, "Can you attend to the matter and secure us? Answer." The next day, the 22d, the managing owner replied: "Will do what I can for you. You must send power to make demand for the sardines." Nothing further was done by either party until the arrival of the schooners in this port, when they were libeled in these suits for damages for the non-delivery of the goods according to the contract of the bills of lading.

The statutes of Maine provide (chapter 81, §§ 43-45,) that "property mortgaged, pledged, or subject to any lien created by law, and of which the debtor has the right of redemption, may be attached, held, and sold as if unincumbered, * * * if the attaching creditor first tenders or pays to the mortgagee, pledgee, or holder the full amount unpaid of the demand so secured thereon;" that when property attached is claimed by virtue of such pledge or lien the claimant "shall not sue the attaching officer until he has given him at least 48 hours written notice of his claim, and the true amount thereof," and "the officer or creditor may within that time discharge the claim by paying or tendering the amount due thereon, or he may restore the property;" that the officer may give the claimant "written notice of the attachment, and, if he does not within ten days thereafter deliver to the officer a true account of the amount due on his claim, he thereby waives the right to hold the property thereon." By section 40, when property attached is claimed by a person not a party, he may replevy it within 10 days after notice given him therefor by the attaching creditor, and not afterwards; and thereafter the attaching officer, without impairing the rights of such person, at the

request and on the responsibility of the plaintiff, may sell the property.

Kane had been dealing with the libelants in the same way for some time previous, and was largely indebted to them on general account.

Wing, Shoudy & Putnam, for libelants.

Goodrich, Deadg & Goodrich, for claimants.

BROWN, J., (after stating the facts as above.) In the case of *Stiles v. Davis*, 1 Black, 101, the supreme court decided that the carrier was not liable in trover for non-delivery to the true owner of goods attached and taken from the carrier's possession by the sheriff under process against a third party. The decision did not turn upon the form of the action. The grounds stated in the opinion are that the goods when seized under judicial process are in the custody of the law, and that the plaintiff had mistaken his remedy as to the persons liable. "They should have brought their action," it is said, "against the officer who seized the goods, or against the plaintiff in the attachment suit, if he directed the seizure." Mr. Justice CLIFFORD in *Wells v. Steam-Ship Co.*, 4 Cliff. 232, says that such "clearly" was the decision. This is not at all incompatible with the subsequent qualifications added by the decisions of the tribunals of several of the states, and now generally laid down in text-books, namely, that the seizure must not be brought about by any laches or connivance of the carrier, and that he give prompt notice of the attachment. These qualifications seem also to have the approval of Mr. Justice CLIFFORD in the case cited.

The whole subject has been exhaustively reviewed by HAMMOND, J., in the case of *Robinson v. Railroad Co.*, 16 Fed. Rep. 57, 9 Fed. Rep. 129, where the carrier was held liable for laches after notice of the intent to attach. See Hutch. Carr. §§ 367-375; Schouler, Bailm. §§ 428, 498; *Mierson v. Hope*, 2 Sweeny, 561; *Railway Co. v. Yohe*, 51 Ind. 181; *Bliven v. Hudson, etc., Co.*, 36 N. Y. 403. I feel bound to hold, therefore, that seizure by judicial process under the conditions above stated has been added as one of the implied exceptions in the carrier's contract, limiting, *pro tanto*, the general rule of the common law that the carrier is liable for non-delivery under the bill of lading through any causes not excepted therein.

The further question remains, whether the master, from the time he had notice of the attachment, performed the duties imposed upon him by the maritime law, in the protection of the libelants' interests. The duty of protection is to a certain degree recognized as incumbent upon carriers by land. Hutch. Carr. § 202. The duty of giving notice is one form of this obligation. The general duty of protecting the owner's interests is, however, more specially applicable to carriers by sea, from the more frequent necessity of it in maritime commerce; and it has accordingly long been a prominent feature of the maritime law. The powers and the duties of ship-masters arising out of the exigencies of navigation, and the circumstances and relations growing out of foreign commerce are much broader than those of carriers by land within the kingdom. The master of a vessel, in all such exigencies, has authority to

do whatever is necessary to preserve the interests of a foreign owner or consignee. He is bound to the exercise of diligence and good faith; to give the owner or consignee timely and needful information; and to take his instructions, when practicable. In case of capture or seizure it is his duty to interpose a proper claim, and to defend the rights of the owners of the ship and cargo. 3 Kent, Comm. *213; *Cheviot v. Brooks*, 1 Johns. 364; *Lemon v. Walker*, 9 Mass. 404; *Hannay v. Eve*, 3 Cranch, 247. In *Willard v. Dorr*, 3 Mason, 166, STORY, J., says, in reference to a seizure at Calcutta:

"He has not only a right, but it is his imperative duty, to remain by the ship until a condemnation, or all hope of recovery is gone. He is intrusted with the authority and obligation to interpose a claim for the property before the proper tribunal, and to endeavor by all the means in his power to make a just and successful defense. To abandon the ship to her fate without asserting any claim would be a criminal neglect of duty, and would subject him to heavy damages for a wanton sacrifice of the property. * * * His duties do not, indeed, cease even with condemnation, but he is to act for the benefit of all concerned; and, if he should deem an appeal to be expedient, he is bound to enter it."

In the case of *The Mary Ann Guest*, Olcott, 501, where the libellant, as in this case, had made advances on the bill of lading, but was not the consignee named therein, the schooner was held liable by BETTS, J., because, as he says, the bill of lading "guaranties to protect the right of possession to the shipper and his assigns," and because the master "did not interpose, as he might have done, in the replevin suit against the shipper;" and on appeal the decision was affirmed by Mr. Justice NELSON, (1 Blatchf. 358.) Upon the decision in *Stiles v. Davis*, *supra*, I do not feel at liberty to follow *The Mary Ann Guest*, so far as to hold the bill of lading an absolute guaranty that the master will protect the consignee's right of possession. But upon the well-settled rules of maritime law it is the undoubted duty of the master, upon any interference with his possession, whether by legal proceedings or otherwise, to interpose for the owner's protection, and to make immediate assertion of his rights and interests, by whatsoever measures are appropriate at the time and place. To that extent the master is bound to take part in legal proceedings, and to continue them until, after informing his absent consignee both of the facts and the local law so far as need be, the owner has a reasonable opportunity to take upon himself the burden of the litigation. The question arises under the law of the sea, not of the land. Upon maritime questions, the states are treated as foreign to each other, and the same general obligation is applicable as if the ship were in a foreign country. The general rule is the same, whether the ship and the consignee are nearer or more distant. Its application varies. Where communication may be had daily or hourly, the duty of speedy notice is the more imperative, and the ship has the corresponding advantage of being able to terminate her obligations to the cargo-owner the more quickly.

I must hold the respondents answerable in this case both for laches, and because they did nothing beyond mere protest, without using the pre-

liminary means that, under the law of the state, were specially provided to secure the libelants' interests.

1. Timely notice of the attachment proceeding itself was not given. Notice was delayed until the third day afterwards. Had a telegram been sent on Friday, or even on Saturday afternoon, instead of Monday forenoon, the acceptance of the draft of \$200 would have been prevented.

2. No such notice of the libelants' claim and lien as the statutes of Maine provide for was given to the sheriff by the master or managing owner, as should have been given. The sheriff's proceeding was cautious. Kane, being general owner, the attachment was rightly levied, provided the libelants, as consignees, had made no advances on the goods, and consequently had no lien thereon. But the consignees, by their advances, had a "lien created by law," within the very letter of the statute. The attaching creditor was doubtless acquainted with the general mode of dealing between Kane and the libelants; and he might therefore reasonably expect that, if there was any lien upon the goods for advances, it would be made known in the manner provided for in the state law, and could be verified; and that, if found correct, the lien could be paid off, at less than the value of the goods; or, if it amounted to their full value, that the attachment might then be relinquished. To hold the goods after a lien on them was made known, without offering to pay it, would be a plain trespass under the law of that state. *Stief v. Hart*, 1 N. Y. 28; *Campbell v. Conner*, 70 N. Y. 424, 428. The evidence does not show any intention to commit a trespass, or to assume a position that could not be maintained. Had the facts been made known to the sheriff, or to the attaching creditor, they could have been verified by either probably within a few hours; and presumptively the levy on two of the lots at least would have been released, as the debtor had no valuable attachable interest in them. *Mutual v. Sturgis*, 9 Bosw. 665. All that was needed to secure the libelants' rights was apparently to give written notice of their lien, as provided by law. There is no reason to suppose that the facts in regard to the consignees' interests could not have been learned by the master within a few hours after the attachment, upon inquiry of the shipper at Eastport. The letters of August 20th and 22d from the managing owner show conclusively that he was well informed of the shipper's affairs, and knew that the libelants were selling on commission, and that Kane had got advances on these goods. But without regard to that, had the master or the managing owner communicated with the libelants as soon as notice of the attachment was given by the sheriff, instead of waiting until Monday, they would plainly have received sufficient information to serve the notice provided by law, and probably in time to prevent even any removal of the goods on which the drafts had been already accepted.

3. After receipt of the libelants' telegram of the 22d, neither the master nor the managing owner took any steps to secure the libelants, as was promised in the answering telegram. They were informed that the libelants had advanced upon bills of lading to the value of the goods. If they did not know the value it was easy to ascertain it by inquiry, so far as

was necessary to give written notice of the lien. They knew, or are presumed to have known, the requirements of the law of their own state. There is no such presumption as respects the libelants. The respondents' reply, to "send power to make demand for the sardines," was frivolous and impertinent. No demand was necessary, or, if needed for any purpose, the master had full authority already. After proper notice of a lien, the master, as representative of the cargo interests, had every power that was needed to enforce the rights of the absent consignee. Such a request, with nothing done by the master or managing owner after this promise by telegram; with the further fact, testified to by the sheriff, that the master or managing owner refused to make any demand for their freight, to which in any event they were legally entitled, (*Tindal v. Taylor*, 4 El. & Bl. 219,)—shows a deliberate intent not to follow the course marked out by the statute, which was designed for the protection of both. Whether the consignees' remedy against the sheriff was thereby lost, the evidence is not sufficient to show. But this is immaterial. The respondents must be held liable to the consignees, because they wholly failed to perform their duty; and they must look for indemnity to the sheriff or attaching creditor, if they have not lost that right by their own laches. The libelants are not bound to prove that the goods would certainly have been saved. The burden is on the respondents to prove that pursuing the course required by law could not possibly have made any difference. *The Pennsylvania*, 19 Wall. 125, 136; *The Frank P. Lee*, 30 Fed. Rep. 277, 280; *The Dentz*, 29 Fed. Rep. 526, 528.

This is not shown either as to the draft of \$200, or as respects the payment of the lien, or the return of the goods.

If the value of the goods was more than the advances, the libelants probably had an additional lien to their full value from the time of their receipt of the bills of lading and the acceptance of the drafts thereon, because of the balance due them as factors on general account. As no excess of value, however, is proved, a decree is directed for the libelants in the case of the Trigg for \$450 only, with interest and costs, and in the case of the Chase for \$600, with interest and costs.

McFARLAND v. THE J. C. TUTHILL.

(District Court, D. Connecticut. February 14, 1889.)

SHIPPING—LIABILITY OF OWNER—INJURIES TO SEAMEN—DEFECTIVE PREMISES.

The libelant, a seaman, while engaged in some work on the deck of a vessel belonging to claimant, stepped upon an iron grating over a coal-hole, which turned and let him down into the hole, injuring him. There was an iron frame around the coal-hole, elevated about three inches above the deck; and upon the shoulder of this frame the grating in question rested. The testimony of the libelant, which was supported by several witnesses, was to the effect that the shoulder of the frame was so worn away that when a weight came upon one side it turned for lack of support. A few days before the accident another seaman had stepped upon the same grating and been thrown to the deck; and after the accident the captain placed a new cover over the hole, resting upon the deck. One whose business it was to keep claimant's vessels in repair, testified that he did not think the coal-hole frame and grating defective; but the claimant did not attempt to get the testimony of officers or men, nor was the coal-hole frame produced, though in the possession of claimant's counsel. *Held*, that the claimant was liable for the injuries suffered by libelant.

In Admiralty. Libel for damages.

Samuel Park, for libelant.

Augustus Brandegee, for claimant.

SHIPMAN, J. This is a libel *in rem* by a seaman to recover damages for an injury alleged to have been caused by the defective equipment of the vessel at the inception of the voyage, which ought to have been known by the owners. On June 30, 1888, at Greenport, Long Island, the libelant shipped on board the steamer J. C. Tuthill, a menhaden fishing vessel, as oarsman, at \$35 per month. The owner of said vessel is a corporation, doing business at said Greenport, where it fits out its vessels, which fish upon the waters of the Atlantic seaboard during the fishing season of about four months in the summer. On July 4, 1888, the vessel was in port. On the next day she was engaged in fishing near Falkner's island, in Long Island sound. The morning was clear, and the water was smooth until about noon, when the wind began to blow hard from the south. About 1 o'clock the seine-boats returned to the vessel on account of the weather, and were hauled up, and triced to the davits. The libelant was tricing up one of the boats, and, while looking forward, stepped back upon the iron grating over the middle one of the three coal-holes on the starboard side of the deck. The grating turned, and let him violently down into the hole, and he struck heavily in the *perineum*, against the rim or bushing of the iron frame-work which surrounded the hole. The violence of the blow caused a stricture across the urethra, which is, in his case, a permanent, serious, and very painful injury. He was in great suffering after the accident, was carried to New London, where he was attended by surgeons, and, after about 11 days, was removed to his home in Maine, where he has been ever since. The surgeons' bills, his board in New London, and his wages were paid by the claimant. He did not know, and had no reason to know, of the

defect in the frame. He is disabled from doing anything but light work, cannot walk without pain, passes water in drops, and will be laid up a good deal of the time. The stricture being deep-seated, the consequences are more painful and more serious than if it could be reached more easily by surgical aid or appliances. There are three coal-holes on the star-board side of the steamer. Each hole is surrounded by a cast-iron frame. An iron grating, which rests upon a shoulder or bushing in the frame, covers the hole. This grating admits light and air into the hold. The Tuthill's frames were elevated about three inches above the deck. In wet weather, a tight, heavy cover is put over the grating, which rests upon the deck, and prevents water from entering the hold. In fair weather, when vessels are fishing in the sound, this cover is not used. On June 30th another seaman on board the Tuthill stepped upon the same covering over the same hole. The grating turned, and threw him upon the deck, but without injury. After July 5th the captain placed over the hole a new cover, which rested upon the deck.

The important question of fact in the case is whether the grating turned by reason of a defect in the shoulder or bushing upon which it rested. The libellant's testimony is to the effect that this shoulder was worn away upon the forward and after ends, and upon the side, so that when a weight came upon one side of the grating it had no adequate support, and immediately turned. Four seamen on board the Tuthill at the time of the accident, and who are witnesses for the libellant, support this position from personal inspection of the frame immediately after the accident. The claimant's testimony on the subject is given by the person whose duty it was to put the claimant's vessels in order, each spring, for the fishing season, and who never saw that the Tuthill's plates were out of order, and who, after the accident, examined the plate, where the libellant fell, and did not think that it was defective. The superintendent of the claimant for the last 10 years also testified that he never had occasion to change the plates, and never noticed that they were out of order. The captain and mate of the vessel are in Maine. No effort was made by the claimant to get the testimony of either of them, or of any of the sailors. The coal-hole frame was sent to the office of the claimant's counsel in New London. It was not produced in court. Its non-production was not owing to forgetfulness, and signifies that its presence in court was not desired by the claimant. In view of the almost entire lack of testimony on the part of the claimant, for the testimony of its officer is, in part at least, offset by the act of the captain in providing a new cover which rested upon the deck, there is no alternative from the conclusion that the shoulder of the frame had become so worn that it was no longer a support for the grating; that the grating had become a trap for the foot of any one who stepped upon it; that this defect did not originate during the voyage, but existed when the vessel was put in order for the season, and on June 30th, when she last left Greenport, and ought to have been known by the owner. It has repeatedly been held of late that the owners are responsible, by the modern maritime law, to seamen for injuries on shipboard arising from the unsafe and dangerous

equipment for the ordinary contingencies of the voyage, which was furnished by the owners at the beginning of the voyage, the defects of which they knew or ought to have known, and of which the injured seamen did not know, and had no adequate reason to know. *Halverson v. Nisen*, 3 Sawy. 562; *The Edith Godden*, 23 Fed. Rep. 43; *The Neptuno*, 30 Fed. Rep. 925; *The Yoxford*, 33 Fed. Rep. 521; *Couch v. Steel*, 3 El. & Bl. 402. The claimant says that, if the gratings were defective, the owner had provided close-fitting covers for use at sea, and that, if the captain did not use them, it was his negligence, for which the owner is not responsible. If this legal proposition was a sound one, it is not a proved fact that the close-fitting covers were for use except in stormy weather, and I do not think that the weather of July 5th required their use. The libellant is a permanently disabled and suffering man. Let a decree be entered in his favor for the sum of \$2,500 and costs.

THE WYDALE.

ANDREWS *et ux.* v. THE WYDALE.

WALKER *et al.* v. SAME.

(Circuit Court, E. D. Louisiana. February 13, 1889.)

1. COLLISION—BETWEEN STEAMER AND TUG—FAILURE TO UNDERSTAND SIGNALS.

A steam-ship ascending the left bank of the river in New Orleans, in the night, and about to cross, gave two blasts of the whistle on discovering a tug and tow, which were descending the middle of the stream, indicating that the steam-ship would pass to port, and starboarded its helm, and proceeded at half speed. The tug did not understand the course and motions of the steam-ship and responded with one whistle, indicating that it would pass to starboard, and ported its helm and the helm of the tow. The vessels approached, and the signals were repeated, and afterwards the tug again gave a single whistle. The tug then showed its red light, and the steam-ship gave the danger-signal, reversed its engines, and ordered full speed astern. The tug responded with the danger-signal, ordered the helm hard a-port, and put on all steam, but collided broadside with the bow of the steam-ship. *Held*, that each was in fault in not reversing its engines, and giving the danger-signal when they were 800 yards apart, as required in case of misunderstanding, by Rules & Reg. Gulf of Mexico, 1; that the tug was in fault in not reversing when the danger-signal was given, as required by rule 2; and that the steam-ship was in fault in entering the harbor under too great speed, and in persisting in going to the left, in violation of rule 1.

2. ADMIRALTY—JURISDICTION—DEATH BY WRONGFUL ACT.

In the absence of a federal statute or statute of the state, where a collision occurs giving a lien on a vessel for damages for the death of a human being from negligence, an intervening libel *in rem* for damages for death resulting from such collision cannot be maintained.

In Admiralty. Libel for damages. On appeal from district court. Libel by William M. Andrews and others against the steam-ship Wydale, and intervening libel by Walker & Fowler and others.

W. S. Benedict and E. D. Craig, for libelants and intervening libelants.
Frank N. Butler, for claimant.

PARDEE, J. The libels and intervening libels are brought against the steam-ship Wydale for damages growing out of a collision between the tug Ivy, and barge in tow, and the steam-ship Wydale, on the night of the 26th of May, 1887, at between half past 8 and 9 o'clock. A great many witnesses have been examined on each side, including the witnesses on each of the colliding vessels, and a large number of witnesses who were ashore on each bank of the river, and the testimony, as usual, is very conflicting. After an attentive examination and careful consideration of the whole, I reach the following conclusions as to the facts in the case pertinent to the issues presented:

The steam-tug Ivy, with the barge Cossack in tow, cleared from her wharf in the upper part of the city of New Orleans for the port of Galveston. She swung out into the middle of the river, and was proceeding on her course, when about opposite the French market, in the city of New Orleans, she discovered a steam-ship ascending the river, showing a white mast-head light, and a red side-light. This steam-ship was the Wydale, which was coming up the river to the port of New Orleans, intending to make a landing in the upper part of the city. When discovered, the Wydale was near the left bank of the river, following the course of navigation, and about to cross over by Algiers point, in order to avoid the eddy in the bend of the river opposite the point. Both vessels carried the proper lights, and were properly manned and equipped. At about the time that the Ivy discovered the Wydale, the Wydale also discovered the tug, which was then showing the two mast-head lights, one above the other, indicating a tow, and the green, or starboard, light. As soon as the lights of the tug were seen on the Wydale, she gave two blasts of her whistle, indicating that she would pass to port, and starboarded her helm accordingly, and at the same time put her engines under half speed. The tug Ivy responded to the signal from the Wydale with one whistle, which would indicate that she would pass to starboard, ported her helm and the helm of the barge accordingly. The evidence is not satisfactory as to whether the pilot in charge of the Ivy understood that the Wydale had given one whistle or two whistles; the pilot insists that the signal was one whistle, and he is corroborated by witnesses afloat and ashore. After this exchange of signals, the vessels proceeded a short distance, approaching each other, when the Wydale again gave two signals of her whistle, and the tug replied with one whistle. There is evidence in the case that this signal was first given by the tug, and responded to by the ship, but it is not material which one at this time signalled first. Not liking the appearance which the vessels now presented, the tug again gave a single whistle, and by this time, or nearly, had swung around, so as to show her red light to the Wydale. Thereupon the Wydale gave the danger-signal of three short whistles, reversed her engines, and ordered full speed astern. The tug Ivy answered with the danger-signal, gave the order to put the helm hard a-port, and put

on all steam. These maneuvers brought the broad side of the Ivy directly in front of the steamer; almost immediately the tug went against the bow of the Wydale, whose headway had not been entirely checked. The tug was sunk, nearly all the crew escaping by way of the barge; a few, however, went into the river, all being picked up safely, except the son of one of the proprietors of the Ivy, who, in some way, fell between the barge and the tug, and was drowned. The Ivy and all the property aboard was a total loss. The barge Cossack, which was in tow of the Ivy, escaped with slight damages, and the loss of a hawser.

On these facts, I have no doubt that both vessels were in fault. Rules 1 and 2 of the rules and regulations for the government of pilots of steamers navigating the rivers flowing into the Gulf of Mexico, and their tributaries, are as follows:

"Rule 1. When steamers are approaching each other from opposite directions, the signals for passing shall be one blast of the steam-whistle to pass to the right, and two blasts of the steam-whistle to pass to the left. The pilot on the ascending steamer shall be the first to indicate the side on which he desires to pass; but, if the pilot on the descending steamer shall deem it dangerous to take the side indicated by the pilot of the ascending steamer, he shall at once indicate with his steam-whistle the side on which he desires to pass, and the pilot on the ascending steamer shall govern himself accordingly; the descending steamer being deemed to have the right of way. But in no case shall pilots on steamers attempt to pass each other until there has been a thorough understanding as to the side each steamer shall take. The signals for passing must be made, answered, and understood before the steamers have arrived at a distance of 800 yards of each other.

"Rule 2. If from any cause the signals for passing are not made at the proper time, as provided in rule 1, or should the signals be given and not promptly understood, from any cause whatever, and either boat become imperiled thereby, the pilot on either steamer may be the first to sound the alarm or danger-signal, which shall consist of three or more short blasts of the steam-whistle in quick succession. Whenever the danger-signal is given, the engines of both steamers must be stopped and backed until their headway has been fully checked; nor shall the engines of either steamer be again started until the steamers can safely pass each other."

It is apparent that from the first exchange of signals there was a misunderstanding on the part of the Ivy. It clearly appears from the testimony of the master and pilot that they did not understand the course and motions of the Wydale; it was a subject of remark between them at the time. It was then the duty of the tug, under the aforesaid pilot rules, to have given the danger-signal, and to have reversed its engines until signals could be exchanged and understood. It is clear that if the Ivy had reversed her engines, and given the danger-signal when her master and pilot first saw that her passing signals with the Wydale were misunderstood, there would have been no collision. The tug Ivy was also clearly in fault in not complying with the positive requirements of the said second rule by stopping her engines, and backing, when the danger-signals were given. Instead of so doing, she put on all steam, and went ahead. It may be that at that time the collision was so imminent that it would have resulted anyhow; but, even if this be so, it is

no excuse for the violation of the positive, peremptory rule, made by competent authority to govern such cases. It is apparent also that the Wydale was in fault. While the course she took was the proper and usual course to ascend the river to her landing-place, she was in fault for entering a crowded harbor under too great rate of speed, without due regard to the obstacles that might be in the way. See *The Southern Belle*, 18 How. 584; *The City of Paris*, 9 Wall. 634; *The Corsica*, Id. 630; *The Adriatic*, 107 U. S. 512, 2 Sup. Ct. Rep. 355; *The Syracuse*, 9 Wall. 672. The Wydale was also clearly in fault for disregarding the first pilot rule above quoted, under which the Wydale had no right, in disregard of the signals of the Ivy, to persist in going to the left; and under the second rule the Wydale was in fault in not stopping and reversing her engines, and giving the danger-signal, while the steamers were at least 800 yards apart, when it was apparent that the signals between the two vessels were misunderstood.

Both colliding vessels being in fault, the admiralty rule is that the damages must be divided between them. The damages in the case consist of the loss of the tug Ivy, the goods of the owner, the pilot, and some of the crew, and the damages to the barge. The Wydale suffered no damage, except that arising from delay, and makes no claim in the case. A great deal of evidence is in the record with regard to the value of the tug Ivy. The libelants claim \$10,000. It appears that she was a vessel built for the government during the Rebellion, and was afterwards sold to private parties. She passed through various hands up to the time of her loss, at different prices, ranging from \$5,000 to \$10,000. She seems to have been in constant use, and to have received at times large and extensive repairs. In the district court the whole question of damages was referred to a master commissioner, who reported the value of the Ivy at the time of her loss to be \$6,437.97. On exceptions to the commissioner's report, the district judge found that her value, under the evidence, was \$5,850. There is a very strong argument made in this court that her value should not be assessed at over \$4,000, on the ground that the last sale made of her was to one of the libelants at that rate. There is evidence, however, to show that there were peculiar conditions attending that sale, and that since that time some considerable repairs have been placed upon the vessel. Considering the whole of the evidence in this record, I am of the opinion that the district judge was correct in his determination of the value.

Other damages suffered by libelants and intervening libelants were referred to and reported by the commissioner, who allowed various amounts, and to his report there seems to be no well-founded objection, except in the case of Walker & Fowler, intervening libelants. With regard to the claim of Walker & Fowler, who have joined in the appeal to this court, the commissioner reported that they had suffered damages for towage, loss of hawser, and repairs in the sum of \$163.40. Their claim, in addition to this amount, is for demurrage, 18 days, at \$50 per day, making a sum of \$900; damages for failure to deliver the cargo on time, \$750; and costs of storing 272 tons of cargo, \$190.40. The evi-

dence does not show that the barge was necessarily delayed any number of days on account of the collision. Of course, it was delayed some. Three days were sufficient time to make the little repair that was necessary, communicate with owners, and hire another tug; and for that time I find that the intervening libelants, as owners of the barge, are entitled to demurrage. The evidence seems to point to \$50 per day as the proper demurrage, and, under the circumstances, that amount will be allowed. The other items of damage will be taken as reported by the commissioner, as no substantial dispute is made as to their correctness.

There remains only to be passed upon the claim of William M. Andrews and wife, father and mother of the boy drowned, who brought their intervening libel against the Wydale, claiming damages for the drowning of their son. So far as the facts are concerned, there is no question but what the drowning of this lad was one of the direct results of the collision; but an exception has been filed to the demand in this case, and, under the decision of the supreme court of the United States in case of *The Harrisburg*, the exception must be maintained. "In the absence of an act of congress, or a statute of a state, giving the right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas or on waters navigable from the sea, which is caused by negligence." See 119 U. S. 199, 7 Sup. Ct. Rep. 140. As there is no statute of the United States, nor of the state of Louisiana, within whose territorial limits the collision occurred, which gives a lien upon a vessel for damages on account of the death of a human being through negligence, the intervening libel in this case, which is a libel *in rem*, cannot be maintained.

The total damages, therefore, involved in this suit, are as follows: Value of the tug Ivy, \$5,850; freight lost, \$600; William M. Andrews lost personal effects, \$200; Samuel Church lost personal effects, \$145; Thomas Wood lost personal effects, \$80; Walker & Fowler, damages to barge and demurrage, \$310.40; making a total of \$7,185.40; one-half of which—\$3,592.70—should be paid by each vessel.

The accompanying decree will be entered in the case.

REPUBLIC IRON MIN. CO. v. JONES.¹*(Circuit Court, N. D. Georgia. March 1, 1889.)*

1. COURTS—FEDERAL JURISDICTION—SUITS BY ASSIGNEES—CONTRACTS.

An action for damages for the breach of a contract of lease is an action "founded on contract," in the sense in which that expression is used in the restriction contained in the first section of the act of March 3, 1875, which provides: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant, and bills of exchange."

2. SAME—PLEADING.

In an action "founded on contract," brought by an assignee, the declaration must show that the suit could have been maintained by the assignor if no assignment had been made.

At Law. On demurrer to the declaration.

Broyles & Johnson, Graham & Graham, and J. D. Conyers, for plaintiff.

Hopkins & Glenn, J. M. & J. W. Neel, B. H. Hill, and William Phillips, for defendant.

NEWMAN, J. This case has been heard on a demurrer to the declaration; the ground of demurrer being that it is a suit brought by the assignee of a contract, when suit could not have been prosecuted by the assignor, and that therefore the court has no jurisdiction of the case. The following is a synopsis of plaintiff's declaration: Plaintiff is a corporation created by the laws of Missouri, and a citizen of that state. Defendant is a citizen of Georgia. On the 18th day of August, 1881, A. R. Silva, plaintiff's assignor, obtained a lease from defendant to certain land in Bartow county, Ga., which lease was for a term of five years, in writing, and under seal. The purpose of the lease was that Silva should mine for iron ores, have all necessary rights for railroads, houses, dams, sluiceways, etc. Silva was to pay defendant a royalty of 17 cents per ton. On the 6th day of January, 1882, Silva assigned in writing his interest in this lease to plaintiff. On said 6th day of January, 1882, plaintiff entered and took possession of said premises, and after that time performed all the covenants to be performed by Silva; but, notwithstanding this, on or about the 1st of September, 1882, the defendant with force entered the premises, and dispossessed plaintiff. Plaintiff, while in possession, had cleared the ground, opened mines, tested ores, erected houses, machinery, etc., and was by its dispossession by the defendant deprived of the use, issues, rents, and profits, etc. Defendant, after dispossessing plaintiff, commenced, and is still, mining upon said land, and retaining to himself the profits. An amendment to the declaration sets forth that on the 3d day of August, 1881, Silva made a contract with a furnace company in Tennessee, whereby he agreed to furnish 30,000 tons of iron ore within a year, at \$1.50 per ton, which contract was assigned to plain-

¹Reported by Will Haight, Esq., of the Atlanta bar.

tiff, and the profits of the contract were lost by the breach of the lease by defendant. It is said in one of the contracts attached that Silva is a citizen of Missouri, and in another that he is a citizen of Georgia, but it is not alleged anywhere that he could have maintained this suit. This is held to be necessary. *Corbin v. County of Black Hawk*, 105 U. S. 659, and cases cited at the conclusion of the opinion, page 667. There is no contention, however, that Silva could have prosecuted this suit. It has been assumed all through that he could not, and that is taken as conceded. This suit was commenced in 1885, and the sole question discussed by counsel has been the application to the case of the language of the act of March 3, 1875, as follows:

"Nor shall any circuit or district court have cognizance of any suit founded on a contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes, negotiable by the law-merchant, and bills of exchange."

It is urged by counsel for plaintiff that this is not a suit "founded on contract" within the meaning of the extract from the act of 1875, just quoted. It is contended that this expression, "founded on contract," is limited in its meaning, and should be construed to cover only suits brought on the contract to recover the amount called for by the contract, or to have a specific performance of its terms; and that it should not be extended to embrace a suit for damages for a breach of a contract. This view of the law would give it a much narrower construction than its language and evident purpose justifies. A suit for damages for breach of a contract would seem to be, for present purposes at least, as much a suit "founded on contract" as a suit to recover a specific amount called for by a contract. Both are based on a contract, and require its support to sustain them. This suit is brought by the plaintiff on account of the deprivation of specified rights, which it says it acquired by the terms of the contract in writing, which it sets out in full in the declaration. The *gravamen* of its action is the violation by the defendant of his agreement contained in the contract. It is the foundation of plaintiff's rights; and, if the suit proceeded to trial, the first evidence offered by it in the case would necessarily and properly be the contract. But it is further urged that this expression, "founded on contract," as used in the act of 1875, should be construed in connection with the language of the judiciary act of 1789, "the contents of any promissory note or other chose in action," and also the language of the act of March 3, 1887. Why a change was made in the language, restrictive of the jurisdiction of the court as to suits by assignees in the act of 1875, and why the language of the original act of 1789 was readopted (so far as applicable here) in the act of 1887, is not apparent; especially as to the last enactment. It would seem probable, however, that the purpose in using the language adopted in 1875 was to simplify the matter, and to avoid the difficult questions and nice distinctions which had arisen in interpreting the expression, "the contents of any promissory note or other chose in action," as used in the original act. However this may be, it is difficult to see how the plain-

tiff is benefited by viewing the act of 1875 in connection with the other legislation on the subject. It would seem that the construction which has been given to the act of 1789 by the supreme court would be fatal to the jurisdiction in this case, even if the suit had been brought while it was in force. Without discussing any of the former cases, the case of *Corbin v. County of Black Hawk*, *supra*, is decisive of the question made in the case at bar. In the opinion, page 665, the term "the contents" is thus defined:

"The contents of a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it, which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents."

This construction clearly covers the case now under consideration, for here the plaintiff seeks to enforce a stipulation, and the most important stipulation of the contract set out in its declaration, and made the foundation of its claim. In the later case of *Shoecraft v. Blozham*, 124 U. S. 730, 8 Sup. Ct. Rep. 686, in the opinion of the court, this language is used:

"Section 629 of the Revised Statutes, which was in force when the suit was commenced, declares that 'no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange.' The terms used, 'the contents of any promissory note or other chose in action,' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court. They were so construed in the recent case of *Corbin v. County of Black Hawk*, 105 U. S. 659, where the subject is fully considered, and the decisions cited. There, a suit brought to enforce the specific performance of a contract was held to be a suit to recover the contents of a chose in action, and therefore not maintainable, under the statute in question, in the circuit court of the United States, by an assignee, if it could not have been prosecuted there by the assignors had no assignment been made."

The case of *Simons v. Paper Co.*, 33 Fed. Rep. 193, in the circuit court of the Eastern district of Michigan, was brought after the passage of the act of March 3, 1887, and in that case it was held that "an action to recover damages for a refusal to accept and pay for merchandise purchased under an oral contract is a suit to recover the contents of a chose in action, within the meaning of the act of March 3, 1887, and a circuit court has no jurisdiction of such suit in favor of an assignee, unless it might have been prosecuted in such court, if no assignment had been made." In the opinion, the court reviews the decisions of the supreme court on the act of 1789, and derives therefrom authority for deciding as above. So that if, as has been urged by plaintiff here, a suit, to come within the restriction of the act of 1875, must be to recover "the contents" of the contract, it would seem that, following the interpretation repeatedly given the term "contents," this suit could not be maintained. The decision in the case of *Blacklock v. Small*, 127 U. S. 96, 8 Sup. Ct. Rep.

1096, so far as it touches upon the question here presented, would seem to be adverse to plaintiff's rights to maintain this suit. That case was brought under the act of 1875, and, while the direction of the supreme court to dismiss the bill for want of jurisdiction seems to have been mainly upon another ground, yet, so far as it affects this case at all, it is not favorable to the plaintiff's rights. Other reasons have been urged for giving this restriction the limited meaning contended for by plaintiff, some of which would be important if doubt was entertained as to its construction in this connection; but none of the reasons suggested can have force in view of what appears to be the plain meaning and intent of the language used. It seems clear, therefore, that this demurrer must be sustained, and it will be so ordered.

The circuit judge, with whom I have consulted, concurs in the conclusions reached.

ROSENBAUM *et al.* v. COUNCIL BLUFFS INS. CO.

(Circuit Court, N. D. Iowa, E. D. March 18, 1889.)

1. COURTS—FEDERAL JURISDICTION—SUITS BY ASSIGNEES—AUXILIARY PROCEEDINGS.

Though an assignee cannot institute an action in the federal courts because of diverse citizenship, under the act of 1875, unless his assignor could have done so, yet, the action having been brought in the state court, and the assignee and the defendant being citizens of different states, the cause is removable, and, having been removed, and having afterwards been continued for the purpose of enabling plaintiff to file a bill for a reformation, which it was held was necessary before he could maintain such action, such bill is auxiliary to the first action, and is properly brought in the federal court.

2. INSURANCE—ACTION ON POLICY—LIMITATION.

Where an action on an insurance policy has been brought within the time limited by the policy, a bill for reformation of the policy, in aid thereof, is not barred though brought after such time. Such bill is not a suit on the policy within the meaning of the limitation.

In Equity. On demurrer to bill.

Bill by Rosenbaum Bros. against the Council Bluffs Insurance Company. For opinion on motion to set aside the order granting leave to file the bill, see *ante*, 7.

Charles A. Clark and F. A. Hormel, for complainants.

Sapp & Pusey and Henderson, Hurd, Daniels & Kiesel, for defendant.

SHIRAS, J. The bill in this cause was filed by complainants for the purpose of reforming a policy of insurance, issued by the defendant company in the name of H. Eyler, upon an elevator building and other property situated in Benton county, Iowa; the property having been destroyed by fire. G. G. Abraham, who is named in the policy as a mortgagee, assigned the policy and his interest in the contract of insurance to complainants, who brought an action at law against the company, averring therein that the interest contracted to be covered by the insurance was

that of Abraham, who was the real owner of the property, and that the company knew such fact, and issued the policy to cover such interest. On demurrer it was held that to sustain the action at law it was necessary to procure a reformation of the contract, and that action was continued for the purpose of enabling complainants to file a bill in equity for that purpose. The proceeding now before the court is instituted for that purpose, and to the bill as filed defendant demurs on several grounds, the first of which is that it appears from the bill that the complainants, who are citizens of Illinois, are suing as the assignees of Abraham, who is a citizen of Iowa, under the laws of which state the defendant company was incorporated; and that, as Abraham could not bring this suit in the federal court, being a citizen of the same state as defendant, neither can complainants, as transferees of the policy. If this proceeding was an independent suit, having no relation to the action at law, the point made would have merit. The proceeding, however, is a dependency of the law action, as is held in *Abraham v. Insurance Co.*, post, 731, and, being auxiliary thereto, the jurisdiction is sustainable if the court has jurisdiction of the law action. *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27. The law action was brought in the state court, in 1884, and was removed by the defendant under the local prejudice clause of the statute. While it is true that under the provisions of the act of 1875 the action could not have been originally brought in the federal court, yet it is no less true that, when brought in a state court, it was removable into the United States court, for the reason that the restriction applicable to original suits by indorsees or assignees is not applicable in cases brought originally in state courts, and removed thence to a federal court. *Claflin v. Ins. Co.*, 110 U. S. 81, 3 Sup. Ct. Rep. 507. Jurisdiction, therefore, existing of the action at law, all auxiliary or dependent proceedings necessary to the full and final hearing and disposition of that action are sustainable in the federal court, without regard to the citizenship of the parties.

The second ground of demurrer is that by the provisions of the policy no suit or action thereon can be maintained unless brought within six months from the happening of the loss, and that the lapse of time is therefore a bar to the proceeding. The action at law was brought within the time limited, and this provision is not a bar to that action. The present proceeding is in aid thereof, in the same sense that invoking the action of the court in granting commissions for taking testimony is merely a proceeding in aid of the law action. The filing of the bill for the purpose of perfecting the evidence to be used on the trial of the law action is not the bringing of a suit upon the policy, within the true meaning and intent of the clause in question. The lapse of time can no more be relied on to bar this proceeding than it could be relied on to prevent taking testimony by commission in aid of the law action. The demurrer is therefore overruled, and leave granted to defendant to answer the bill by the April rule-day.

TAFT v. STEPHENS LITH. & ENG. CO.

(Circuit Court, E. D. Missouri, E. D. March 20, 1889.)

FEDERAL COURTS—JURISDICTION OF CIRCUIT COURT—COPYRIGHT LAWS—QUI TAM ACTIONS.

In view of act July 8, 1870, § 106, conferring on the circuit courts jurisdiction of all actions arising under the copyright laws, whether civil or penal in their nature, those courts, under Rev. St. U. S. § 629, cl. 9, giving them jurisdiction of all suits arising under the copyright laws, have jurisdiction of *qui tam* actions for penalties imposed by section 4963, for violations of the law relating to copyright, though by section 563 the district courts have jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States.

At Law. On plea to jurisdiction.

Qui tam action by Marcus H. Taft, who sues, etc., against the Stephens Lithographing & Engraving Company.

W. E. Fisse, for plaintiff.

Paul Bakewell, for defendant.

THAYER, J. This is a *qui tam* action, brought to recover certain penalties imposed by section 4963, Rev. St. U. S., for violations of the law relating to copyright. Defendant's attorney contends that the jurisdiction to recover penalties of such character is vested in the United States district court, and not in the circuit court. He has accordingly filed a plea to the jurisdiction. By section 9 of the judiciary act of 1789, United States district courts were given jurisdiction "of all suits for penalties and forfeitures incurred under the laws of the United States." This clause has ever since continued in force, and reappears in the Revised Statutes of the United States as subdivision 3 of section 563. Suits to recover penalties imposed by the laws of the United States must accordingly be brought in the United States district court, unless jurisdiction to recover a particular penalty is vested in the circuit court by the statute imposing the penalty. It is claimed by plaintiff's attorney that jurisdiction of suits to recover penalties imposed by section 4963, is vested in the United States circuit court by the ninth clause of section 629, Rev. St. U. S., which gives that court jurisdiction "of all suits at law or in equity arising under the patent and copyright laws of the United States." If the claim was based solely on the phraseology of the ninth clause of section 629, we should be disposed to overrule it, and to hold that the suits therein referred to, and over which the circuit court is given jurisdiction, are ordinary civil suits at law and in equity to recover damages for, or to restrain, infringements of patents and copyrights, and that the clause does not confer jurisdiction upon this court over suits of a penal character; that is, of suits brought to recover penalties imposed by the patent and copyright laws. It must be borne in mind, however, that the ninth clause of section 629 is based on sections 55 and 106 of "An act to consolidate and amend the statutes relating to patents and copyrights," approved July 8, 1870, (16 St. at Large, 206, 215.) We infer

that the revisers, in drafting the ninth clause of section 629, did not intend to disturb the jurisdiction then vested in the United States circuit court, conferred by the two sections of the act last alluded to. By reference to the act of July 8, 1870, it will be seen that section 106 provides "that all actions, suits, controversies, and cases arising under the copyright laws of the United States shall be originally cognizable, as well in equity as at law, whether civil or penal in their nature, by the circuit courts of the United States, or any district court having the jurisdiction of a circuit court." Prior to that enactment congress had expressly authorized certain other penalties imposed by the copyright laws to be sued for in the circuit as well as in the district courts of the United States. *Vide* 14 St. at Large, 395, § 1, act Feb. 18, 1867. In view of section 106 of the act of July 8, 1870, we think it clear that congress intended thereby to give the United States circuit courts jurisdiction of suits brought to recover penalties imposed by the copyright laws of the United States, and that it retains such jurisdiction since the revision of the laws of the United States, by virtue of clause 9 of section 629, *supra*. The reference made in section 106 of the act of July 8, 1870, to suits of a penal as well as of a civil nature, makes it certain that *qui tam* actions arising under the copyright laws were within the contemplation of congress when that section was enacted, and that jurisdiction of such suits was intended to be conferred on the circuit court. The plea to the jurisdiction is accordingly overruled.

TORRENT v. S. K. MARTIN LUMBER CO.

(Circuit Court, W. D. Michigan, S. D. February 19, 1889.)

REMOVAL OF CAUSES—PRACTICE—TIME TO PLEAD.

Under the statute requiring that after the filing of the petition and bond for removal the petitioner shall file a copy of the record in the circuit court on the first day of the next term, and that the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court, while the court's jurisdiction becomes vested when the petition and bond are filed, the time for pleading does not begin to run till the record is entered.

At Law. Motion to set aside default and other proceedings.

Uhl & Crane, for the motion.

Smith, Nims, Hoyt & Erwin, contra.

SEVERENS, J. The plaintiffs commenced this action in the circuit court for the county of Muskegon by an attachment, for the purpose of recovering an alleged indebtedness due to them from the defendant. The defendant, at the time its appearance was due in that court, filed therein its petition for removal into the circuit court of the United States, setting forth that it was a corporation organized under the laws of Illinois, having its principal place of business at Chicago, and that the plaintiffs were all

citizens of the state of Michigan; and filed the requisite bond for entering the record in this court on the first day of the next term. The petition and bond were filed in the state court on the 3d day of January last. On the 29th day of the same month, upon the petition of the plaintiffs, and suggestion that the removal of the cause by the defendant was for the purpose of delay merely, and that there was reason to apprehend that the defendants would not file the transcript here within the proper time, this court entered an order giving the plaintiffs leave to file the copy of the record. The order went no further than that, and did not determine the consequences of filing the record here before the first day of the next term. On the 31st day of January the plaintiffs, pursuant to the leave so granted, filed the transcript in this court. On the 1st day of February they gave notice of the order and of the filing of the transcript to the defendant in Chicago, and on the next day entered the default of the defendant for want of an appearance, and also for want of a plea. This the defendant now moves to set aside.

The entry of the default must have been done, and could only be sustained, upon the theory that the time for pleading continued to run on uninterruptedly upon the removal into this court by the filing of the proper petition and bond in the state court, instead of being suspended. The defendant, on the other hand, insists in its reasons for this motion, and upon the hearing it was argued, that the jurisdiction of this court did not fully attach upon the filing of the petition and bond, and will not be finally vested until the first day of the next term, at the time designated for filing the transcript; and it is said, in substance, that the case is dormant, and the court without power during the interval to move in it, except upon some emergency to preserve the *statu quo*. Finally, it is urged that the time for pleading is suspended during this period of dormancy, and revives only upon the arrival of the day when the record must be brought and filed here. I do not agree to the proposition that there is an intermediate state in which a case is resting after the filing of the petition and bond in the state court, and before the day when the record must be filed in the federal court, and in which the jurisdiction of the latter court is inchoate, and can only be exercised piecemeal, as necessity requires. On the contrary, it appears to me that the correct view of the matter is to regard the jurisdiction over the case as being absolutely and completely acquired by the federal court upon the instant when the state court loses it, and that is upon the proper filing of the petition and bond in the latter court. And it seems to me that the concession that the court may exercise its authority over the case upon its own views of the necessity for it is tantamount to an admission that its jurisdiction is fully vested. But in the exercise of its jurisdiction the federal court is bound to follow the course of practice prescribed by law. If it fails to do this in dealing with the case, its authority is erroneously exercised. It is not, therefore, a question of jurisdiction, but of regularity only. This appears to me to be the view of the subject taken by the supreme court in *Railroad Co. v. Koontz*, 104 U. S. 5, where it is said, in the opinion delivered by Chief Justice WAITE, at page 15:

"We are aware that in the *Removal Cases*, [100 U. S. 475,] and *Kern v. Huidekoper*, 103 U. S. 485, it is said, in substance, that after the petition for removal and the entering of the record the jurisdiction of the circuit court is complete; but this evidently refers to the right of the circuit court to proceed with the cause. The entering of the record is necessary for that, but not for the transfer of jurisdiction."

And at page 17:

"As we have already seen, the jurisdiction was changed from one court to the other when the case for removal was actually made in the state court. The entering of the record in the circuit court after that was mere procedure, and in its nature not unlike the pleadings which follow the service of process, the filing of which is ordinarily regulated by statute or rules of practice. The failure to file pleadings in time does not deprive the court of the jurisdiction it got through the service of process."

And in *Steam-Ship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. Rep. 58, it is said at page 122:

"Upon the filing, therefore, of the petition and bond, the suit being removable under the statute, the jurisdiction of the state court absolutely ceased, and that of the circuit court of the United States immediately attached. The jurisdiction of the latter court attached in advance of the filing of the transcript from the moment it became the duty of the state court to accept the bond and proceed no further; and whether the circuit court of the United States should retain jurisdiction, or dismiss or remand the action because of the failure to file the necessary transcript, was for it, not the state court, to determine."

The next question is, what is the course of procedure prescribed by law in such cases? In regard to this it appears to me to be necessarily implied in the provision that the petitioner shall file the copy in the circuit court of the United States on the first day of the next term, and that the cause shall "then proceed in the same manner as if it had been originally commenced in said circuit court;" that the time which will elapse before that date is not to be counted in measuring the periods allowed for the steps in pleading. For, while it is absolutely settled that the federal court may direct or permit the record to be entered before the first day of the next term, still it is evident that in the general course it was contemplated by the statute that the record would not be entered until that time. That being the clear intent of the law, it must be taken as implied that the time for taking forward steps in the pleadings in the case was intended to be suspended until the time fixed when the record must be entered; otherwise we should have the anomaly of a course of pleading going forward here before the return of the record. To pursue the analogy suggested by the Chief Justice in *Railroad Co. v. Koontz*, *supra*, it would be like accelerating the pleadings and the joining of the issue before the return-day of the process, which has been duly served. There would be the like irregularity and error in the one case as in the other.

The result is that the default was prematurely entered, and must be set aside. The other parts of the motion are denied, namely, that "all proceedings of the plaintiff in this court in this cause be set aside for want of jurisdiction," "and for a stay of all proceedings in this cause in

this court until the first day of the next session of this court;" the former because, whether grounded upon good reason or not, such proceedings are harmless to the defendant; and the second, because, in the present situation, and in the view which has been taken of the principal question, no such order is required or would be appropriate.

PLATT v. PHOENIX ASSUR. CO. OF LONDON.

(Circuit Court, D. Vermont. March 14, 1889.)

REMOVAL OF CAUSES—JURISDICTIONAL AMOUNT.

A declaration containing a special count on an insurance policy for \$2,250, alleging a total loss, and concluding to plaintiff's damage \$2,000, "for the recovery of which, with just costs, plaintiff brings suit," and common money counts in *assumpsit* for \$2,000, concluding as in the first count, shows that the amount in dispute exceeds \$2,000, and the action is removable under the act of March 3, 1887.

At Law. On motion to remand.

Action by Frederick S. Platt, assignee, against the Phoenix Assurance Company of London.

George E. Lawrence, for plaintiff.

F. G. Swinington, for defendant.

WHEELER, J. This suit was begun in the state court, and removed to this court. The plaintiff has moved to remand upon the ground that the amount in controversy does not exceed the sum of \$2,000, required by the act of 1887. The declaration contains a special count upon a policy of insurance of \$2,250 on specific property, alleging a total loss, and concluding to the damage of the plaintiff \$2,000, "for the recovery of which, with just costs, the plaintiff brings suit;" also the common money counts in *assumpsit* for \$2,000, concluding to the damage of the plaintiff \$2,000, "for the recovery of which with just costs the plaintiff brings suit." These allegations of damages and claims of recovery, together, amount to \$4,000, which, so far as appears, is the amount in dispute which may be recovered in the suit. *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. Rep. 501; *Hilton v. Dickinson*, 108 U. S. 165, 2 Sup. Ct. Rep. 424. The motion must therefore be overruled.

ABRAHAM v. NORTH GERMAN FIRE INS. CO.

(Circuit Court, N. D. Iowa, E. D. March 18, 1889.)

1. EQUITY—AUXILIARY SUIT—SUBPOENA—SERVICE.

Where it is held that an action at law cannot be maintained on an insurance policy unless it is reformed, and the action is continued to enable plaintiff to procure such reformation, a bill filed for that purpose is auxiliary to the action at law, and a subpoena to defendant in the equity suit is properly served on its attorneys in the law action.

2. SAME—BILL FOR REFORMATION IN AID OF LAW ACTION.

Though plaintiff might have filed his bill for reformation in the first instance, he was not bound to do so, but had the option to adopt the course pursued.

In Equity. On motion to set aside service of subpoena.

Bill by G. G. Abraham against the North German Fire Insurance Company.

Charles A. Clark and F. A. Hormel, for complainant.

Henderson, Hurd, Daniels & Kiesel, for defendant.

SHIRAS, J. The complainant in this proceeding brought an action at law in a state court against the defendant company, averring that he was the owner of a certain elevator building in the town of New Hall, Iowa, and that he had been carrying on business therein in the name of one Eyler, who was in fact his agent; that the defendant company contracted to insure complainant from loss by fire on said property; that as evidence of such contract a policy of insurance was issued in the name of said Eyler; that during the life-time of said policy the property was destroyed by fire; and that the company, after due notice and proofs of loss had been furnished, refused to pay the sum due upon the contract of insurance. The defendant removed the case into the federal court, and upon demurrer it was held that upon the face of the policy of insurance, which was attached to the petition, it appeared that the contract of insurance was with Eyler, insuring his personal interest in the property, and not that which he represented as agent of complainant; that complainant could not therefore recover in the law action, so long as the policy of insurance remained as it then appeared on its face; and that, if the facts were as claimed by complainant, the remedy consisted in procuring a reformation of the written policy, conforming it to the truth of the matter. Thereupon the court, on the application of the complainant, continued the action at law, in order to permit the complainant to file a bill in equity for the purpose of reforming the policy, and by conforming it to the facts as they were claimed to be, to enable complainant to rely thereon as evidence supporting the action at law. The bill being filed for the purpose named, a subpoena was duly issued for service upon the defendant company, and was returned by the marshal, having been served upon the attorneys appearing on behalf of the company in the law action. The company, entering a special appearance, moves to set aside such service as insufficient. It is shown that the defendant com-

pany is a foreign corporation created under the laws of Germany, and it does not appear that it has within this district any officer or agent upon whom service can be had, and the marshal returns that after diligent search he is unable to find any agent of the company within the district. It is further shown that the attorneys upon whom service was had are still attorneys for the defendant company in the law action, and are charged with the duty of protecting and defending the interests of the company in that action, which is still pending.

The question is whether the suit in equity, brought to reform the policy of insurance, is auxiliary to or dependent upon the law action, in such sense that service upon the counsel in the latter action may be held to bind the defendant in the equity cause. It is not questioned by the parties representing the motion to set aside the service that, if the equitable proceeding is a mere dependency on the suit at law, service upon the counsel in the latter may be substituted for service upon the party when such substitution is necessary to enable the court to proceed in the matter. The contention is that the suit in equity is not a dependency upon the law action, but is an independent proceeding, complete in itself, and in which the party complainant might have a hearing of the entire controversy; and it is further urged that the authorities show that the right to substitute service on the attorney is confined to cases wherein the plaintiff in the law action is made the defendant in the dependent proceedings. It is also suggested that the proper course would be to require the complainant to go into the state court for relief, in the mean time staying the case at law in the United States court. The proceeding is between a citizen of Nebraska and a foreign or alien corporation. If this court should hold that the remedy could only be had by sending the complainant to the state court for relief, the same difficulty would there be encountered. It is a question of service, not of jurisdiction; and if sufficient service could be had in the state court, it can be had in this court. The proceedings under consideration in *Christmas v. Russell*, 14 Wall. 69, and the authorities therein reviewed and the conclusions therein announced, upon which counsel in this case rely, pertain to questions of an entirely different nature. The object and purpose of the present bill is to procure, in proper form, the evidence upon which the complainant relies to support his action at law. In this respect the proceeding is akin to obtaining evidence by a bill of discovery. To support the action at law, the plaintiff therein is compelled to invoke the aid of the court of equity in order to obtain the necessary evidence. A bill of discovery in aid of an action at law is sustainable on behalf of either plaintiff or defendant therein, and is deemed to be a dependent or auxiliary suit. The present bill is based upon the allegations that a suit at law is pending; that the complainant needs the aid of a court of equity to perfect his evidence; and it is clear that, if upon the hearing upon the bill it should be decreed that the policy should be reformed, such reformed policy would be adduced in evidence in the law action. The relief sought by the bill is of no value, except to supply complainant with evidence in proper form to be used on the trial of the law action. If

upon the hearing on the bill it should appear that in the action at law judgment on the merits had gone against the plaintiff, the court would not proceed with the hearing, for it would thus appear that cause for a decree did not exist. In fact, therefore, the bill is in aid of the action at law. It is between the parties to the law action, and is dependent upon and auxiliary thereto, in such sense that service upon the attorneys charged with the duty of defending the law action may be had where such service cannot be made directly upon the party. There can be no possible question that service upon the attorneys in the law action of notice of the suing out commissions or letters rogatory for taking testimony would be good, and this proceeding is of the same general character. Should it be necessary, in order to properly defend the action at law, to obtain evidence by means of a bill of discovery or other proper process or proceeding, there can be no question that the counsel appearing for the company have the authority to institute such proceedings in performance of their duty to their client. They represent their principal in the field of evidence as well as in that of the pleadings and final trial of the cause, and in such capacity service may be had upon them in any auxiliary proceeding necessary in the preparation of the case for hearing.

It is also urged that the complainant need not have commenced the action at law, but that he should have brought a bill for the reformation of the contract in the first instance, and in the same proceeding have asked a decree for the damages sought. Such a course was doubtless open to the party, but he was not compelled to adopt it at his peril. He had a right to sue at law in the first instance, and then to bring his bill to perfect his evidence. The latter does not abate the former. The bill, as filed, does not seek relief beyond the reformation of the policy of insurance. If that is secured, the action at law remains to be heard. It is not perceived, however, that these objections bear upon the sole point involved in this motion, which is, whether service can be had upon the attorneys in the law action, under the facts appearing of record in this cause. As already indicated, the motion is not deemed well taken and is overruled. The defendant must plead to the bill by the April rule-day, or complainant will be entitled to a default *pro confesso*, and to proceed *ex parte*.

OREGONIAN RY. CO., Limited, v. OREGON RY. & NAV. CO.

(Circuit Court, D. Oregon. April 20, 1885.)

SPECIFIC PERFORMANCE.

A court of equity, as a rule, will not enforce the performance of a contract to construct or repair a railway.

(Syllabus by the Court.)

In Equity.

H. H. Northrup and John W. Whalley, for plaintiff.

¹ Delay in publication caused by failure to obtain copy of opinion at time of its delivery.

Charles B. Bellinger, for defendant.

DEADY, J. This is a bill for an injunction requiring the defendant, as lessee of the plaintiff's road, to complete the same, and put certain portions thereof in repair, and operate the same according to the covenants in the lease, or for the appointment of a receiver with authority to do such work at the expense of the defendant.

It appears from the bill that on August 1, 1881, the plaintiff being the owner of a railway in the Wallamet valley, commonly called the "Narrow-Gauge," leased the same to the defendant for the period of 96 years, at a rental of £28,000 a year, to be paid in half-yearly installments. At the date of the lease 134 miles of the road were substantially constructed, and 31 other miles were being constructed.

By the terms of the lease the plaintiff was to finish the road, and put the same in good repair throughout, by January 1, 1882; but on October 1, 1881, the defendant, in consideration of the sum of \$87,115, paid to it by the plaintiff, undertook to perform this covenant itself.

A covenant in the lease bound the defendant to maintain and operate the road, and keep it in good repair. And upon the failure of the defendant to keep any covenant in the lease, the plaintiff may enter and take possession of the demised premises, and may have a receiver appointed, with such power and authority as may seem best calculated to secure the performance and observance of the obligations imposed by the lease on the lessee.

The bill alleges that the defendant has failed to finish the road according to its undertaking, and that since February 20, 1883, it has failed to keep the same in repair, and that the cost of making such repairs, including two bridges over the North and South Santiam rivers, to replace those carried away by floods, will amount to \$108,450.

The defendant has also refused to pay the rent now falling due, and given notice of its intention to surrender the premises, and cease to operate the road, upon the ground that the lease is void for want of power in itself to enter into any such contract.

Pending the decision on the application for the injunction, the defendant has been required to operate the road, and is now doing so in pursuance of said direction.

The defendant demurred to the bill for want of equity, and because the plaintiff had an adequate remedy at law.

As a general rule a contract to build or repair will not be specifically enforced by a court of equity. It is said that if one wont build another will; and if there is any loss sustained the remedy is at law, for damages. And this is especially so as to contracts like the covenant in the present lease, to repair during a period of many years.

The rule and the reason of it will be found stated and exemplified in the following cases, and particularly in the one from 1 Woolw., in which Mr. Justice MILLER has gone over the subject with his usual thoroughness and good sense: *Ross v. Railway Co.*, 1 Woolw. 26; *Storer v. Railway Co.*, 21 Eng. Ch. 48; *Stuyvesant v. Mayor, etc.*, 11 Paige, 415; *Gibbs*

v. *David*, L. R. 20 Eq. 373; Fry, Spec. Perf. 36-40. But see *Pennsylvania Co. v. Railroad Co.*, 118 U. S. 305, 6 Sup. Ct. Rep. 1094.

The application for the injunction is denied.

An order for the appointment of a receiver will be made, giving him authority to operate the road, and apply the proceeds to the payment of current expenses and making repairs. And, if the plaintiff will ask for it, he may be authorized to borrow money on the security of the road, sufficient to put it in repair, and thereafter bring an action at law to recover the amount from the defendant.

WHITCOMB v. GANDY.

(Circuit Court, D. Nebraska. March 1, 1889.)

JUDGMENT—VACATION—MISTAKE.

In an action on five notes, a parol agreement was made between counsel for the parties that the case should be passed until the attorney for plaintiff, who was sick, could attend to it. Afterwards the plaintiff employed another attorney, and after the case had been passed several times it was tried in the absence of defendant and his counsel, and judgment given for plaintiff. It appeared that neither the latter nor the attorney who tried the case knew of the agreement made by plaintiff's former counsel, and that, after the case had been passed once or twice, the plaintiff wrote to defendant's attorney that it would be pressed for trial at the then present term. *Held*, that on the payment by defendant of one of the notes, the validity of which was satisfactorily shown by the evidence, the judgment would be set aside.

In Equity. On bill for injunction.

Reavis & Thomas, for complainant.

John L. Webster, for defendant.

BREWER, J. This case is before me on bill, answer, and proofs. The testimony is voluminous, many score of witnesses having been sworn and examined. It is monumental in the amount of falsehood which is developed. It is impossible to avoid the conclusion that many witnesses have deliberately perjured themselves, and in such a case it is not easy to separate the truth from the falsehood, or to determine what are the real facts. These are beyond question, and they must furnish the basis of investigation: Prior to April, 1884, John Anderson and Nels Anderson formed the firm of Anderson Bros., residing at Humboldt, and engaged in the manufacture of wagons, buggies, etc. In April or May of that year, O. M. Whitcomb, the plaintiff, joined the firm, the name of which was changed to Anderson Bros. & Co. That firm was dissolved on September 29, 1884, plaintiff taking the property and assuming the debts. J. L. Gandy was a physician living at Humboldt, and as agent for his wife, M. E. Gandy, or acting for himself, had sundry business transactions with the firm of Anderson Bros. & Co. On the day of the dissolution of the firm, —September 29th, —John Anderson executed to

M. E. Gandy in the firm name a note for \$575. It is claimed that on the same day he executed four other notes, also in the firm name, to the same party,—three for a thousand each and the fourth for \$744.75. These notes were all indorsed to defendant, W. S. Gandy, a brother of J. L. Gandy, and a resident of Indiana. Suit was commenced on these notes in the state court, and removed by the plaintiff to this court. The case was for trial at the November term, 1886. The only attorney of record for the plaintiff was August Schoenheit, who resided at Falls City, near Humboldt; while E. W. Thomas, E. A. Tucker, and Isham Reavis, who also resided at Falls City, were the attorneys of defendant. Whitcomb, who alone was served with process and answered. Mr. Schoenheit was sick during the fall and winter, unable to attend court, and finally died in February, 1887. Mr. Reavis made a parol agreement with Mr. Schoenheit that the case should be passed until such a time as Mr. Schoenheit's health would permit him to go to Omaha to try the case. This was before the commencement of the term. The fact of this agreement he communicated to his co-counsel and client; and when the case was called by Judge DUNDY for trial at the opening of the term, he announced the fact of such agreement. No memorandum was made of it, and no order entered by the court. Mr. Schoenheit's health not improving, J. L. Gandy, acting for his brother, came to Omaha, and employed J. L. Webster to look after the case. Several times the case was called for trial and passed, but finally, on the 29th of December, in the absence of defendant and his counsel, trial was had, and judgment rendered for the full amount of the five notes and interest. Mr. Reavis, one of the counsel for defendant, was informed of this judgment on the 2d or 3d day of January following; and within two or three weeks at least, the defendant and his other counsel were also advised of the fact. The term at Lincoln commenced the first Monday of January. Nothing was done at that term, and this bill was filed on June 17, 1887, to restrain the enforcement of that judgment on the ground that it was fraudulently obtained. Answer to this bill having been duly filed, testimony was taken, and the case is now before me for consideration. Mr. Schoenheit is dead, so that we do not have his version of the arrangement between counsel; but there is no reason to doubt, in view of Mr. Reavis' high character, the substantial accuracy of his recollection, or that there was some general understanding between him and Mr. Schoenheit that the case should be passed to await Mr. Schoenheit's restoration to health. It does not appear, however, that J. L. Gandy, who managed his brother's case, knew of any such arrangement, or that Mr. Webster, the counsel subsequently employed, was informed of it; so that they acted in the utmost good faith in pressing the case for trial at the time they did. More than that, it appears clearly that, after the case had been called and passed once or twice, J. L. Gandy, in Mr. Webster's office, wrote a letter to one of the counsel for defendant, notifying him that the case would be pressed for trial at that term. This letter was mailed in ample time to have reached counsel so as to enable him to attend the trial. Further than that, before coming to Omaha, he mailed a postal to the

same counsel; giving like notice. Execution was issued on this judgment, a levy made on some property of defendant, and the marshal went down to make the sale. Defendant gathered a crowd of his friends, and by threats and intimidations prevented the sale, and compelled J. L. Gandy to sign a stipulation for arbitration. I think the foregoing facts are either undisputed, or so clearly established that there is practically no doubt as to them. Among the disputed facts are: whether the four notes were signed by John Anderson; whether any consideration was received for said notes if signed by him; whether the notes were transferred in good faith to plaintiff before maturity; whether defendant and some of his counsel did not know of the judgment in time to file a motion for a new trial at the term at which it was rendered; whether the defendant did not admit the correctness of the indebtedness, and the propriety of the judgment, under the belief that his property was concealed from execution, and first complained thereof when the marshal had found some property upon which to levy. It would be a waste of time to attempt to review the testimony of the various witnesses, or to attempt to determine what is the truth as to these disputed matters. It is conceded that the note of \$575 was signed by John Anderson in the firm name, and notwithstanding John Anderson's denial I think it is satisfactorily shown that there was consideration for it, and such consideration as would make the note valid, in the hands of a *bona fide* holder at least, and probably in the hands of the original payee. While I have no doubt that there was, as stated by Mr. Reavis, some such understanding or parol agreement between himself and Mr. Schoenheit, the case furnishes only another of the many illustrations of the danger, at least, of relying upon mere parol agreement between counsel. Many courts insist on a rule that all agreements between them shall be in writing, and that no parol stipulation will be recognized. If a stipulation had been signed and filed with the clerk, or if an order had been made by the court, all this trouble would have been avoided; and when a party risks his interests upon such parol stipulations, he has no one but himself to blame if trouble and expense be the result. There is no reason to doubt that Mr. Webster acted in the utmost good faith, for he passed the case from day to day to enable the defendant to be present with his counsel, and took even the unnecessary pains to send formal notice to him by letter. Nor is there any testimony which shows that Mr. Gandy was not also acting in good faith. So that it would be unjust and inequitable to cast upon him the burden and expense of a blunder which he did not make. At the same time a court of equity ought, so far as it can, to relieve a party from the consequences of such a blunder. I think, therefore, that which under the circumstances is equitable is this: that the present complainant (the defendant in the law action) should have the privilege of making a defense to the four notes, and that can be done only by sustaining the bill. The order will be that, upon the payment by complainant of the note of \$575 and interest, and the costs of this suit, the judgment in the law action will be set aside and held for naught, and the case set for trial upon the issues as to the

four notes; the security already given for the payment of the judgment to remain until the determination of the suit. The failure to file a replication is a merely technical omission, which the court would never permit to interfere with a decision according to the equities of the case as developed in the testimony.

BURTON *v.* HUMA *et al.*

(Circuit Court, D. Colorado. February 19, 1889.)

QUIETING TITLE—RES ADJUDICATA.

A decree quieting title in plaintiffs in a suit under Code Civil Proc. Colo. § 257, providing that an action may be brought by any person in possession of real property "against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim, estate, or interest," is conclusive against all adverse claims or interests then held by defendants, whether pleaded in defense or not.

In Equity. On plea and exceptions to answer.

Teller & Orahood, for complainant.

Wolcott & Vaile and *E. Miles*, for defendants.

BREWER, J. This case stands on a plea and exceptions to the answer. The facts, as developed, are these: In 1884 one Rufus Clark was the owner of the real estate in question. He sold and conveyed it to Henry and Loveland for the sum of \$70,000, of which \$10,000 was paid in cash, and a trust deed given for the balance to two trustees. A few hundred dollars only having been paid upon this balance, the trustees, at the request of Clark, advertised the property for sale, and sold the entire tract to Clark for \$76,800. In pursuance of that sale a deed was made to Clark, who subsequently conveyed it to the South Denver Real Estate Company. While the advertisement of the sale was in the names of both trustees, only one attended the sale, and only one executed the deed. Prior to the original conveyance by Clark to Henry and Loveland certain portions of this land had been subdivided into lots and blocks, and the plat thereof recorded in the office of the recorder of deeds, but neither the conveyance from Clark, nor the trust deed, nor the advertisement of sale took any notice of this platting, but described the lands simply by quarter sections and parts thereof. At the time of the sale in pursuance of the direction of Clark by his attorney, the trustee made this announcement:

"I desire to sell this property for the highest possible price it will bring in cash. In order to ascertain the best price obtainable for the whole property I will first offer it in parcels, the subdivided parts in lots and blocks separately, and the rest in tracts of about twenty-two to forty acres each. After the whole property is thus offered, and the aggregate of the highest bids computed, then the whole tract will be offered in one body. If the aggregate of the high-

est bids obtained when offered in lots, blocks, and parcels, equals or exceeds the highest bid when offered as a whole, the property will be struck off according to such bids in parcels; otherwise it will be sold as a whole."

In pursuance of this announcement it was so offered in lots, blocks, and parcels, and, on computing the aggregate of the various bids, the amount was \$76,798.87. Then it was offered as a whole, and \$76,800 offered, and the property struck off to the bidder. Prior to the sale, one McIntosh, who is a party to this bill, and one of the principal stockholders in the real estate company, being desirous of obtaining the land, entered into a written contract with Clark, by which the latter agreed to have the property sold under the trust deed, and if he obtained title thereto at such sale, to convey to the former at a named price. It was also stipulated in this contract that Clark should attend the sale, and make bids in pursuance of instructions from McIntosh. The sale and the deed to Clark were on the 3d of August, 1886. Thereafter, and on the 12th of April, 1887, Henry and Loveland filed a bill in the state court, alleging that the sale and deed were void on the ground that they were made and executed by one trustee, and not by both, and also on the ground of some defects in the advertisement, etc., praying that that deed and all subsequent conveyances be canceled and held for naught, and that upon the payment of the balance due on the original purchase price a conveyance should be made to them. To that complaint the various defendants answered, and also filed a cross-complaint, in which they set out the original sale from Clark, the trust deed, the advertisement, sale, and deed, and subsequent conveyances, and alleged that the proceedings of the complainants were casting a cloud upon their title, and prayed that it might be quieted, and the defendants in the cross-complaint decreed to have no right or claim or interest in or to the property.

The pleadings having all been perfected, the case went to trial, and a decree was entered in which it was found that none of the material allegations of the original bill of complaint were sustained, and that all of the material allegations of the cross-complaint were sustained, and adjudged that the original bill be dismissed for want of equity, and that the title of the cross-complainants be quieted, and forever set at rest as against all claims whatsoever of the complainants, or either of them. This decree was taken to the supreme court of the state for review, and by that tribunal affirmed.¹ Thereafter, on July 16, 1888, this bill was filed, which is called a "bill to redeem," and sets up the facts heretofore stated, except the proceedings in the state court; tenders the balance due on the original purchase price, with interest; and prays a decree for redemption. It sets up a title in complainant, derived from sundry mesne conveyances from Henry and Loveland. It also sets up a title derived by conveyances from the parties who bid for the several lots and parcels at the trustees' sale.

Now, the plea sets up the proceedings in the state court as a bar to all claims which complainant may have derived through his conveyances

¹Loveland v. Clark, 18 Pac. Rep. 544.

from Henry and Loveland; and the answer, besides being in support of the plea, sets up defenses to the title obtained by the conveyances from the bidders for the lots and parcels. This, I think, presents all the substantial facts in the case. Some technical questions have been argued, but I think it useless to notice them, and proceed to the substantial matters. I have not mentioned all of the conveyances by which titles have been transferred, or the various parties who have interests, but have treated the complainant on the one side and the real estate company on the other as the real parties in interest, for, their rights being settled, all other questions and rights are disposed of. Now, are the proceedings in the state court a bar to this action? It is said by counsel for complainant that the state case proceeded on the theory that the sale and deed were absolutely void, while this accepts the sale as apparently valid, but goes upon the theory that it is voidable, and seeks simply redemption, and that the wrongful and fraudulent contract between Clark and McIntosh was not set forth in the bill of complaint in the state court, or made the basis of relief. Inasmuch as complainant holds under Henry and Loveland, by conveyances since the former case, this action must stand as between the same parties in reference to the same property, and I think it would be difficult, even if no cross-complaint had been filed in the original case, to draw any substantial distinction between the two actions, or avoid holding that the former was a bar to this. The fact that new matter is added in the complaint makes no difference. In the case of *Cromwell v. County of Sac*, 94 U. S. 352, the supreme court lays down in very clear language the rule controlling as follows:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy; concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed of which no proof was offered; such as forgery, want of consideration, or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

But I shall not stop to pursue this question, for, when we consider the decree in the former case, it was a decree upon the cross-complaint, and

a decree quieting title. The cross-complaint was properly filed, for the matter set up therein was germane to that presented in the original complaint. The propriety of its presence was unchallenged, and the parties went to trial upon that, and the decree of the lower court was affirmed by the highest court of the state. Now, if a decree in an action quieting title amounts to anything, it must be held that in a case like this it has quieted defendants' title as against all claims growing out of the transactions of the sale. The Colorado Code provides not merely for settling the title, but every title, claim, or interest, and the decree which was rendered quieted the title as against all claims.¹

It is said in Pomeroy on Remedies, section 369, that the object of this statutory action is the "putting all litigation to rest." In *Green v. Glynn*, 71 Ind. 339, the court observes:

"The very object of the action to quiet title is to determine all conflicting claims and to remove all clouds from the title of the complainant. If one having a claim is brought into court by a complaint to quiet title, and fails to assert his claim, he is concluded by the judgment, even though he omitted to assert his real claim. The statute was intended to secure repose, and to settle in one comprehensive action all conflicting claims. * * * If one brought into court, and being not only allowed full opportunity to assert such claim as he may have, but directly challenged to do so, neglects to use this opportunity expressly afforded him, he has no right to again vex the courts or those claiming adversely to him by instituting a new and distinct action against the party who summoned him into court."

In *Farrar v. Clark*, 97 Ind. 449, I find this language:

"The question as to the effect of a judgment in an action to quiet title is important but not difficult. If, as has been so often held, the purpose of the action is to determine and quiet title, then it is manifest that the judgment determining and quieting title must be conclusive. The decree quieting title in the appellees was not a mere empty declaration. It was a conclusive adjudication. Title will not be quieted unless the decree can operate, and if it does operate, then it puts at rest the question of title. In a case similar to the present, the court said: 'Of what avail, then, can it be to the plaintiff to have his title quieted in him when, after that is done, he cannot recover possession upon it? Equity will not grant a relief in form which must be valueless in fact.' * * * The object of the action to quiet title was to settle all claims, and the question of title was the dominating one in that action, and the controlling one in this. It is a mistake to suppose that the object of a suit to quiet title is to settle particular claims. On the contrary, it is, as was in substance said in *Barton v. McWhinney*, 85 Ind. 481, an action to quiet the plaintiff's title against all claims of the defendant, whatever they may be. If, then, all claims are included, all claims are necessarily finally adjudicated, and the question of title forever settled."

The Oregon Code is very like the Colorado one, and something of a similar question was presented under that Code to the United States circuit court of that district in *Starr v. Stark*, 1 Sawy. 276, and the court disposes of the matter in these words:

¹ Code Civil Proc. § 257. An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest.

"The plaintiff cannot at his option split it up into many suits with which to harass and weary the defendant. By the final decree in such a suit, the title to the premises as between the parties is determined, and all questions or matters affecting such title are concluded thereby. If either party omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot correct his error by bringing another suit upon the portion or fragment of the case omitted. * * * If they failed to bring to the consideration of the court by proper proof or allegation anything material to a correct determination of the controversy for which such suit was given and brought to settle, it was their own fault, and they must abide by the consequences."

In *Sedgwick & Wait*, on the Trial of Title of Land, it is declared that a decree in an action to quiet title is conclusive, and puts all litigation to rest as regards the parties to it, and the titles involved, and in *Reed v. Calderwood*, 32 Cal. 111, under a similar statute, the court observes:

"It may be admitted that the plaintiffs were not in strictness entitled to a decree enjoining the defendants from making any further contest on the plaintiff's title, whether judicially or otherwise; still the error must be disregarded, for it cannot affect any substantial right of the party. The decree would have been a bar to subsequent litigation on the same subject-matter if the injunction clause had been omitted, and that clause may be of positive service in preventing the bringing of suits by the defendant which, if brought, would be sure to fail. The defendant, however, is mistaken in supposing that the injunction will preclude him from availing himself of an after-acquired title."

And in *Parrish v. Ferris*, 2 Black. 609, the supreme court of the United States observed in reference to the Ohio statute, which is like the one of this state, as follows:

"The statute authorizes any person in possession of real property to institute a suit against any one who claims an estate or interest therein adverse to him, for the purpose of determining such adverse estate or interest. Now, it is quite apparent that the title of the defendant to the lands in question is involved, under this act, and that the determination of the court must be conclusive against him, and all claiming under him, as between the parties. If not, the act is of no effect."

And indeed, if a decree in an action to quiet title does not quiet it, it is difficult to conceive the object or purpose of such an action. It does not seem to me open to question. I have not the slightest doubt that the decree under the cross-complaint in the original action barred all of complainant's claims springing out of the trustee's sale, and passing to him through the conveyances of Loveland and Henry. It follows from this that the plea must be sustained. With reference to the exceptions to the answer, it is unnecessary to notice them in detail; it is enough to say that the bidders at the sale took nothing by their bids, either at law or in equity, and had therefore nothing to convey to complainant. The method of sale adopted by the trustee was one in frequent use. Its propriety cannot be questioned. Indeed, it may be considered as settled. Many decrees even contain a provision directing such method of sale. I remember the decree in the Wabash foreclosure contained a similar provision, and as there is no suggestion that there was any mistake in the adding up of their several bids, or that the amount bid for the land in gross did not exceed the amount of the several bids, or that the property

was not finally struck off on the single bid, the separate bidders have no claim, either in law or equity. Furthermore, it may well be doubted whether there was any memorandum in respect to their bids, sufficient to sustain them under the statute of frauds. *Eppich v. Clifford*, 6 Colo. 493; *Grafton v. Cummings*, 99 U. S. 100. As no cause of action appears in respect to this claim of title it is unnecessary to waste any time upon the exceptions to the answer thereto. The order, therefore, will be that the plea be sustained, and the exceptions to the answer overruled.

GIBSON v. RICHMOND & D. R. Co.

(Circuit Court, S. D. New York. February 23, 1899.)

RAILROAD COMPANIES—BONDS AND MORTGAGES—RIGHTS OF MORTGAGEES.

The state of North Carolina, under act Jan. 27, 1849, incorporating the N. C. R. Co., subscribed for \$3,000,000 of its \$4,000,000 authorized capital stock, with the right to vote thereon, and to appoint eight of the twelve directors. The state created a statutory mortgage upon its stock to secure construction bonds issued by it, and subsequently created a second mortgage on its stock to secure an issue of bonds. Thereafter, and while the road was paying 6 per cent. per annum on its capital stock, defendant, with notice of the rights of the second mortgage bondholders, took a lease of the road at a rental sufficient only to pay the interest on the first mortgage bonds. The charter authorized the N. C. R. Co. to lease its property and franchises, and it was not claimed that the lease was improvident, or in any respect invalid. The complainant, a second mortgage bondholder, filed a bill against the defendant, the lessee, to compel it to account for the excess of earnings above the amount of interest on the first mortgage bonds, upon the theory that by the hypothecation of its shares to the second mortgage bondholders the state impliedly agreed to become a trustee for them, and exercise its control as a majority stockholder in the N. C. R. Co., so as to preserve the earnings for the benefit of their bonds, thus making the earnings a trust fund which complainant could follow into the hands of the defendant, the defendant being a recipient with notice. The defendant demurred to the bill. *Held*, (1) that in the absence of any averment of fraud in the making of the lease the complainant could not maintain the action. (2) That the state was no more a trustee than any other majority shareholder of a corporation who mortgages his stock, and was under no duty to the mortgagee except to conduct itself honestly in exerting its power of control for the interests of the mortgagees and the other creditors and stockholders of the corporation.

In Equity. On demurrer to bill.

Edward L. Andrews, for complainant.

George Hoadley, for defendant.

WALLACE, J. The complainant is the owner of certain bonds for \$1,000 each of the state of North Carolina, created pursuant to an act of the legislature of the state, and containing a certificate executed by the authorized officers of the state, which recites that "ten shares of the stock in the North Carolina Railroad Company, originally subscribed for by the state, are hereby mortgaged as collateral security for the payment of

this bond." The defendant is a lessee of the property of the North Carolina Railroad Company for a term of years. The complainant has filed this bill for himself, and in behalf of other holders of the bonds, to compel the defendant to account for the earnings of the leased railway property in excess of the rent reserved in the lease. The defendant has demurred to the bill.

Succinctly stated, the averments of the bill are that the North Carolina Railroad Company was incorporated by an act of the legislature of the state of North Carolina, passed January 27, 1849; that the act provided that the state should subscribe for \$3,000,000 of the \$4,000,000 authorized capital stock of the company; should be entitled to appoint eight of the twelve directors of the company, and should be entitled to vote by an official proxy upon its capital stock at all stockholders' meetings; that the state took the stock, and has always exercised its rights to appoint directors and vote; that the state created a statutory mortgage upon the shares of the stock, to secure certain construction bonds issued by it; that subsequently it created a second statutory mortgage upon its shares of stock, to secure an issue of bonds, of which the bonds in suit are a part, and issued \$2,500,000 of such bonds, and sold them to the public; and that thereafter, September 21, 1871, and while the railway company was earning and paying 6 per cent. per annum upon its capital stock, and while the state was in default in paying the interest on the second mortgage bonds, the defendant, with full knowledge of the rights of the second mortgage bondholders, took a lease of the railway at a rental merely sufficient to pay the interest on the first mortgage bonds, and has since been in possession of the property, and in receipt of earnings therefrom largely in excess of the rental. The acts of the legislature incorporating the railway company, and authorizing the creation of the construction bonds by the state and the first mortgage upon the shares to secure their payment, are not fully set out in the bill; but, as these are laws of which the courts must take judicial notice, the bill is to be read in connection with their provisions. By the act incorporating the railway company and directing the state to take shares therein, power was granted to the corporation to lease its property and franchises. Such effect was given to section 19 of the act by the decision in *State v. Railroad Co.*, 72 N. C. 634, where the lease in question to the present defendant was adjudged to be within the authority of the corporation. The acts creating the statutory mortgages give effect to the lien of the bondholders, at law and in equity, without registry or proof of notice. The bill does not aver that the lease made to the defendant was improvident, or in any respect invalid or vicious. The averment that at the time the lease was made the railway was earning 6 per cent. upon its whole capital, and the rent reserved was only equivalent to the interest on the first mortgage bonds of the state, may be intended to suggest that the property was leased for an inadequate rental; but as the amount of the first mortgage bonds is not mentioned, and as their amount may have been for as much or for more than the amount of the capital stock, this averment does not even insinuate that the lease was improvident. The bill does not seek to have the

lease declared invalid or vacated for any reason. Neither the railway company nor the state is made a party defendant.

The theory of the bill seems to be, and the case for the complainant has been argued upon that theory, that the state of North Carolina has invested, by the legislation under which it became a stockholder of the railway company, with complete control of the affairs of the company; that by the hypothecation of its shares to the second mortgage bondholders it impliedly agreed to become a trustee for them, charged with the duty of exercising its power of control so as to preserve the earnings of the railway, and appropriate them to the payment of the bonds; that consequently the earnings were a trust fund for the bondholders; that by permitting the lease by the railway company to the defendant the state consented to a diversion of the trust fund; and that, as the defendant is the recipient of a trust fund, with notice of the rights of the *cestuis que trustent*, it must account for such of the fund which has come to its hands as is not applicable to the payment of interest to the first mortgage bondholders. The proposition that the state assumed fiduciary obligations towards the second mortgage bondholders which do not ordinarily exist between mortgagor and mortgagee, and which gave the bondholders the right to insist that the railway company should be managed in their interest as a trust property, has been ingeniously presented, but does not seem to have any real substance. The case is not distinguishable, in its legal aspects, from one where an individual, a majority stockholder of the stock of a corporation, has hypothecated his shares by chattel mortgage to a creditor as security for a loan. In such a case it may be assumed that both parties to the transaction understand at the time that the value of the security is to depend upon the financial prosperity of the corporation, and measurably upon the honesty and efficiency of the corporate management; but no promise or duty can reasonably be implied from that understanding that the shareholder who has mortgaged his shares is to use his power of control in the corporate affairs exclusively in the interest of the mortgagee, or is not to consent to or promote any scheme or undertaking in the conduct of its business which is within the scope of its legitimate functions, and which he may believe to be expedient and proper. Certainly no promise or duty can be implied from such an understanding, which would be inconsistent with his obligations to the other shareholders, or his good faith towards the creditors of the corporation. So long as he conducts himself towards the mortgagee honestly in exerting his power of control, he violates no duty, and the latter has no ground of complaint. When, in consequence of a default in payment, pursuant to the terms of the hypothecation, the mortgagee's title to the shares become absolute, he is in a position to substitute himself in the place of the mortgagor, and participate in the control of the corporation, according to the forms and subject to the conditions of the organic law. If, instead of doing this, he nevertheless allows the mortgagor to do so, he ought not to complain, and cannot be heard to challenge any transactions with third persons by the corporation which are effected in the mean time in good faith, and are within the corporate

power. Applying these familiar rules of law to the present case, the second mortgage bondholders cannot assert with reason that the state has violated any fiduciary duty towards them, or that the corporation itself has been in any way a party to the subversion of their rights, unless they are prepared to show—what is not alleged in the bill—that the lease was fraudulent, or *ultra vires*. All persons dealing with a corporation must take notice of the provisions of its organic law. In the present case the second mortgage bondholders were bound to know when they took their security that the railway company was authorized to lease its property and franchises, and should have expected that circumstances might arise under which the interests of the corporation, its stockholders, and its creditors, would be promoted by doing so. They were also bound to take notice of the prior rights of the first mortgage bondholders, originating in the statutory mortgage created by the acts of the legislature, and to anticipate that the interests of these bondholders, to whose lien upon the shares of stock their own lien was subordinate, might require the company to lease its property. The second mortgage bondholders therefore took their securities with the knowledge that circumstances might arise under which it would be not only the right, but the duty, of the state as a majority stockholder in the railway corporation towards the other stockholders and the first mortgage bondholders to promote the leasing of the railway. Certainly it cannot be maintained that the effect of the second mortgage was such as to preclude the shareholders of the railway company, other than the state, and the prior mortgagees of the shares, from deriving the benefit of any legitimate mode of exercising the franchises granted to the corporation which might be expedient.

So far as appears from the bill, the lease in question was a reasonable and legitimate arrangement, and has been acquiesced in since 1871 by the complainant and those whom he represents. It is fair to assume that the North Carolina Railroad Company and the state both regarded it as probably offering a better income than could be derived from the ordinary traffic of the railway, and therefore as an arrangement which would promote the interests of shareholders and bondholders. Very clearly the second mortgage bondholders cannot maintain a suit in equity to charge the defendant with the earnings derived under the lease, when they do not assert that the lease is void or voidable, as between the parties to it. The lease is either a valid contract between the North Carolina Railroad Company and the defendant, or it is an invalid one. If valid, the complainant cannot assail it, and the defendant is entitled to stand upon the terms of the contract, and derive whatever profit it may be able to from operating the road after paying the rent. It cannot be valid as between the parties to it and invalid as to the complainant, unless the second mortgage bondholders have rights or equities superior to those they would have if, when the bonds were not paid, they had demanded and acquired the shares of stock hypothecated to them as collateral security. It may be that they are not in a position to intervene in the affairs of the North Carolina Railroad Company, and cannot,

through their influence at corporate meetings or otherwise, cause such proceedings to be taken by the corporation as it ought to take if the lease were a fraud upon the stockholders whom it represented as trustee in entering into the contract. But although the complainant may occupy a better position as to matters of procedure and remedy than he would if he were a stockholder, this circumstance cannot prejudice the right of the defendant to insist that the contract cannot be set aside, in whole or in part, unless it is invalid as between the North Carolina Railroad Company as a trustee for its stockholders and itself. The complainant's cause of action is founded on the rights to which he has succeeded as a mortgagee of the shares of stock, and his position is not assisted, nor is that of the defendant prejudiced, by his neglect to substitute himself as a stockholder in place of a mortgagee of the stock. For these reasons, and without discussing the other questions which are presented by the demurrer, the demurrer is sustained.

UNITED STATES v. AMERICAN WATER-WORKS CO.

(Circuit Court, D. Nebraska. March 1, 1889.)

WATER COMPANIES—TARIFF OF CHARGES—CONSTRUCTION.

The Omaha water-works ordinance provides that the company shall furnish water to citizens residing along the line of its mains at certain rates, and gives a tariff for dwelling-houses according to the number of rooms and other buildings of different kinds. Rents for other purposes are fixed by meter-rates, lowering inversely to the amount of water taken. *Held*, that the company has the right to treat each building separately; and the United States, as owner of the Fort Omaha reservation,—a tract of many acres, on which are dwellings for officers, hospitals, warehouses, and barracks,—is not entitled to be supplied as a single consumer.

In Equity. Injunction.

George E. Pritchett, for the United States.

J. M. Woolworth, John L. Webster, and Lake & Hamilton, for respondent.

BREWER, J. This is a bill brought by the United States to enjoin the defendant from taking up its water-mains or shutting off the supply of water heretofore furnished by it to Fort Omaha. The facts are these: The government, complainant herein, owns a reservation of many acres known as "Fort Omaha," upon which are situated a number of buildings, among them dwelling-houses for officers, hospitals, warehouses, and barracks for at least a regiment of troops. In 1870, the state of Nebraska ceded jurisdiction over this tract of land to the general government. At that time it was a mile or two distant from the limits of the city of Omaha. The defendant is a corporation having authority by ordinances and contracts to lay down its water-mains in the streets of the city of Omaha, and obliged to supply its citizens and inhabitants with water in accordance with the provisions of the ordinances. Some years since the gov-

ernment made a contract with defendant to extend one of its mains to Fort Omaha, and supply the buildings on the premises with water at a stipulated sum. This contract, by its terms, expired at the end of one year, but similar contracts have been made from year to year, the last one expiring about the 10th of last July. In 1887 the exterior limits of the city of Omaha were extended so as to include said military reservation and fort. At the expiration of the contract last July, the complainant declined to enter into another, and insisted that it was entitled to the privileges of a citizen or inhabitant of the city of Omaha, and a supply of water from the water-works of the defendant at ordinance rates, and for all the buildings on the fort reservation to be considered as one consumer. The defendant declined to supply water under these terms, and was proceeding to take up its mains, when this bill was filed.

The facts are all agreed upon, and but two questions have been presented and argued. *First*. Has the government, in respect to this reservation, any rights under the ordinance of the city, or power to compel the defendant to supply it with water? The argument, briefly stated, is that this reservation, though within the exterior limits of the city of Omaha, is not a part of it, or even a part of the state of Nebraska, because jurisdiction has been ceded to the general government. The city has no power to enter on this reservation, open, grade, or improve streets, or exercise any municipal powers, or discharge any municipal duties within its limits; hence conversely, neither the government, as the owner of the ground, nor any of the persons dwelling upon the reservation as individuals, have any rights as against the municipality or under its ordinances. The cases of *Railroad Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. Rep. 995, and of *Railroad Co. v. McGlinn*, 114 U. S. 542, 5 Sup. Ct. Rep. 1005, and the cases cited in the opinion, are referred to as authorities upon this question. It may turn, partially at least, on the true intent and meaning of the contracts and ordinances heretofore referred to. Perhaps a fair construction would require the defendant to furnish water to all within the outer boundaries of the city, irrespective of the question whether any individual or property is within the territorial jurisdiction of the municipality. I shall not, however, decide that question, but pass to the other, the answer to which must be against the contention of the complainant, and fatal to this bill. As heretofore stated, the reservation or fort is a tract of many acres, upon which are situated many houses and other buildings. Now, it makes a very material difference whether all these houses and buildings are to be treated separately by reason of the separate occupancy, or as a unit by reason of the single proprietorship of the government. The average amount of water delivered to the reservation has been 20,000 gallons per day. The meter rates, as fixed by ordinance, are 100 to 500 gallons per day, 35 cents per 1,000 gallons; 4,000 gallons per day, 15 cents per 1,000 gallons. Now, if each building is to be treated as a separate consumer, the water would have to be paid for probably at the rate of 35 cents, whereas, if all are to be treated as simply one consumer, then 15 cents per 1,000 gallons would be the price. That under the ordinance the water company has a right

to treat each building as a separate consumer, seems to me very clear. Section 10 of the ordinance is the one that prescribes the rates. It reads as follows:

Any person, company, corporation, or association, or their assigns, who shall construct such water-works shall furnish water to citizens residing along the line of said mains, or contiguous to the same, at all times when any such water-works shall be maintained, at rates which shall not exceed the following tariff, to-wit:

TARIFF OF WATER-RATES.

Dwelling-houses, not exceeding five rooms, - - -	\$ 6 00 per annum	
Each additional room, - - - - -	75	"
Banks, including one wash basin, - - - - -	10 00	"
Bakeries, average daily use for each barrel of flour, - - -	3 50	"
Barber shops, one chair, - - - - -	5 00	"
Barber shops, each additional chair, - - - - -	2 50	"
Bath-house, public, per tub, - - - - -	\$7 00 to 15 00	"
Bath-rooms, private, per tub, - - - - -	3 50	"
Bath-rooms, each additional tub, - - - - -	2 00	"

Beyond these particular tariffs quoted are some 75 or 100 special tariffs, and then the section closes with these words:

Rents for all purposes not herein named will be fixed by meter measurements, as may be agreed upon between consumers and water company, not exceeding meter rates.

METER RATES.

100 to 500 gallons per day, at the rate of - - -	35 cts. per 1,000 gal.	
500 to 1,000 " " " - - -	30	" "
1,000 to 2,000 " " " - - -	25	" "
2,000 to 4,000 " " " - - -	20	" "
Over 4,000 " " " - - -	15	" "

Obviously the whole scope of this section is to give to the water company a right to treat each building separately. That, by the agreed statement of facts, has been their constant practice, and any other construction would work injustice to it. The very fact that all the special rates prescribed make no reference to ownership of buildings or property, shows that the question of ownership is immaterial, and that the rates depend upon the character of the property, and the probable extent of the use. Take the first two items: it is not to the owner of the dwelling-house not exceeding five rooms, but for the house itself, and for each additional room. The same principle should apply to a large property like the reservation, upon which are many buildings. The question is not who owns all this, but what is the character of the buildings, the number of them, and the uses to which they are put. And the meter rates are to be construed as merely a substitute for the special rates, giving the right to pay for the amount of water, rather than upon the character and size of the building. Suppose some one in the city owning a block of ground should put up 20 or 30 residences to rent; it would be a clear violation of the spirit of this ordinance to permit him to supply all these houses as though they constituted one property. Indeed, as nothing is said about contiguity, if ownership was the test, a

man having buildings, residences, stores, and factories scattered in different parts of the city might insist upon a supply to all at the lowest rate; or, as neither ownership nor contiguity is spoken of, why might he not contract for all the water from defendant, and subcontract it to various consumers in the city? I think there can be little doubt on this. The practice which has obtained ever since defendant's waterworks were established correctly interprets the ordinance, and expresses its true spirit and meaning; and that gives defendant the right to treat each building as a separate consumer, and charge either for the building or at meter rates accordingly. This being the true interpretation of the contract, it follows that complainant's case must fail, and a decree must go dismissing the bill.

GEORGIA INFIRMARY FOR THE RELIEF AND PROTECTION OF AGED AND
AFFLICTED NEGROES *v.* JONES *et al.*

CITY COUNCIL OF AUGUSTA *v.* SAME.

(Circuit Court, S. D. New York. February 22, 1889.)

WILLS—CONSTRUCTION—SPECIFIC LEGACY—ADEMPTION.

Testator, after expressly disposing of all the residue of his estate except certain cotton claims against the United States government, bequeathed a specified sum out of the proceeds of said claims to complainants, or so much as should remain after paying certain legacies to others. At that time his claims were pending before the court of claims, but before his death he collected them, and invested the proceeds in securities, realizing a sum sufficient to have satisfied the bequest to complainants. *Held*, that the legacies were specific, and were payable only in case the executors collected the funds from the source indicated, and that testator by collecting them caused an ademption of the legacies.

In Equity. Bills for legacies.

Bills respectively by the Georgia Infirmary for the Relief and Protection of Aged and Afflicted Negroes and the city council of Augusta, against Jones and another, administrators *c. t. a.* of Gazaway B. Lamar, for the payment of certain legacies given to complainant.

John W. Weed, for complainants.

Charles C. Beaman, for defendants.

WALLACE, J. These actions involve the rights of the complainants, respectively, to legacies of \$50,000, bequeathed to them for charitable objects by the will of Gazaway B. Lamar, deceased. The will was executed September 28, 1872, and at that time the testator owned real and personal property in possession, and had besides certain claims for a large amount against the government of the United States for cotton which had been seized and sold by its officers during the war of the Rebellion, which claims were then being prosecuted for collection. The will, by the first

clause, directs that all the debts of the testator be paid by the executors. By the second clause the executors are directed to divide into four equal parts "all the rest of my property of which I may die seised or possessed, (or which I may hereafter acquire,) excepting only my cotton claims upon the government of the United States." The will then provides, by clauses 3, 4, 5, and 6, for the distribution of the four parts by the executors of the property of the second clause, one to each of the four children of the testator, according to specified trusts and conditions. The seventh clause directs the executors "to press my claims upon the government of the United States for payment for cotton, which are now before the court of claims, or before the committee on claims of the congress of the United States," and enumerates the particulars of the several claims. By clauses 8 and 9 the will makes provision for the payment to certain persons of specified sums to which they are legally or equitably entitled from the proceeds of the cotton claims. The tenth clause directs the executors to divide the "amount collected" from the said cotton claims into four equal parts, if it be less than \$200,000, and distribute it to the four children of the testator pursuant to the provisions of clauses 3, 4, 5, and 6. The eleventh clause bequeaths to the present complainants, "next out of the residue of my cotton claims when collected, \$100,000, if so much may remain, and, if not, whatever balance may remain, to be divided equally," for the charitable objects particularly specified. Clauses 12, 13, and 14 bequeath certain other legacies out of the residue of the proceeds of the cotton claims. The fifteenth clause devises and bequeaths all the rest and residue of the testator's property, "real, personal, and mixed," to the four children of the testator. The testator died in October, 1874. The will was probated in New York city, the testator's place of domicile. After making the will, the testator collected from the government of the United States \$342,819 on account of his cotton claims, and invested the proceeds in various securities. The cotton claims not collected during his life-time are of inconsiderable value, and the executors have been unsuccessful in their efforts to collect them.

Applying the familiar rule that a will speaks as of the time of the death of the testator, and not as of the time of its date, the second clause of the present instrument could be interpreted to mean that all the property which might belong to the testator at the time of his death, excepting only such cotton claims as he should then have, is to be divided by the executors into four parts, to be distributed for the benefit of his children. Consequently, in the absence of any other language or provision in the will to limit or control the meaning of the clause, according to this canon of interpretation, the provision would require the executors to include in the property to be distributed to the testator's children all the property and assets belonging to him at the time of his death, excepting such only as might exist in the form of outstanding and uncollected demands against the government of the United States. This view would be fatal to the claims of the complainants; but it does not seem to be the reasonable one. It seems very plain that when by that clause the testator directed his executors to divide for the benefit of his children all the prop-

erty of which he might die possessed, excepting only his cotton claims against the government of the United States, he intended to exclude from the property thus to be divided the outstanding demands, which he particularly enumerated in clause 7 of the will. When he used the words, "my cotton claims," he referred to the uncollected debts, from which he thought enough might be realized to create a further fund of \$200,000 for his children, and \$100,000 for the complainants. These particular claims which he enumerated and described, and which he directed his executors to press and collect, were the property which he had in mind, and which he intended to except from the operation of the second clause. In this sense, the will speaks as of the time of its execution, and the seventh clause is to be read as a gift of the cotton claims belonging to the testator at that date for the benefit of the children and the complainants together. According to this interpretation, however, the legacies to the complainants are specific legacies, and the case falls within the rule that, where the subject of the bequest has ceased to exist before the testator's death, the legacy is adeemed. A specific legacy is one which is to be paid only out of a particular source or fund designated by the will. The extinction of the subject of a specific legacy, or such a change in its state as makes it another thing, annuls the bequest, for reasons paramount to considerations of intention. An example of the class, and an illustration of the rule, is found in the recent case of *Davis v. Crandall*, 101 N. Y. 311, 4 N. E. Rep. 721. The will in that case bequeathed to the legatee "the sum of \$243.92, a portion of the debt due me from James Davis, secured by his note." The court held that this was a specific legacy, and said: "If that note had been paid during the life-time of the testatrix, or otherwise canceled or destroyed, so that no obligation at her death rested upon James Davis to pay it, the legatee would have taken nothing." This authority is in harmony with many decisions to the effect that if the bequest be of the sum owing upon a security or obligation, or of a sum to be paid out of a designated and distinct part of the testator's property, the legacy is specific. *Sidebotham v. Watson*, 11 Hare, 170; *Chaworth v. Beech*, 4 Ves. 555; *Ford v. Fleming*, 1 Eq. Cas. Abr. 302; *Fryer v. Morris*, 9 Ves. 360; *Towle v. Swasey*, 106 Mass. 100. In *Gilbreath v. Winter*, 10 Ohio, 64, the bequest was: "All the amount of moneys and interest that may be recovered of and from K. for the sums due me on the purchase of the [described] estate, to her and to her assigns." The bequest was held to be a specific one, and the receipt of the money by the testator to be an ademption of it. Because of the hardship of the doctrine that a specific legacy is lost if the subject of it is disposed of by the testator, or is extinguished in his life-time, notwithstanding the will may denote unmistakably that the testator intended to treat the legatee as an object of his bounty, the courts incline to consider legacies as demonstrative, rather than specific, where the language of the will is reasonably capable of that construction. Accordingly, if the bequest, instead of being for a specified sum "due upon" a security or obligation, is for the sum "out of the proceeds," or "contained in" a security or obligation, it will be treated as a demonstrative legacy, to which the rule

of ademption does not apply. And whenever it can be inferred from the language of the will that the testator's intention was to give the legatee a specified sum, not necessarily out of a particular fund, although incidentally and primarily so, but irrespective of it, the gift will be construed as a demonstrative, instead of a specific, legacy. *Le Grice v. Finch*, 3 Mer. 50; *Giddings v. Seward*, 16 N. Y. 365; *Newton v. Stanley*, 28 N. Y. 61; *Clark v. Browne*, 2 Smale & G. 524. A case in which the distinction between a specific and a general legacy in the same will is taken upon these principles, is *Gillauwe v. Adderley*, 15 Ves. 384. In determining whether the legacy is specific or demonstrative the question always is whether it is a gift out of a specified fund or security, or a gift of a specified sum, with a specified fund as security. If it falls within the former class, the legacy fails when the fund or security ceases to exist in the testator's life-time. The law is well stated in *Walls v. Stewart*, 16 Pa. St. 281:

"The distinction seems to be this: If a legacy be given with reference to a particular fund only, as pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed, though the fund totally fails. But when the gift is of a fund itself, in whole or in part, or is so charged upon the object made subject to it as to show an intent to burden that object alone with its payment, it is specific."

Upon the authorities, it is entirely clear that the legacies to the complainants do not fall within the class of demonstrative legacies. They are legacies of \$50,000, payable exclusively out of the amount to be collected from the cotton claims by the executors; they are a gift out of a specified fund, and not otherwise. The will, in effect, gives the cotton claims to the executors, in trust to collect them, appropriate the proceeds to a distinct fund, and apply \$200,000 of the fund pursuant to the directions of clauses 3, 4, 5, and 6, and the residue, if any, to the complainants and other legatees. The bequest cannot take effect except as to the claims which were not collected before the testator's death, because there was such a change in the subject-matter as to annul the gift to the executors in trust. As to the collected claims, there was nothing in existence in respect to which the trusts imposed by the will upon the executors could attach. The case is directly met by the observations of Lord THURLOW in *Humphreys v. Humphreys*, 2 Cox, 185, that—

"The only rule to be adhered to is to see whether the subject of the specific bequest remained *in specie* at the time of the testator's death; for, if it did not, then there must be an end to the bequest; and the idea of discussing what were the particular motives and intention of the testator in each case in destroying the subject of the bequest would be productive of endless uncertainty and confusion."

So far as the authorities which are cited for the complainants declare that bequests by which the collections or proceeds, or the amount to be received from a particular claim or fund, are given to legatees, are not defeated when the proceeds are received by the testator in his life-time, and have been kept by him so as to be distinguishable from the rest of his estate, they are accorded to as undoubtedly correct. They proceed

upon the distinction between the gift of a debt *qua* debt, and the gift of a sum of money to arise when the debt shall have been recovered and ceased to exist as a debt. In a gift of the latter class it may be inferred that the testator contemplated the recovery of the debt in his own life-time, and intended to give, not the debt itself, but the amount to be received in respect of it. When the bequests are of this character, the fund received by the testator in his life-time may be followed through its transmutations, and reached, if capable of identification. The case of *Doughty v. Stillwell*, 1 Bradf. (Sur.) 300, is a departure from the doctrine of these authorities, and, so far as it sanctions the proposition that the ademption of a specific legacy caused by the act of the testator in extinguishing the subject may be nullified by extrinsic evidence of his motive or intentions, it is not approved. The bequests here are for the sums given to the complainants, respectively, in case the executors should realize the amount by collecting the cotton claims, and not otherwise. The testator, by collecting the claims himself, put it out of the power of the executors to comply with the provisions of the will, and to that extent his acts were equivalent to a revocation of the bequests. The bill is dismissed.

WHITE *et al.* v. RUKES.

(Circuit Court, D. Indiana. February 23, 1889.)

WILLS—CONSTRUCTION—DESCRIPTION OF DEVISEE.

Testator had many children, and devised real estate to several of them and their heirs, the will being unskillfully drawn. One devise of land was to "the heirs of H. [testator's son] by his paying \$600 out of the rents and profits yearly arising out of the place." H. was named as one of the executors. At testator's death H. had one child, born out of wedlock, but which he and his wife treated as their child, and another child *in ventre sa mere*, and born a few weeks later. Three other children were born to H. afterwards. Before the will was executed, H. took possession of the land, and occupied it with testator's consent, and continued to occupy it for 22 years after testator's death, when he sold it. *Held*, that the devise should be construed as if it read "to H. and his heirs."

At Law.

Action by Winfield S. White and Serelda White against Harrison J. Rukes to recover land. Trial by the court.

James A. Shackelford and William H. Dye, for complainants.

Harris & Calkins, for defendant.

GRESHAM, J. John A. White died testate November 1, 1858, leaving a widow, and sons and daughters, namely, Henry, Polly, Malinda, James, Alexander, Amelia, Rebecca, Esther, and William. The entire estate was disposed of by the will, which was written by an unskilled, if not an illiterate, person. After directing the payment of his debts and funeral expenses, and making money bequests to Polly, Malinda,

James, and Alexander, the testator devised to Amelia and her heirs, Malinda and her heirs, Rebecca and her heirs, Esther and her heirs, and William and his heirs, specific real estate. The devise to Esther was charged with the maintenance of her mother, and the devises to the other children were charged with the payment of specific sums to the executors, to enable them to pay bequests, and otherwise carry out the provisions of the will. The sixth item of the will reads: "Also to the heirs of Henry White, 93 acres of land," (describing it) "by his paying six hundred dollars out of the rents and profits yearly arising from the place, as my executors may deem proper." The testator designated William Adams and Henry White as executors of his will and guardian of his minor children. Winfield S. White, the eldest child of Henry White, was born two years before his parents were married, and their next child Serelda, was born in wedlock, a few weeks after the testator's death. Although Winfield S. was born out of wedlock, he was recognized by Henry and his wife as their child, and as such became a member of their household. Three other children were born unto Henry and his wife. Some time before the death of the testator,—just how long the evidence fails to show,—Henry went into possession of the land described in the sixth item of the will, and with the knowledge and consent of the testator occupied and cultivated it, and continued in possession until August 13, 1880, when he conveyed it to Harrison J. Rukes, by deed of general warranty, in consideration of \$2,300, which was paid by the grantee. Shortly after this conveyance Henry removed with his family to Missouri, where he died in 1881, and Winfield S. and Serelda, his two eldest children, then brought this action against Rukes to recover the land, claiming it as devisees under the item above quoted.

The plaintiffs insist that the words "heirs of Henry White" should be construed to mean "children of Henry White, born or begotten," thus excluding his three after-born children, and evincing an intention to disinherit Henry, notwithstanding the testator's confidence in him, manifested by making him one of the executors of the will, and, so far as the testator could, one of the guardians of the infant legatees and devisees. Wills are not so construed unless the language is clear and unambiguous. It cannot be doubted that the testator intended to devise the land to some one who should hold it "by his paying \$600 out of the rents and profits yearly arising from the place." The pronoun "his" refers not to "heirs," but to the last antecedent,—Henry White,—who had occupied the land with the consent of the testator for some time before the will was executed. It is unreasonable to suppose that the testator intended to devise the land to all or part of Henry's children in such a way that the devise was liable to be defeated for the non-payment of an annual charge, and require or expect Henry to make such payments out of the rents and profits of the land, (only 93 acres,) although nothing was given to him. It appears from a fair construction of the sixth item, in connection with the other provisions of the will, that the testator intended to devise the land to Henry, charged with the payment of \$600 a year, which, with the annual charges against the lands devised to the

other children, would enable the executors to satisfy the specific legacies. The person who was expected to occupy and cultivate the land and pay the annual charges was in the testator's mind as the devisee. If "children" is substituted for "heirs," it becomes necessary to go further and substitute "their" for "his." And if the testator intended to devise the land to Henry's children, and at the testator's death there had been no such children, the devise would have lapsed or failed for want of a devisee. By transposing the words "heirs of Henry White" so as to read "Henry White and his heirs," (thus conforming to the language employed in making the other devises,) the words of the testator are preserved, all obscurity disappears, and the scheme of the will is upheld. When from the circumstances under which a will is made, the state of the property disposed of, the relation of the legatees, devisees, and others to it, and the general scheme of the instrument, the intention of the testator is manifest, it will be carried out, even to the extent of supplying and transposing words. Finding and judgment for the defendant.

VAN BIBBER *et al.* v. WILLIAMSON *et al.* MORRIS *et al.* v. SAME. JONES *et al.* v. SAME. MCARTHUR *et al.* v. SAME. MCARTHUR v. SAME.

(Circuit Court, S. D. Ohio, W. D. March 1, 1889.)

1. EJECTMENT—OCCUPYING CLAIMANTS—ESTIMATE OF IMPROVEMENTS.

Under the Ohio occupying claimants' law, (2 Rev. St. 1886, c. 10, subd. 2,) which requires that the value of all "lasting and valuable improvements" made on the land shall be paid for in full, such value is not to be ascertained by what the improvements originally cost the claimant, but by the substantial benefit they confer upon the rightful owner, at the date of the commencement of the action.

2. SAME—IMPROVEMENTS BY LIFE-TENANT—LIABILITY OF REMAINDER-MEN.

Improvements made by the life tenant, or those holding under him, prior to his death, cannot be charged against the remainder-men, who, at the time the improvements were made, were minors, and in no position to interfere or complain.

On Exceptions to Report of Special Master.

King, Thompson & Maxwell, for plaintiffs.

R. A. Harrison, F. C. Goode, and A. H. Gillett, for defendants.

JACKSON, J. Consolidated causes pending on exceptions to the report of special master, filed herein January 2, 1889, upon the subject of lasting and valuable improvements, which defendants have placed upon the lands or several tracts recovered by plaintiffs.

Aside from certain clerical errors or mistakes in the commissioners' report, which counsel at the hearing agreed should be corrected, the exceptions taken by the several defendants to the report relate chiefly to alleged excessive charges of rent against them respectively, and the failure to allow them larger amounts for improvements. The plaintiffs' ex-

ceptions relate mainly to the allowance made defendants for clearing lands, for fencing, wells, draining or ditches, and fruit trees. These exceptions on the part of plaintiffs and defendants are too numerous to notice and comment upon in detail. After a careful examination of the report, in connection with the evidence taken before and submitted by the commissioners, the court is of the opinion, and so holds, that the exceptions filed by the several defendants are not well taken, and should be disallowed.

The allowances made defendants by the report for improvements, and plaintiffs' exceptions thereto, present questions of more difficulty. The court gave no special direction as to what improvements should be allowed for, or as to the time or mode of making the valuation thereof. In rendering its judgment the court held that the defendants in these actions at law were entitled to the benefits conferred by the law of Ohio upon occupying claimants, and, in conformity with the Ohio statutes on the subject,¹ directed "that a jury of twelve men be selected, as provided by law for the selection of juries, to try causes in this court, to whom shall be referred to ascertain and report to this court, upon all matters referable to a jury, under the occupying claimant's law of this state; rents, taxes, and assessments only excepted,"—said rents, taxes, and assessments having by consent of parties been specially referred to the clerk of this court for ascertainment and report. Instead of proceeding by jury to ascertain the character and value of the improvements to be allowed defendants respectively, the parties, by agreement, selected certain special commissioners to perform said functions. These specially selected commissioners, after making partition of the several tracts, as to which there is no complaint on either side, state, in reference to lasting and valuable improvements, that they have experienced much difficulty in arriving at satisfactory conclusions as to the character and quality of the improvements proper to be included in this estimate; that this difficulty arose from the absence of specific instructions on that subject in the decree "and the vague and somewhat contradictory nature of the decision of our state courts;" and that the difficulty as to the quality of the improvements grows out of the lapse of time since the date of bringing the suits, that date being fixed as the time at which the value of such improvements were to be estimated. The commissioners were certainly entitled to more definite instructions than were given by the court, and such as the court would have given the jury had one been selected as contemplated by the order directing the selection of a jury to pass upon the matters involved. It is hardly to be supposed that the occupying claimants' law of the state contemplated action and findings by a jury on the subject of improvements of a lasting and valuable character, according to their own ideas, without direction and instruction from the court. The commissioners have very properly, therefore, called attention to the difficulties under which they labored in making their investigations; and they could with propriety have called upon the court for

¹2 Rev. St. 1886, c. 10, subd. 2.

instructions on the matters referred to them, before proceeding without directions. Neither the report of the commissioners, nor the evidence produced before them, shows the value of the improvements made by defendants at the date plaintiffs commenced their actions herein, viz., April 18, 1879. The evidence and the report undertake to state simply what the improvements originally cost defendants. What additional or enhanced value those improvements gave to the land recovered by plaintiffs at the date of commencing those suits, nowhere appears. It is argued by counsel for defendants that certain Ohio decisions, to which the attention of the court is called, sustain the proposition that the occupying claimant is entitled to an allowance on the basis of what the improvements cost him, rather than the enhanced value such improvements have given to the property recovered by the rightful owner. But, as the court reads those Ohio cases, they hardly sustain that broad proposition. Other decisions of the same court announce the rule, that the occupant should be allowed for all improvements honestly made that are beneficial to the successful claimant. It may not be easy to reconcile those decisions, but the latter seem to us to state the correct principle, and give to the statute the correct meaning. The "lasting and valuable improvements" which the *bona fide* occupant has made in the honest belief of his ownership of the land, and for which he is to be compensated, manifestly refer to that class and description of improvements which give lasting enhancement to the value of the property, and which benefits and advantages the rightful owner will enjoy when he regains possession thereof. It seems to us, from a careful examination of the statute, and of the Ohio decisions upon the subject, that the occupying claimants' law aimed to embody and apply to actions at law for the recovery of real estate the equitable principle enforced by courts of equity in cases calling for its application, that the true owner seeking relief against a *bona fide* possessor, who in good faith has made lasting and valuable improvements beneficial to the estate, must do equity, which is fully done and met when the occupant is awarded compensation to the extent of the benefits which the real or rightful owner will receive from such improvements.

It does not appear from the report of the commissioners, or from the evidence introduced before them, that the lands set apart to plaintiff have been enhanced in value to any extent by the improvements for which allowance has been made defendants in the report; nor does it appear that plaintiffs have or will derive benefits or advantages equal to the amounts allowed defendants for such improvements. It does not, in fact, appear that defendants' improvements for which compensation is awarded will confer any benefit or advantage upon either plaintiffs or their lands. It is shown in one instance that plaintiffs are charged \$15 per acre for clearing land, the timber from which was sold by the occupant at about \$9 per acre. But aside from this, the rule of allowing the cost of such improvements, rather than the added value thereby given to the land in a way to benefit the rightful owner, is not sound in principle and is not, in our opinion, a proper construction of the Ohio occupying

claimants' law. It cannot be properly urged, as suggested by counsel for defendants, that the cost of improvements is *prima facie* evidence of the added value to the property on which the same are made. Besides, in the present case it does not appear when the improvements for which defendants claim and are allowed compensation were made. For aught that appears, they may have been made long before plaintiffs' right of action or right to actual possession of the land accrued, and the cost of making them would in no fair or just sense represent the substantial benefit conferred upon the owner, which, *ex æquo et bono*, should be the measure of his liability to make compensation.

The will of Gen. Duncan McArthur was duly probated, and all parties dealing with his children and the lands therein and thereby devised had constructive notice of its provisions in favor of the present plaintiffs, as held by the supreme court in *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. Rep. 652. The proceedings to set aside that will were a nullity as to plaintiffs, and in no way affected their rights, as held in the same case. Allen C. McArthur, the life-tenant of the lands in question devised in remainder to the plaintiffs or his children, departed this life on April 21, 1858. At the date of his death all his children entitled to the remainder-interest were minors. The youngest of these surviving children, Allen C. McArthur, reached his majority on March 4, 1875. Now, improvements made by the life-tenant, or those holding or claiming by, through, or under him, prior to his death, could not, upon well-settled principles, be charged against the remainder-men, who were minors, and in no position to interfere or complain. Nor does the Ohio occupying claimants' law cover or embrace such a case. It follows, as we think, that defendants must be confined to improvements of a lasting and valuable character which they or those under whom they claim have made upon those portions of the lands allotted to plaintiffs in the partition since March 4, 1858, when plaintiffs' right to possession and beneficial enjoyment accrued. By arrangement between the parties and the commissioners, no account has been taken of the improvements made on those portions of the lands which, under the partition, have been allotted and assigned to the several defendants respectively. It is not, therefore, necessary to refer to those improvements.

The question in respect to the improvements made upon the lands set apart and allotted to the plaintiffs under the partition (which is not excepted to, and should be confirmed) are two, viz.: *First*, what improvements of a permanent or lasting and valuable character have the several defendants, or those under whom they claim, made upon the several parcels of land allotted to plaintiffs since the 4th day of March, 1858; and, *secondly*, what enhanced value did such improvements give to that portion of the land in April, 1879? In other words, what benefit or advantage were such improvements to the rightful owners of the land on April 18, 1879? Plaintiffs' exceptions to the report are accordingly sustained; and in respect to the matters relating to said improvements, and covered by said exceptions, the report of the commissioners is set aside. In all other respects it is confirmed.

If the parties, with the material now before them, cannot adjust the questions relating to the character and value of the improvements to be allowed for as of the date April 18, 1879, in conformity with the foregoing principles and directions, those matters will be referred back to the commissioners, with directions to ascertain and report as soon as practicable the compensation to be allowed defendants according to the rule and upon the basis herein announced.

One of the counsel for defendants has in his brief called the attention of the court to the fact that John Rathburn, one of the original defendants, died before the trial of the case, intestate, leaving adult and minor heirs, who have not been made parties. This should be looked to and disposed of before judgment is finally entered on the reports.

The various motions of several defendants are disallowed. The costs incident to the exceptions will be taxed against the defendants, respectively. The costs connected with the partition will be equally divided between the plaintiffs and the several defendants between whom and the plaintiffs such partition has been made. The costs incident to the commissioners' report upon the accounts for rents and improvements will await the further order of the court, when the question as to such improvements has been finally settled. All of which is ordered and decreed.

STEINBACH v. MONTPELIER CARRIAGE Co.

(Circuit Court, D. Vermont. March 2, 1889.)

1. FACTORS AND BROKERS—COMMISSIONS.

The plaintiff agreed to obtain the orders of responsible parties for goods manufactured by the defendant, and, after a number of orders had been obtained, the defendant rendered an account of sales made, and agreed to pay plaintiff any commissions that might be due him on account of such sales, reserving no right to question the responsibility of those giving the orders. *Held*, that as there was no proof that the defendant had suffered any loss on account of a lack of such responsibility, the plaintiff was entitled to recover his commissions without showing such responsibility.

2. SAME.

But plaintiff was not entitled to recover commissions on his contract with defendant for orders sent by him but which were never received, although there were circumstances from which the defendant might have inferred that such orders had been sent; the latter not having agreed to notify the plaintiff of missing orders.

At Law.

Stephen C. Shurtleff, for plaintiff.

Hiram A. Huse, for defendant.

WHEELER, J. The defendant agreed to fill orders of responsible parties, obtained by the plaintiff, for goods to be made by the defendant, and to pay the plaintiff the difference between the prices at which they should be ordered above a schedule of prices at maturity of bills, and to

render an account of sales quarterly. On an account of sales rendered there was a column headed "Merchandise on Sale," which was footed at \$4,334.70. The defendant, by writing dated June 28, 1886, agreed to pay the plaintiff any commissions that might be due him on the amount marked as on sale in that statement in 90 days from the 1st of June. This amount has been found to be \$1,053.57, assuming, without proof on the part of the plaintiff, that the orders so marked were given by responsible parties. The only question made in respect to this item is whether the plaintiff is entitled to recover the amount of the item without that proof. The orders were before the parties to the agreement of June 28, 1886, when it was made. The defendant reserved no right to question the responsibility of those giving the orders. The maturity of the bills at 90 days from June 1st would determine the amount to be paid to the plaintiff, unless those to whom the goods were sent were not responsible. The time to determine whether the defendant would fill the orders or not was when the orders were received. If the orders were accepted, and the goods forwarded, the plaintiff would be entitled to his commissions, unless he warranted the responsibility of those giving the orders. If he did so warrant, which is not held or denied, he might be liable for any loss to the defendant occasioned by want of such responsibility, but not without proof of such loss by the defendant. As the case stood before the trier, without proof either way, the plaintiff would seem to be entitled to this commission. The plaintiff numbered his orders taken under this contract during one year extending from 1 to 586, for convenience in tracing them. Then he commenced at 1 again, and when he had got 48, transmitted them, but they did not reach the defendant. He forwarded others, numbered 49 and on. The defendant did not know that the 48 had been sent, and he did not know that they had not been received till after they could not be duplicated, and nothing more was done in that direction. The trier has found that the defendant was guilty of negligence of duty in not informing the plaintiff on receipt of order numbered 49 that none for preceding numbers had been received, and that the plaintiff lost commissions on account of that negligence. The plaintiff claims to recover the amount of the commissions so lost.

This is an action of *assumpsit* to recover the amount due the plaintiff on the contract. The question whether the plaintiff is entitled to recover this amount on these facts is the only one remaining in the case. The defendant did not agree to notify the plaintiff of orders not received; the getting of the orders to the defendant was what he was to be compensated for. When the defendant has satisfied the commissions on orders actually received, the contract will be fulfilled. No duty as to orders not received arose from the contract; and damage resulting from any duty arising from other circumstances is too remote to be recovered in an action on the contract. The referee has allowed the item of \$1,053.57, and disallowed this, which appears to be correct. Other items vary this amount. Judgment on report for plaintiff for amount named in report.

CALVERT v. UNITED STATES.

(District Court, D. South Carolina. February 26, 1889.)

UNITED STATES COMMISSIONERS—DOCKET FEES—ACT CONG. AUG. 4, 1886.

Act Cong. August 4, 1886, (24 St. at Large, 274,) making appropriations to supply deficiencies, which expressly declares that commissioners shall receive no docket fees, amends Rev. St. U. S. §§ 828, 847, authorizing such fees, and takes away the right to them.

At Law.

Action by Archibald B. Calvert against the United States for docket fees as United States Commissioner.

M. F. Ansel, for plaintiff.

H. A. De Saussure, Asst. U. S. Dist. Atty.

SIMONTON, J. The plaintiff is a commissioner of the circuit court in this district. He brings his action for docket fees as such commissioner for the period 1st August, 1886, to 2d January, 1888,—104 cases, at \$3 each, \$312. In all these cases issue was joined, and witnesses were examined. The docket was produced in evidence, and is carefully and accurately kept. The claim was duly presented, approved by the district attorney and by the court. It was disallowed by the first comptroller of the treasury. The answer in behalf of the United States sets up some purely formal objections, which are disregarded. If there be any weight in them, the objections can be cured by amendment. The real question raised in the answer is that, under the present law, commissioners cannot charge or be allowed docket fees. Section 847, Rev. St. gave to commissioners "for issuing any warrant or writ for any other service the same compensation as is allowed to clerks for like services." Section 828 gives to clerks "for making dockets and indexes, issuing *venire*, taxing costs, and all other services on the trial or argument of a cause where issue is joined, or testimony given, three dollars." This entitled the commissioner to docket fees. *U. S. v. Wallace*, 116 U. S. 398, 6 Sup. Ct. Rep. 408. This decision was filed 18th January, 1886. In the act making appropriations to supply deficiency in the appropriations for the fiscal year ending 30th June, 1886, and for prior years, and for other purposes, "approved August 4, 1886," we have this provision, (24 St. at Large, 274:)

"For fees of commissioners and justices of the peace acting as commissioners, \$50,000: provided that for issuing any warrant or writ, and for any other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees."

Is this amendatory of section 847, Rev. St.? Much argument has been made showing that it is not a repeal of that section, there being no repeal of the section in express words; and it is claimed, there being no such repugnancy, that the section and the clause in the statute cannot

be reconciled. It clearly does not repeal the section. Does it amend the section? Counsel for plaintiff contend that the act of 1886, being a deficiency act, is temporary in its character; that the proviso in question applies only to the appropriation mentioned; that, it being an appropriation act, no new legislation has place in it. It is true that, as a general rule, an appropriation act is temporary in its character; but congress has used such acts for permanent legislation. In the sundry civil act of March 3, 1883, (22 St. at Large, 631,) the sum of \$160,000 is appropriated for fees of clerks, with provisos—*First*, putting the clerk of the supreme court of the District of Columbia under the same regulations as to fees with clerks of the United States courts; *second*, changing the law with regard to fees and emoluments of the clerk of the supreme court of the United States, reducing his compensation greatly; *third*, repealing section 3, act 28th Feb. 1799, compensating the same clerk for his attendance in court; *fourth*, empowering the supreme court to prepare a table of fees. It is true that, when new legislation is introduced into an appropriation bill, it may be excluded upon a point of order; but this is a rule of order which can be suspended, disregarded, or waived; and if in either event the house consider the amendment, its passage is not repugnant to any provision of the constitution or of the statutes. Did congress intend to make this proviso apply to this appropriation only? There is nothing in the language of the proviso limiting its application. It would seem to have the same force and effect as the proviso in the act of 1883, quoted above. Besides this, we have instances of the language used by congress when its intention is to limit the effect of the proviso, in the sundry civil act of 1887, (24 St. at Large, 541:)

“For fees of United States commissioners, and justices of the peace acting as United States commissioners, \$50,000. And no part of any money appropriated by this act shall be used to pay any fees to any United States commissions, marshals, or clerks, for any warrant issued or arrest made, or other fees in prosecutions under the internal revenue law unless,” etc.

The difference is marked. I am of the opinion that this proviso in the act of 1886 amends the law, and takes from commissioners the right to charge docket fees. The court of claims in the case of *Faris v. U. S.*, 23 Ct. Cl. 374, (No. 15,588,) reached the same conclusion. The subject is discussed and exhausted in *Strong v. U. S.*, 34 Fed. Rep. 17. In that case the cases are compared, and the rule laid down which this court follows and adopts. Let the complaint be dismissed.

HEYWARD v. UNITED STATES.

(District Court, D. South Carolina. February 26, 1889.)

1. UNITED STATES COMMISSIONERS—FEES—ORDERS OF COMMITMENT AND DISCHARGE.

United States commissioners are entitled to fees for written orders of commitment and discharge of persons necessarily remaining in the custody of the commissioners over night.

2. SAME—RECOGNIZANCES—ACKNOWLEDGMENTS.

A commissioner is entitled to but one fee for each recognizance acknowledged before him, though each recognizance may be acknowledged by several.

3. SAME—TRANSCRIPT OF DOCKET.

A commissioner is entitled to a fee for a transcript of docket for the circuit court, made under the peremptory order of the court.

At Law.

Action by Julius H. Heyward against the United States for fees as commissioner.

John R. Bellinger, for plaintiff.

H. A. De Saussure, Asst. U. S. Dist. Atty.

SIMONTON, J. The plaintiff is a commissioner of the courts of the United States in this district. He brings his action on the following account, for the period between 1st January, 1887, and 31st March, 1888; making dockets in 33 cases in which issue was joined, and testimony taken, \$99; for making dockets in 5 cases in which no testimony was taken, \$10; for issuing 16 temporary commitments, \$20; for issuing 6 orders for discharge of defendants, \$1.50; for taking 24 acknowledgments, \$6; for transcript of docket for November term, 1887, of circuit court, 20 folios, \$3. The docket has been exhibited in evidence, carefully and accurately kept. The commitments of persons whose examination extended beyond one day have been proved. So, also, with the orders of discharge. The item for acknowledgments is made up of charges for the acknowledgment of recognizances by parties, one charge being made for each name signed to the recognizance, and not for each recognizance. The transcript of the docket was made and sent up under an order of the circuit court passed December 8, 1881, in accordance with the request of the attorney general, and precisely in the words requested. The charge for docket fees must be disallowed for the reasons given in *Calvert v. U. S.*, ante, 762, (just filed.) The charge for temporary commitments is allowed because the commitments are deemed necessary. When the deputy-marshal, under warrant, arrests a person, and brings him before a commissioner, the exigency of the warrant is fulfilled. Thenceforward the person is in the custody and at the disposal of the commissioner. If his examination is not completed in one day, and stands over, the commissioner, for his own protection, as well as in the interest of the law, must commit him. He has no place of his own, or, rather, he cannot be required to have a place of his own, in which to imprison persons. Hence, if he is within reach of the jail, he can

commit him to the care of the jailer. This should be done in writing. The protection of the liberty of the citizen, the safety of the jailer, the accuracy of his claim on the government, all require that no person should be imprisoned except upon an order distinctly stating when, by whom, and for what, he is imprisoned. So with the discharge of a person. How can a jailer safely discharge him without an order in writing? How can a jailer properly present his claim to the government unless he can produce a voucher showing when the custody ended, as well as when it began? How can a person in custody force his discharge, if he cannot establish by indisputable evidence that he has been discharged? If the evidence remain in parol, or *in pais*, the death, removal, or silence of the commissioner may imprison him indefinitely. These items for commitments and discharges are allowed.

The items for acknowledgments are proved thus: Recognizances were taken by the commissioner, and acknowledged before him. This acknowledgment is not a mere form, nor is it simply another mode of witnessing. It has been held that the acknowledgment and signature of the commissioner makes the recognizance binding, even if the parties do not sign it. *U. S. v. Pickett*, 1 Bond, 123. The recognizance must be acknowledged before the commissioner, and is binding because so acknowledged. This gives this form of obligation its distinctive character. A recognizance is more than an ordinary bond. It can be estreated and enforced as a judgment; and its name, "recognizance," that is to say, "acknowledgment," shows the importance of the acknowledgment before the commissioner. But this recognizance, though the recognizance be signed by several, is but one act. The parties acknowledge before the commissioner that they are bound, and his signature completes the act. *U. S. v. Pickett, supra*. But one fee can be charged for the acknowledgment on each recognizance.

The transcript of the docket for the circuit court was made under the peremptory order of the court. The charge for this is allowed. Let a decree be entered in accordance with this opinion.

THORNLEY v. UNITED STATES.

(District Court, D. South Carolina. February 25, 1889.)

UNITED STATES COMMISSIONERS—DOCKET FEES—PRIOR TO ACT CONG. AUG. 4, 1886.

United States commissioners are entitled to docket fees earned before the passage of act Cong. Aug. 4, 1886, which amended Rev. St. U. S. §§ 828, 847, and took away the right to such fees, allowed by the latter statute.

At Law.

Action by John L. Thornley against the United States for fees as commissioner.

Julius H. Heyward, for plaintiff.
H. A. De Saussure, Asst. U. S. Dist. Atty.

SIMONTON, J. The plaintiff is a commissioner of the courts of the United States in this district. He brings his action for docket fees for the period beginning 12th March, 1886, and ending 23d June, 1888; in all, \$517. Upon his account it appears that between 12th March, 1886, and 1st August, 1886, he charged 19 docket fees, to-wit 16 at \$3, \$48; and 3 at \$1, \$3; in all, \$51. He presented in his accounts forwarded to the department claim for these last-mentioned docket fees in due form. The department disallowed all docket fees anterior to July 1, 1886, and allowed all docket fees charged between July 1, 1886, and August 4, 1886. The amount thus disallowed is \$39. The other items of docket fees were never included in his accounts, and the claim has never been made upon or disallowed by the department, and has never been, until now, presented to the court.

In the case of *Calvert v. U. S.*, ante, 762, (decided this day,) it has been held that the provision inserted in the deficiency act of August 4, 1886, depriving commissioners of docket fees, was not a condition annexed to the special provision then made, and was not confined to that act; but that it was permanent in its character, and operated as an amendment to section 847, Rev. St. U. S. If this is so, the section remained the law until thus amended, and commissioners are entitled to the fees provided in it. When the amendment was passed, this plaintiff had performed certain services anterior to its passage, payment of which the section provides for, and has earned his money. The government then owed it to him. Let him have a decree for \$39. The rest of the account comes within the ruling in *Calvert's Case*, and must be disallowed. Since August 4, 1886, commissioners have lost the right to docket fees. It is unnecessary to decide whether a suit can be maintained in this court on a claim not passed upon by the treasury department.

SWAIN v. BOYLSTON INS. CO.¹

(Circuit Court, E. D. New York. February 12, 1889.)

PLEADING—AMENDMENT OF ANSWER—NEW DEFENSE—MATERIALITY.

In an action on a policy of marine insurance, on application to amend the answer by the insertion of a clause in the application for insurance warranting the vessel to be commanded by a certified captain, *held*, that if the clause operated as an inducement to the defendant to accept the risk, defendant was at liberty to avail himself of such defense under an amendment made since the trial. If the statement was one not material to the risk, defendant should not now be allowed to set it up as a bar in a case where his amendment as to representation gave him opportunity to prove in defense whatever fact he selected for a defense when he made his contract. Hence the motion was denied.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

At Law.

On motion for reargument of a motion to amend the answer by setting up as a defense a clause in the application for insurance that the vessel on which the policy sued on was issued was to be commanded by a certified captain.

Wing, Shoudy & Putnam, for plaintiff.

Lester W. Clark, for defendant.

LACOMBE, J. 1. Upon the trial it was held that the clause in the application for insurance on the *Altavelia* could not be considered a warranty because it was not carried into the policy. The defendant's contention then was (and still is) that, the policy being an open one, not in fact completed as to the *Altavelia* until the application for that particular vessel was put in, the application is to be considered a part of the policy or contract of obligation between the parties. If the contention of the defendant is sound, it will avail him under his original answer, which contains a denial that the plaintiff has duly fulfilled all the conditions of the policy.

2. If the clause warranting the *Altavelia* to be commanded by a certified captain, which is contained in the application for insurance on that vessel, operated as an inducement to accept the risk, the fact warranted being deemed by the insurer material to the risk, the defendant should in all fairness be allowed to avail of such a defense. But he is at liberty to do so now, under the amendment made since the trial.

3. If the statement as to the certificate of the captain was one not material to the risk, and of no effect as an inducement to the insurer to accept the plaintiff's offer,—in other words, if it is an after-thought,—then the defendant should not now be allowed to set it up as a flat bar in a case where his amendment as to representation gives him every opportunity to prove in defense whatever fact he selected for a defense when he made his contract.

CARRINGTON v. POTTER *et al.*

(Circuit Court, E. D. Missouri, E. D. February 16, 1889.)

1. EVIDENCE—DOCUMENTARY—PUBLIC RECORDS.

In the absence of statute authorizing entries in a book termed the "Record of the Register of Swamp Lands," relating to the disposition of such lands belonging to a county, certified copies of such entries are not admissible in evidence as public records.

2. SAME—DEED—SEAL.

A certified copy of a deed is admissible, though it shows no seal opposite the grantor's signature, when the attestation clause recites that the deed was executed "under the hand and seal" of the grantor. Following *McCoy v. Cassidy*, 9 S. W. Rep. 926.

3. PUBLIC LANDS—SWAMP LANDS—CONVEYANCE BY DEED OF COMMISSIONER.

Under Sess. Laws Mo. 1868, p. 67, declaring that deeds for county swamp lands, theretofore executed by commissioners, should be "deemed and held to

be valid and legal," and vest in the purchasers "all right, title, and interest of the counties in such lands, as fully as if * * * patents or deeds had been granted by the governor," who was the proper officer to execute deeds for such lands, such commissioner's deeds are, equally with a patent, *prima facie* evidence of a prior purchase in conformity with law, and a payment of the purchase price at the established rate.

At Law.

Ejectment by Charles S. Carrington against James M. Potter *et al.*

W. H. Clopton, for plaintiff.

Johnson & Lentz, for defendants.

THAYER, J. This is an ejectment suit involving the title to 320 acres of land in Butler county, Mo. The county is the common source of title, the lands in question being a part of those originally ceded to the county by the state as swamp lands, under the acts of March 3, 1851, and February 23, 1853. Sess. Laws Mo. 1851, p. 238; Sess. Laws Mo. 1853, p. 108. Plaintiff derives title under a deed executed by Daniel L. Jennings on October 4, 1858, as commissioner of Butler county, appointed to make conveyances to purchasers of such swamp lands as had been fully paid for. Defendants are in possession under a patent for the same lands granted by the county to J. M. Potter on March 9, 1887.

The opinion which I have formed on the various questions discussed by counsel may be stated as follows: The objection made by defendants' attorney to the admission of the certified copies of the entries said to be contained in a book now in the custody of the clerk of the county court of Butler county, Mo., and variously termed the "Record of the Register of Swamp Lands," and the "Recorder's Register of Swamp Lands of Butler County, Missouri," in my judgment, is well taken. So far as was shown, there was no law in force at the time the entries in question purport to have been made, requiring either the register or receiver to make such entries, or to keep any such book as that from which the entries are said to have been copied. The book is not a public record, and copies of entries therein, certified by the clerk aforesaid, are not admissible in evidence. If the entries in question are admissible on any other ground,—for instance, as *memoranda* made in the course of the discharge of official duty,—the requisite proof was not made to authorize their admission on that ground. The certified copies of the entries aforesaid are accordingly rejected.

The objection made to the introduction of the deed of Daniel L. Jennings, as commissioner, to Mary Tanner, on the ground that it was not executed under seal, is fully met and overcome by a late decision of the supreme court of this state, not as yet reported in the published volumes of decisions, to-wit, *McCoy v. Cassidy*, 9 S. W. Rep. 926. The case holds that, even though a certified copy of a deed offered in evidence shows no seal or scrawl opposite the grantor's signature, yet, if in the attestation clause the deed purports to be "signed and sealed" by the grantor, a presumption arises that the original deed was duly sealed as the law requires. The case of *Hamilton v. Boggess*, 63 Mo. 233, is thereby expressly overruled. The certified copy of the Jennings deed that was offered (the

original not having been produced) in the attestation clause recites that it was executed "under the hand and seal [of the grantor] as commissioner aforesaid." Under the authority cited, that recital raises the presumption that the original was duly sealed.

It is no doubt true, as claimed by defendants' counsel, that the county court of Butler county had no authority to appoint a commissioner to make conveyances of its swamp lands. The act of March 3, 1851, *supra*, made it the duty of the governor to issue patents for such lands, when paid for. That point is expressly decided in *Sturgeon v. Hampton*, 88 Mo. 212, and is clearly intimated in previous cases, to-wit, *Barton Co. v. Walser*, 47 Mo. 194; *Wilcox v. Osborn*, 77 Mo. 627. In actions of this character the decisions of the highest court in the state, on points of the kind last mentioned, are controlling authority in the federal courts. Therefore it must be regarded as settled that the Jennings' deed, standing by itself, conveyed no title to the lands in controversy.

But it was because many such invalid deeds had been made throughout the state, by reason of a false construction of the various acts relating to swamp lands, that the curative act of March 26, 1868, was passed. Sess. Laws Mo. 1868, p. 67. It has been heretofore held, in effect, that the main purpose of the act of 1868 was to validate swamp-land deeds that had been theretofore executed by commissioners appointed for that purpose. *Sturgeon v. Hampton, supra*; *Barton Co. v. Walser, supra*; *Wilcox v. Osborn, supra*. The act of 1868 in broad terms declared that such commissioners' deeds "shall be deemed and held to be valid and legal, * * * and shall vest in the purchaser of any such lands all right, title, or interest of counties in said lands, as fully as if said patents or deeds had been granted by the governor of the state," whose duty it was, under the act of March 3, 1851, to grant patents for swamp lands when sold by the various counties. It is insisted, however, by defendants' counsel, that the act of March 26, 1868, did not validate the Jennings deed, for the reason that there is no proof that the grantee in that deed ever paid Butler county for the lands conveyed to her. It is furthermore urged that, even if there is some proof of payment, it is not shown that the grantee paid the price therefor established by law, and that it does not appear that the sale of the lands in question was conducted in conformity with law. The exceptions so taken to the deed clearly assume that it was plaintiff's duty, before offering the commissioner's deed, to show that the sale was regularly conducted; that the purchase price was paid in full, according to the rate established by law for the sale of swamp lands; and that, until such proof was furnished, the commissioner's deed was not brought within the operation of the act of 1868. This, in my judgment, is a false assumption as to the burden of proof in this class of cases. Certainly the plaintiff would not have been required to make such proof if he had produced a patent for the lands granted by the governor. A patent granted by the governor would have been *prima facie* sufficient to divest the title of the county, without proof of an antecedent purchase, payment, etc. Now, the act of 1868 in terms gives to a commissioner's deed the force and effect of a patent issued by the gov-

error, when it is shown to relate to swamp lands. That was the purpose of the act,—to validate such deeds by giving them the force and effect of patents; and the act is not void on account of its retrospective character, as was held in *Barton Co. v. Walser*, *supra*. The stipulation offered in the present case admitted that the lands in controversy were swamp lands, and that they had been patented to the state by the general government, and that the state had furnished lists and plats thereof to the county. Plaintiff proved that Daniel L. Jennings, on May 15, 1858, had been duly appointed commissioner of Butler county, to make conveyances in the name of the county to purchasers of swamp lands. The commissioner's deed, reciting full payment for the lands, was then read. This proof, with the aid of the act of 1868, made out a *prima facie* case. It placed the plaintiff in the same attitude he would have occupied if he had produced and offered a patent signed by the governor. It is very true that in the case of *Barton Co. v. Walser* it was held that if there was any fraud or other infirmity attending a sale of swamp lands, which would render the sale void, such fact might be shown to defeat a commissioner's deed, notwithstanding the curative act of 1868. In the case of *Sturgeon v. Hampton*, 88 Mo. 215, *supra*, it was also held to be the purpose of the act of 1868 to make valid, deeds executed by officers who had no authority to make deeds. It was further said that the act was not intended to validate sales made in violation of law, or to make valid a void sale, or to make valid a deed, when the purchaser was not entitled to one. But when a commissioner's deed is produced, and the officer's authority from the county to make deeds of its class is established, and the lands are shown to be swamp lands, as in the present case, upon whom rests the burden of showing that the sale was void for violation of law, and that the purchaser was not in fact entitled to a deed, although the county, acting by its commissioner, has elected to execute one? Manifestly the person who alleges facts calculated to impeach the conveyance, and take it out of the operation of the act, ought to prove the facts so alleged. The construction which defendants' attorneys apparently place on the act of 1868, in effect adds a proviso thereto that commissioners' deeds shall only be deemed valid in the event that the grantee therein, or those claiming under him, first prove that they made purchases in strict conformity with law, and have paid the purchase price in full, at the established rate. The act itself contains no such proviso, and was obviously intended to cast the burden of proving such facts on those who contested the validity of such deeds. When the plaintiff made proof of Jennings' authority as aforesaid, and offered the commissioner's deed and other derivative deeds, which are not assailed, he made out a *prima facie* case. Defendants, on their part, introduced no testimony to impeach the Jennings deed. The only evidence having such a tendency was contained in the certified copies of the entries above mentioned, which must be rejected, on defendants' motion, for the reason before given.

The proof respecting the damage done to the land by the removal of timber thereon by the defendants, is not very satisfactory, and there is

no evidence as to the rental value. I assess the damages at the sum of \$500, and the value of the rentals at a nominal sum, to-wit, \$1 per month. Judgment will be entered against all of the defendants for possession of the premises, and against Potter for the damages, as he appears to be the one who was instrumental in selling the timber.

SHAMPEAU v. CONNECTICUT RIVER LUMBER CO.

(Circuit Court, D. Vermont. March 18, 1889.)

1. WRITS—SERVICE OF PROCESS—PLEAS IN ABATEMENT.

A plea in abatement in an action commenced in the state court against a foreign corporation showed that the writ was not properly served as a writ of summons, but the writ and return showed that the writ issued and was served as a writ of attachment. *Held* that, as the plea did not deny that the person with whom the copy was left was defendant's known agent or attorney, or that it was left with him at the place of attachment, it was bad, such service being authorized by the state laws, (R. L. Vt. § 881.)

2. SAME—ATTACHMENT—SUFFICIENCY.

Such service is sufficient to hold the property, though not to support a personal judgment, and a motion to dismiss should be denied.

At Law. On demurrer to plea in abatement and motion to dismiss.

Action by William Shampeau against the Connecticut River Lumber Company.

E. W. Smith, for plaintiff.

H. C. Ide, for defendant.

WHEELER, J. This cause was brought in the state court, where the defendant pleaded in abatement, and moved to dismiss for defective service, and then removed it to this court, being a foreign corporation. The plea alleges that the writ was served by leaving an attested copy thereof and of the return thereon "with one Edward W. Lawler;" and that Lawler was not a clerk or other officer, or a stockholder, of the defendant; and that there was no other service or acceptance or waiver of service. The plaintiff has demurred to the plea, and hearing has been had on the plea and motion.

The plea well shows that the writ was not served in any lawful manner as a writ of summons. But the writ and return thereon are referred to in the plea, and show that the writ issued and was served as a writ of attachment. The defendant was not and could not be an inhabitant of the state. *Hall v. Railroad Co.*, 28 Vt. 401; *Filli v. Railroad Co.*, 37 Fed. Rep. 65. In such case the writ could be served by leaving a copy with the defendant's known agent or attorney, and for want thereof at the place where the goods or chattels were attached. R. L. Vt. § 881. The plea does not allege that Lawler was not such agent or attorney, nor that the copy was not left with him at the place of attachment. When a cause is removed from a state court to this court it is to proceed as if

brought here by original process, and the pleadings are to have the same force and effect for every purpose as they would have had by the laws and practice of the state court, if the cause had remained there. Rev. St. U. S. § 639. By the laws of the state court a plea in abatement for defective service which does not negate every manner of lawful service is bad on demurrer. *Smith v. Chase*, 39 Vt. 89. This plea must therefore be adjudged insufficient here.

The motion to dismiss is to be determined upon what appears on the face of the record. *Bliss v. Smith*, 42 Vt. 198. The attachment was good to hold the property, although not sufficient to found a personal judgment upon. R. L. §§ 1404, 1405; *Price v. Hickok*, 39 Vt. 292; *Pennoyer v. Neff*, 95 U. S. 714. If the motion should be granted, and the proceedings wholly dismissed, that right would be cut off. The defendant has notice of the suit, sufficient to found such a judgment upon at least. The plaintiff insists that the defendant could not remove the cause without becoming a party for all purposes, but that need not now be determined. The motion must be overruled, whether that is so or not. Demurrer sustained, and plea in abatement adjudged insufficient, and motion to dismiss overruled.

PREBLE v. BATES et al.

(Circuit Court, D. Massachusetts. March 5, 1889.)

1. NEW TRIAL—TIME OF FILING—ADDITIONAL GROUNDS.

When a motion for a new trial is filed within the two days after verdict, as required by a rule of court, and before its decision another motion is filed on the ground of evidence discovered after the expiration of the two days, the latter will be construed as an amendment or addition to the former motion, and both grounds will be considered.

2. SAME—WAIVER OF MOTION—TENDER OF BILL OF EXCEPTIONS.

Pending a motion for a new trial, if a party tender a bill of exceptions he will be required to elect whether he will waive his motion so far as it is based on questions of law that might be embodied in a bill of exceptions, but the presenting of a bill of exceptions does not itself constitute a waiver of the motion.

At Law. On motion to dismiss motions for new trial.

B. F. Butler and *L. C. Southard*, for plaintiff.

Samuel Hoar, for defendant.

COLT, J. The defendants in this case filed a motion for a new trial within two days after verdict against them under law rule 26. At a subsequent date they filed another motion for a new trial, asking that the verdict be set aside on the additional ground of newly-discovered evidence. The plaintiff now moves to dismiss these motions, on the ground that the first motion was waived by the filing of the subsequent motion, and that the subsequent motion is irregular, because not

filed within the time allowed under the rule. I think the defendants preserved their rights under the rule by filing a motion within the two days allowed, and that the second motion, so called, should be construed to be in amendment of, or in addition to, the first motion, rather than a distinct motion for a new trial. It would be going too far, perhaps, to say that a party must set out within the limited time specified by the rule all the grounds upon which he bases his motion. He may not with the utmost diligence be able to discover within two days every ground he can fairly take. For example, in this case, as I understand it, the alleged newly-discovered evidence did not come to the knowledge of defendants' counsel until some days after the expiration of the time allowed by the rule. The rule should receive a reasonable construction; and provided a party has filed his motion for a new trial within the two days, setting out his reasons in the light of the knowledge he then possesses, he should not be deprived of the right of bringing forward additional grounds, which he could not have known at the time, because the facts were not within his knowledge. I do not think, therefore, that either of the defendants' motions should be dismissed, but that they should be allowed to stand as one motion. The plaintiff also moves that the bill of exceptions to be tendered by the defendants be not signed, on the ground that the filing of the motion for a new trial constitutes a waiver of their bill of exceptions. I do not understand that the mere filing of a motion for a new trial is a waiver of the right to a bill of exceptions. The most that can be said is, under the decision of Judge STORY, in *Cunningham v. Bell*, 5 Mason, 173, that the court will require the party to elect whether he will proceed to a hearing on his motion, or, waiving that, proceed upon his writ of error to the supreme court. The scope of Judge STORY's decision is this: that where a party means to apply to the appellate court for a final decision of the law of the case, he should do so without delay, and that he should not be permitted to argue the same questions before the lower court. This seems to be most convenient for the due administration of justice. But I think this rule should be subject to this qualification: that while a party has no right to bring forward in a motion for a new trial any legal question which could properly be embodied in a bill of exceptions, he should not be deprived of the right of presenting to the court in the form of a motion for a new trial questions which cannot properly be made a part of a bill of exceptions; such as that the verdict is against the weight of evidence, or that the party is entitled to a new trial on the ground of the discovery of new evidence. To hold otherwise would be to deprive a defeated party of taking advantage of all of his legal remedies. Where a verdict is given against the weight of evidence, or where new evidence has been discovered, the remedy of a party is by motion for a new trial. He has no remedy in a court of error. Such a motion is addressed largely to the discretion of the court, and its decision is not reviewable by the appellate court. *Mulhall v. Keenan*, 18 Wall. 342; *City v. Babcock*, 3 Wall. 240. The supreme court have held that in the absence of a rule to the contrary a motion for a new trial was not a waiver of a writ

of error. *U. S. v. Dashiell*, 4 Wall. 182; *U. S. v. Hodge*, 6 How. 279. In this circuit there is no rule of court on this subject. The plaintiff relies upon the language of Judge STORY in *Cunningham v. Bell*, but I do not think that language should receive the broad interpretation contended for. In *Stave Co. v. Manufacturing Co.*, 32 Fed. Rep. 822, the facts were quite different. In that case the court found an express waiver of the exceptions. I am of opinion that under the law of this circuit a party should not be allowed to be heard on a motion for a new trial embracing the same questions of law which are embodied, or could properly be embodied, in his bill of exceptions, and that under these circumstances the motion for a new trial will not be heard, unless he consents to waive his exceptions. At the same time I think a party should be heard, on a motion for a new trial which is confined to such questions as could not be properly embraced in his bill of exceptions without waiving his right to a writ of error. In the present case, I shall allow the defendants to be heard on their motion for a new trial, if limited to questions which could not properly be raised in their bill of exceptions. The plaintiff's motions in this case are overruled, and the defendants may have leave to amend their motion for a new trial.

In re BRACMADFAIR et al.

(Circuit Court, S. D. New York. February 23, 1889.)

IMMIGRATION—ACT AUG. 3, 1882—DETENTION AND RETURN—HABEAS CORPUS.

Under section 2 of the act of August 3, 1882, (22 St. at Large, 214,) immigrants cannot be detained or sent back except upon an adverse report made to the collector by the commissioners themselves, or by some person by them authorized, after an examination and a finding that the persons are within some of the prohibited classes. The report made by the secretary of the board upon the action of a subordinate not authorized to act finally in the matter, and without further authority from the commissioners, or either of them, is insufficient; and upon *habeas corpus*, the above facts appearing, and on subsequent examination by one of the commissioners the immigrants being found not within either of the prohibited classes, they were ordered to be discharged, and allowed to land.

Writ of Habeas Corpus for the Release of Detained Immigrants.

On the 21st of February, 1889, 21 Armenian immigrants arrived at this port by the Netherlands steamer *Leerdam*. On the following day the secretary of the commissioners of emigration sent a letter to the collector, stating that he was directed by the commissioners to report these immigrants, naming them, as persons "liable to become a public charge." The collector thereupon directed that the immigrants be not allowed to land, but returned by the *Leerdam*, which was intending to sail on her return voyage on the 23d or 24th. The immigrants were detained in the mean time at Castle Garden under the regulations of the secretary of the treasury, which provide that their custody there shall not be deemed a landing from the ship.

On the 23d a writ of *habeas corpus* was issued, returnable forthwith, upon a petition setting forth that the report had been made without any examination of these immigrants by any of the commissioners, and without authority. The writ was addressed to the collector, and to the commissioners of emigration. The return of the collector set forth a report from the commissioners stating that the persons were "liable to become a public charge," and that they were accordingly held for return, and landing refused. The return of Commissioner Stephenson, on whom the writ was also served, stated that the report had been made without authority of the commissioners, and without examination of the immigrants by any of the commissioners. A traverse was filed to the return of the collector, substantially to the same effect.

Charles Steckler, for petitioners.

S. A. Walker, U. S. Dist. Atty., and *W. W. Smith*, Asst. Dist. Atty., for the collector.

BROWN, J., (*after stating the facts as above.*) Section 2 of the act of August 3, 1882, (22 St. at Large, 214,) under which these immigrants are detained, provides that "it shall be the duty of such state commission, board, or officers so designated, to examine into the condition of passengers arriving at the ports within such state in any ship or vessel; and for that purpose all or any of such commissioners or officers, or such other person or persons as they shall appoint, shall be authorized to go on board of and through any such ship or vessel; and if, on such examination, there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of such port, and such persons shall not be permitted to land." The report to the collector, made in this case by the secretary of the board, purported to be the act of the board. It was regular upon its face. Properly it should have stated that the persons were "unable to take care of themselves without becoming a public charge," and not merely that they were "liable to become a public charge." But, waiving this irregularity of form, which, however, I do not mean to say is immaterial, the report was otherwise presumptively sufficient to require the collector to detain these immigrants and not permit them to land.

The secretary of the board and Commissioner Stephenson were both sworn as witnesses upon the issue raised by the traverse to the collector's return; and from their testimony it appears that one of the subordinate employes who examined the passengers by the *Leerdam* returned a list of these persons, with certain brief affidavits, with his oral report to the secretary, that he thought these persons ought not to be admitted, and that the secretary's report in writing to the collector was based upon this subordinate's report only; that the secretary had never been authorized by the board to make adverse reports to the collector until such affidavits taken by the subordinate, with his recommendation thereon, had been first submitted to, and examined and approved by, one of the commissioners; and that in the present case no such examination had been pre-

viciously made by any of the commissioners, or any authority to report to the collector given. It further appears that Commissioner Stephenson, after the report had been made, did examine carefully into the condition of these 21 persons; that he found them to be able-bodied, healthy, intelligent, and much above the average of immigrants ordinarily allowed to land; nearly all with friends in this city; some with considerable means; a few with only a little money in their pockets, but with baggage containing articles designed for trade; and all of them entitled, upon admission, to the further sum of \$10 each, which was in the hands of the steam-ship company, being a prepayment of their return passage in case they should be refused a landing; and that, in his judgment, they were able to take care of themselves without becoming a public charge.

Upon this testimony it is plain that the intention of the statute had not been complied with at the time the report was made to the collector, and that the report was made by the secretary without authority. The question whether immigrants should be allowed to land, or be sent back, is one that cannot be allowed to be determined except under the responsibility which the statute imposes. It must be either by the board of commissioners, or by some one of them, or by some person whom the board of commissioners has authorized to pass finally upon the question. It is sometimes a matter of no small difficulty to adjust the claims of humanity and justice to the faithful enforcement of the law, and to determine justly whether particular persons come within the prohibited classes. The commissioners, as appears from the evidence, have never devolved upon any subordinate the right to determine this question, or whether an adverse report shall be made to the collector. The report in this case must therefore be treated as a nullity; and as a sufficient examination appears to have been made by one of the commissioners to show that the persons ought not to be detained, and no further examination appearing to be needed or desired, they should be discharged, and allowed to land. *In re Cummings*, 32 Fed. Rep. 75; *In re O'Sullivan*, 31 Fed. Rep. 447.

ZUCKER & LEVETT CHEMICAL Co. v. MAGONE, Collector.

(*Circuit Court, S. D. New York. January 31, 1889.*)

1. CUSTOMS DUTIES—CONSTRUCTION OF LAWS.

Where two provisions of the tariff act apply to an imported article, the first of which provisions is qualified by the phrase, "not otherwise provided for," while the second contains no such qualifying phrase, the article is properly dutiable under the second provision, and must be held to be therein "otherwise provided for," so as to take it out of the operation of the first provision.

2. SAME—ARTICLES OF VARIOUS USES.

When an imported article is a "painters' color," and also a "polishing powder," it is not necessary to show that its predominant use is as a polishing powder, in order to make it dutiable as such. It is sufficient if its use for that purpose is a substantial use.

3. SAME—OXIDES OF IRON.

Oxides of iron, which are in general use both as "colors" and as "polishing powders," are properly dutiable under the provision in Schedule N of the act of March 3, 1883, for "polishing powders of every description, by whatever name known;" and not under the provision of Schedule A, for "colors and paints, including lakes, whether dry or mixed, or ground with water or oil, and not specially enumerated or provided for in this act."

(*Syllabus by the Court.*)

At Law.

This was an action against the collector of the port of New York, to recover duties alleged to have been exacted in excess of the lawful rate upon certain oxides of iron. The collector had assessed the duty at 25 per cent. under the provision in Schedule A of the act of March 3, 1883, for "colors." The importer claimed that the articles were properly dutiable at 20 per cent., as "polishing powders," under a provision therefor in Schedule N of the same act. The proof showed that the articles were used for both purposes. As to some of the importations it was shown that they were much more largely used as "colors" than as "polishing powders."

Edward Hartley, for plaintiff.

Stephen A. Walker, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*after stating the facts as above.*) It appears by the statute (act of 1883) that congress has provided, in the chemical product schedule, for "colors and paints, including lakes, whether dry or mixed, or ground with water or oil, and not specially enumerated or provided for in this act, twenty-five per centum *ad valorem*." Inasmuch as the tariff act immediately thereafter proceeds to deal with bone-black, ocher, and umber, it might perhaps be supposed that congress intended to restrict the exception to that schedule; but they have not said so, and to put that interpretation upon the act would be legislation, and not construction. Within the same tariff act, however, there is a provision for "polishing powders of every description, by whatever name known, including Frankfort black, and Berlin, Chinese, fig, and wash blue, twenty per centum *ad valorem*." It appears by the evidence here that these goods, although painters' colors, and used as such, are also used as polishing powders, and are so used to a substantial extent. It is not necessary to show that their predominant use is as polishing powders, provided it appears that there is at least a substantial use of this kind of article for that particular purpose. That being so, the acts, so far as these articles are concerned, should be interpreted so as to read, "colors and paints, except such as are used as polishing powders." By that I do not intend to imply that congress meant that each particular importation should be followed out, and its use traced, and the question as to whether it should pay duty or not disposed of upon an examination into the function which that particular importation subserved; but that, if a particular class of articles was used, and was suitable for use, for the purpose named at the time that the act was passed, that is sufficient. There

is no evidence here tending to show that the state of affairs is any different now from what it was when congress legislated. Therefore, as there has been evidence here to show that there was a substantial use of these varieties of painters' colors as polishing powders, I think they are within the language of paragraph 479, which is itself an exception from the eighty-seventh paragraph. I shall therefore direct a verdict for the plaintiff.

SULLIVAN v. ROBERTSON, Collector.

(Circuit Court, S. D. New York. February 15, 1889.)

1. CUSTOMS DUTIES—CONSTRUCTION OF LAWS—ACT MARCH 3, 1883, SCHEDULE K. The proviso as to goods weighing over four ounces per sq. are yard, at the end of the paragraph relating to women's and children's dress goods composed wholly or in part of wool or worsted, in Schedule K of the act of March 3, 1883, relates only to such goods as are composed wholly of wool or worsted. Following *Ellison v. Hartranft*, 24 Fed. Rep. 186.

2. SAME.

The phrase "goods of like description" in the provision of Schedule K of the act of March 3, 1883, for "women's and children's dress goods, coat linings, Italian cloths, and goods of like description," etc., is not restricted in its application to Italian cloths, but relates also to "women's and children's dress goods."

3. SAME—"THYBET" CLOTHS.

Articles known as "Thybet" cloths or coatings, made of cotton warp and worsted filling, which are commercially known as "dress goods," or are of like description to dress goods, as known in trade and commerce, are properly dutiable (when valued at less than 20 cents per square yard) at 5 cents per square yard and 35 per cent. *ad valorem*, under the provision for women's and children's dress goods in Schedule K of the act of March 3, 1883, and not at 35 cents per pound and 40 per cent. *ad valorem*, under the provision in the same schedule for "all manufactures of every description composed wholly or in part of worsted, valued at above 80 cents per pound."

At Law.

This was an action against a former collector of the port of New York, to recover duties alleged to have been exacted in excess of the lawful rate on certain "Thybet Coatings." Duty had been assessed and exacted at 35 cents per pound and 40 per cent. *ad valorem*, under the provision in Schedule K, act of March 3, 1883, for "manufactures of every description composed wholly or in part of worsted, valued at over 80 cents per pound." The importer claimed them to be dutiable at 5 cents per square yard and 35 per cent. *ad valorem*, under a provision in the same schedule for "women's and children's dress goods, coat linings, Italian cloths, and goods of like description, composed in part of worsted, valued at less than 20 cents per square yard." Evidence was adduced by plaintiff to show that the goods were commercially known as "dress goods," or were like such goods; that they were valued at less than 20 cents per square yard; that they were made of cotton warp, with worsted filling; and that they were used for ladies' and children's dresses and jackets. Defendant gave evidence showing that the goods weighed over four ounces to the square yard, and that they were largely used by tailors to make men's

clothing, and were known by them as "coatings." At the close of the case, plaintiff's counsel moved for the direction of a verdict in his favor, on the ground that there was no conflict of testimony as to the fact that the goods imported were commercially known as "dress goods," or were of like description thereto.

Stephen G. Clarke, for plaintiff.

Stephen A. Walker, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*after stating the facts as above.*) As to the proviso at the close of paragraph 365, it has been held in *Ellison v. Hartranft*, 24 Fed. Rep. 136, that it applies solely to so much of the paragraph as begins with the words, "if composed wholly of wool." That opinion seems not to have been reviewed in the supreme court. It has been adhered to since, and I shall follow it in this case.

There remains, then, but one question for determination,—whether these goods are women's and children's dress goods, coat linings, Italian cloths, or goods of like description. As to the question whether or not they are women's and children's dress goods, there might perhaps be sufficient conflict of evidence to send the case to the jury, although even that is doubtful; but that they are goods of like description to women's and children's dress goods, as those goods were known in trade and commerce in this country at the time that the act was passed, I think there is no conflict of testimony at all. The question, then, resolves itself into this: Do the words "goods of like description," in paragraph 365, qualify only "Italian cloths," or do they qualify the entire preceding enumeration of articles? Construing them according to the very strictest rules of grammar, I suppose it should be held that they qualify all that precedes; that, had the other meaning been intended, the word "and" would properly have preceded the word "Italian," so that the clause should read: "Women's and children's dress goods, coat linings, and Italian cloths, and goods of like description." But of course these statutes are not to be construed by any mere strict or critical interpretation according to grammatical rules, and the conclusion to which I have arrived is strongly fortified by considering the phraseology of this statute in connection with prior acts. With regard to this general group of goods, (which we know, not only from the evidence in this case, but from our experience in other cases, is a species of fabric which women use for their dresses,) we find that in the act of 1857 congress undertook to describe them as "delaines." In the act of 1861, it having turned out that there were a great many kinds of delaines, and that there were a great many other articles which might or might not be delaines, and which were called all sorts of names in the trade, they provided for them by the description: "All delaines, cashmere delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description." The decision in the *Square Yard Cases*,¹ and the universal

¹*Schmieder v. Barney*, 5 Sup. Ct. Rep. 624, and cases there cited.

acceptance of the treasury department, as to the meaning of this particular phrase, was that the words "of similar description" there were not restricted to "barege delaines," but qualified "delaines" and "cashmere delaines" as well. So, when the phrase "of similar description" first came into this part of the tariff act, it was used to qualify all the articles that preceded it in the enumeration of this paragraph. The same thing appears in the act of 1862, when it was discovered that there was still another variety of delaines that congress apparently had not known of before, and to which the name "muslin" delaine was applied. Undoubtedly, when that name was inserted, the phrase "of similar description" qualified "muslin" delaines just as much as it did "barege" delaines. In 1864 congress seems to have given up all effort to describe these articles by a long list of names and the phrase "of similar description," and to have started out with a new nomenclature, "women's and children's dress goods, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other animals." In 1867, however, it having been found that there were several articles which could not be termed "women's and children's dress goods," such as Italian cloths, they altered the phraseology to read: "Women's and children's dress goods, and real and imitation Italian cloths." By 1883, however, some other varieties of the article had turned up which it was necessary for them to enumerate; they therefore inserted the words "coat linings," so that the clause read: "Women's and children's dress goods, coat linings, Italian cloths,"—(the words "Italian cloths" covering, of course, both the real and the imitation,) and then, in order to cover any new articles that should come, they added the words "and goods of like description." So that the paragraph now reads: "Women's and children's dress goods, coat linings, Italian cloths, and goods of like description." I see no reason why the phrase "goods of like description" should not be taken, in this last state of the section, as being of the same purport and intent as when it was first introduced into the tariff act, viz., as qualifying all the articles which are enumerated in the clause preceding that phrase. Under the evidence, as to which there seems to be no dispute, these goods, even if not "women's and children's dress goods," are "goods of like description" to them, or are "goods of like description" to "coat linings," or to "Italian cloths." For that reason I shall direct a verdict for the plaintiff.

SWAYNE v. HAGER, Collector.

(Circuit Court, N. D. California. February 25, 1889.)

1. CUSTOMS DUTIES—CLASSIFICATION—CHINESE SHOES.

Chinese shoes, consisting of an upper part of cotton or silk and a sole of felt and leather, the felt being made from hair mixed with wool fiber, and paper, stiffened with rice starch, are taxable, not under the act of 1883, Schedule K, par. 14, imposing 40 cents per pound and 35 per cent. *ad valorem* on clothing, ready-made, and wearing apparel, not enumerated, composed wholly or in part of wool, worsted, alpaca, or other hair, made up by the tailor, seamstress,

or manufacturer, but as non-enumerated articles at the highest rates at which their component material of chief value may be chargeable. The cotton shoes, therefore, fall under Schedule I, par. 7, imposing 35 per cent. *ad valorem* on manufactures of cotton not specially provided for, and the silk ones under the last paragraph of Schedule L, imposing 50 per cent. *ad valorem* on goods not specially enumerated, made of silk, or of which silk is the component material of chief value.

2. SAME.

A definition adopted and acted upon for a long time should not be regarded as changed by a subsequent act of congress unless the intention to change is clearly manifest.

At Law. Action by R. H. Swayne against John S. Hager, collector of customs, to recover an excess of duties paid by him.

Milton Andros and Page & Eells, for plaintiff.

J. T. Carey, U. S. Atty.

Before SAWYER, Circuit Judge.

SAWYER, J. This is an action brought to recover \$3,799.50, with interest, for what is claimed to be an excess of duties over the amount required to be paid by law, collected upon various invoices of Chinese shoes, imported at the port of San Francisco. The shoe consists of the upper part made of silk or cotton, which constitutes the most valuable part of the material, and the sole, the upper part of which is composed of layers of felt and the bottom part of leather. The felt is manufactured in thin sheets from the hair of various animals, as dogs, cattle, and goats, intermixed with wool fiber and paper. A glue, or starch, made from rice, is added to give greater cohesion. Layers of this article are placed together, and the whole pressed into large sheets, which are then sold to manufacturers for the purpose of making shoes. Several thicknesses of these attached to the silk, or cotton uppers, with a leather bottom-piece, constitute the sole of the shoe. The question is, under what provision of the statute should duties on these Chinese shoes be levied and collected? Under, then, recent instructions from the treasury department they were classified, and duties thereon collected under the fourteenth paragraph of Schedule K, of the act of March 3, 1883, (22 St. 509,) which reads as follows:

"Clothing, ready-made, and wearing apparel of every description, not especially enumerated or provided for in this act, and balmoral skirts, and skirting, and goods of similar description, or used for like purposes, composed wholly or in part of wool, worsted, the hair of the alpaca goat, or other animals, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, except knit goods, forty cents per pound, and in addition thereto, thirty-five per centum *ad valorem*."

The importer claims that inasmuch as the goods are non-enumerated articles, "manufactured of two or more materials," the duties should have been assessed "at the highest rates at which the component material of chief value may be chargeable," under section 2499 of the Revised Statutes as amended by the act of March 3, 1883, (22 St. 491.) The clause of said section under which it is claimed that the goods should be classified reads as follows:

"And on all [non-enumerated] articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable. If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates: provided, that non-enumerated articles similar in material and quality and texture, and the use to which they may be applied, to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free."

Under this statute, the importer further claims, that the cotton shoes—the cotton being the most valuable part of the material—should be assessed under paragraph 7, of Schedule I, of the act of 1883, as "manufactures of cotton not specially enumerated or provided for." The provision is as follows:

"Cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton not specially enumerated or provided for in this act, and corsets, of whatever material composed, thirty-five per centum *ad valorem*." 22 St. 506.

And on the silk shoes, in like manner, duties should be levied under the last paragraph of Schedule L, as a non-enumerated article made of silk, or of which silk is the "component material of chief value." The paragraph reads as follows:

"All goods, wares, and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per cent. *ad valorem*." 22 St. 510.

After a careful examination of these provisions of the statute, and the rules of construction of revenue laws laid down by the United States supreme court in the cases cited on behalf of the plaintiff, I am satisfied that the treasury department is wrong, and the complainant right, in their respective constructions of the statute. I do not think the shoes in question are "composed wholly or in part of hair," within the meaning of the statute. The component parts of the shoes are cotton, or silk, felt, and leather. These are the parts as used by the manufacturers of shoes. It is true that hair is one of the elements used in the manufacture of felt. But I do not think congress intended, by this classification, to include all the ultimate elements that may have entered into an article. Such a classification would be too nice for practicable purposes. I think also, the statute refers to textile fabrics. For rules of construction on this point see *Elliott v. Swartwout*, 10 Pet. 137, 142, 151; *Arthur v. Morrison*, 96 U. S. 110; *Cohn v. Seeberger*, 30 Fed. Rep. 425; *Greenleaf v. Worthington*, 26 Fed. Rep. 303; *Riggs v. Frick*, Taney, 100. So, also, in my opinion, shoes were not intended to be included in the terms, "wearing apparel of every description," in the provision cited from Schedule K. By reading it with the context, "wearing apparel * * * made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer," it seems evident that congress intended other manufacturers of a class similar to a "tailor, or seamstress"—"something *ejusdem generis*." The principle *noscitur a sociis* appears to me to be applicable. A shoemaker is not in any respect similar to a tailor, or seamstress. In ordinary popular use of language, no one, I presume, would for a moment think that

shoes are included in the terms "wearing apparel." See the following decisions supporting and illustrating the construction adopted: *Oates v. Bank*, 100 U. S. 239, 244; *Bend v. Hoyt*, 13 Pet. 263, 270-272; *Adams v. Bancroft*, 3 Sum. 384, 386; *Reiche v. Smythe*, 13 Wall. 162. Chinese shoes have been imported for more than 20 years, and it is understood that during all the time and for three years after the passage of the act in question, they have been classified as manufactures of silk and cotton respectively. A definition adopted and acted upon for a long time should not be regarded as changed by a subsequent act of congress, unless the intention to change is, clearly, manifest. *Reiche v. Smythe*, 13 Wall. 162; *De Forest v. Lawrence*, 13 How. 274. See, also, *Edwards v. Darby*, 12 Wheat. 210; *Hahn v. U. S.*, 107 U. S. 402, 406, 2 Sup. Ct. Rep. 494; *U. S. v. Pugh*, 99 U. S. 269; *Robertson v. Downing*, 127 U. S. 608, 613, 8 Sup. Ct. Rep. 1328, and cases therein cited. I think the classification should be made, and duties levied under the several provisions cited as claimed by the importer. Let there be findings and judgment accordingly.

HAKE v. BROWN *et al.*

(Circuit Court, S. D. New York. March 5, 1889.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—BEVEL-EDGED CARDS—PROCESS.

Letters patent No. 219,464, September 9, 1879, to Philip Hake, describes a method of making bevel-edged cards, and ornamenting the edges by piling them obliquely so that the slope of the pack corresponds to the desired bevel, compressing them to hold them in position, beveling, ornamenting, and finishing the whole pack on the sloping edge, and successively treating the other sides and ends in the same manner. Beveling in packs was not new, but arranging them obliquely, and treating one side or end successively till all were complete, did not appear to have been previously known. Packs can be thus grooved, embossed, or ornamented so as to present beveled designs, which could not be produced by treating the cards separately, and the method of making bevel-edged cards of any design is greatly facilitated. *Held*, that such method of treating the cards is novel and patentable, and claim 1, which is for such method, is valid.

2. SAME—PRODUCT.

But, as bevel-edged cards were old, and as those made by the process differed from others in no way unless in design, claim 2 of the patent, which is for a card treated in the manner described, is invalid.

3. SAME—VALIDITY—DISCLAIMER ON TRIAL.

Though under Rev. St. U. S. § 4920, subd. 4, the patent might be held void because it covers a material thing not invented by the patentee, yet, under section 4922, as no willful default or intent to defraud or mislead appears, complainant, in a suit for infringement, which is established, may have a decree, without costs, on filing a disclaimer of the second claim.

In Equity.

Suit by Philip Hake against George F. Brown and another, for the infringement of a patent.

Arthur v. Briesen, for orator.

Walter D. Edmonds, for defendants.

WHEELER, J. This cause rests upon patent 219,464, dated September 9, 1879, and granted to the orator for an "improvement in visiting cards." The patent describes a method of making bevel-edged cards, and of ornamenting the edges, by piling them obliquely, first, so that the slope of the pack will correspond with the desired bevel, compressing them to hold them in that position, beveling and ornamenting and finishing the whole pack on the sloping edge, which will bevel, ornament, and finish that edge of each separate card by each operation, and of successively treating the other sides and ends of the pack in the same manner, by which means the whole pack is treated as readily as one card. The first claim is for the method of treating cards in this manner, and the second is for a card so treated. The defenses are want of novelty, want of patentability, and lack of proof of infringement.

According to the evidence, bevel-edged cards were not new at the date of the orator's invention; neither was beveling in packs new; but arranging cards in oblique packs, and treating one side or end till all the cards were complete on that side or end, as if they were one card, and treating the other side and ends successively in the same manner, does not appear by the requisite measure of proof to have been known before. By this process the packs can be grooved or embossed and ornamented in a manner to present beveled designs upon the edges of such cards, which could not be produced by treating cards separately, and the making of bevel-edged cards of any design is greatly facilitated. This method seems to be ingenious and useful. Such an arrangement of mechanical operations, that produces a new and useful result, or an old result in an easier or better manner, is understood to be patentable. *Cochrane v. Deener*, 94 U. S. 789; *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778. The first claim of the patent, therefore, appears to be good and valid for the method described.

There is nothing new about the bevel-edged cards produced by this process, except that they are made in this way. They do not differ from those made in any other way, unless they do in design. The process does not inhere to the product, so that it differs from any like product made in any other way, as was the case with Cummings's invention of rubber plates and teeth, in *Smith v. Vulcanite Co.*, 93 U. S. 486; or the driven well, in *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073. The product itself here is old in the sense of the patent law, and there can be no patent for it, although produced in this new way. *McKloskey v. Du Bois*, 8 Fed. Rep. 710, 9 Fed. Rep. 38; *McCloskey v. Hamill*, 15 Fed. Rep. 750. The second claim of this patent, therefore, appears to be invalid.

The plaintiff's evidence tends directly to show that the defendants use this process; and the defendants do not, in testimony, deny that they do, nor dispute or meet this testimony. Upon this state of the evidence the infringement is found as a fact to exist of the first claim.

The patent might be held to be invalid on account of its covering the product, of which the patentee is not the inventor, and which is a material and substantial part of the thing patented. Rev. St. § 4920, subd. 4.

But when such material or substantial part has been claimed through inadvertence, accident, or mistake, without any willful default or intent to defraud or mislead the public, a recovery may be had for the infringement of any part which is *bona fide* the inventor's own, that is a material and substantial part of the thing patented, and definitely distinguishable from the part claimed without right; but without costs, unless a disclaimer is filed before suit brought. Section 4922. The benefits of the provisions of this section are to be denied if the entry of a disclaimer has been unreasonably neglected or delayed, but waiting to take the judgment of a court is allowable. *Burdett v. Estey*, 15 Blatchf. 349, 19 Blatchf. 1, 3 Fed. Rep. 566. No such willful default or intent to defraud or mislead appears, or is claimed to exist, thus far in this case. The orator, therefore, appears to be entitled to file a disclaimer of the second claim now, and thereupon to have a decree as to the first claim without costs. Upon the filing of a duly-attested copy from the patent office of a disclaimer of the second claim, let a decree be entered that the first claim is valid, and for an injunction and account accordingly, but without costs.

BREWSTER *et al.* v. SHULER.

(Circuit Court, N. D. New York. February 23, 1889)

1. PATENTS FOR INVENTIONS—REISSUE—ENLARGEMENT OF CLAIM.

In the original patent of May 27, 1873, to Thomas H. Wood, for an improvement in carriage springs, the invention was stated to have for its object to combine in a wagon supported on single transverse springs and side-bars the advantage of elasticity, double elliptic transverse springs, and of the deep setting of the body previously obtained by using single springs. The claim was for a frame consisting of longitudinal side-bars, downwardly bowed springs, and upwardly bowed middle springs, constructed, arranged, and applied as and for the purpose described. The reissued letters patent granted August 18, 1874, state that the object is to improve the manner of connecting the bodies of light carriages with the side-bars whereby they are supported, and that the invention consists in interposing a pair of semi-elliptic springs between the side-bars and wagon body. The claim is for the semi-elliptic springs interposed between the side-bars and the wagon body, all combined substantially as specified. *Held*, that the original being for a combination of half springs with other half springs in reverse, and the reissue being for a combination which omits the half springs in reverse, the reissue is void.

2. SAME.

The reissue is void also because there is no defective or insufficient specification and no inadvertent mistake in the statement of the claim of the original.

3. SAME—ANTICIPATION.

Semi-elliptic scroll-ended springs having been previously interposed between the side-bars and the body of the Robert Pierce buggy, and there being nothing to indicate that a spring other than one having a scroll end was an element of the claim, the patent is void for prior public use, though the drawings show springs without scroll ends.

In Equity. Bill to restrain the infringement of a patent.

B. F. Thurston and Livingston Gifford, for complainants.

v.37F.no.14—50

M. L. Stover, (Witter & Kenyon and Causten Browne, of counsel,) for defendant.

WALLACE, J. This suit is brought to restrain infringement of reissued letters patent granted August 18, 1874, to Thomas H. Wood, for an "improvement in carriage springs." The defendant relies upon the invalidity of the patent as a reissue of the original, and upon prior public use by others of the subject of the invention, among other defenses to the suit. The original patent to Wood was granted May 27, 1873. The invention is described therein as follows:

"This invention relates to an improved arrangement of transverse springs on light wagons, and has for its object to combine, in a wagon supported on single transverse springs and side-bars, the advantage of elasticity, double elliptic transverse springs, and of the deep setting of the body obtained at present by using the single springs. Light carriages supported on double elliptic springs raise the bodies too high for convenience, and are, moreover, more expensive than those having single springs. On the other side, such carriages as are at present supported on single transverse springs, whose ends connect with side-bars rigidly secured to the wagon bodies, are not sufficiently elastic and yielding to suit the rapid motion to which they are frequently subjected. The invention consists in the improvement of light vehicles, as hereinafter described and pointed out in the claim. In the accompanying drawing, the letter A represents the body of a light carriage of suitable style. B and C are the axles of the carriage, and D, D, the wheels. Upon the axles are fastened the middle portions of transverse springs, E, E, whose ends are secured to side-bars, F, F. These side-bars are made of hickory wood or other material, and aid, with whatever elasticity they may possess, in making the support of the body, A, yielding. To the under side of the carriage body, A, are secured transverse springs, G, G, whose ends connect, by suitable couplings, with the side-bars, F, F, as is clearly shown in the drawing. The springs, G, G, and E, E, can be made of metal, or wood, or other material, and are semi-elliptic or flat springs, in contradistinction to the full elliptic spring heretofore used as direct supports for carriage bodies on their axles."

The claim of the original patent is as follows:

"A frame consisting of the longitudinal side-bars, F, F, downwardly bowed springs, E, E, and upwardly bowed middle springs, G, G, constructed, arranged, and applied as and for the purpose described."

The description in the reissued patent is as follows:

"This invention has for its object to improve the manner of connecting the bodies of light carriages with the side-bars, whereby they are supported, and consists in interposing a pair of semi-elliptic springs between said side-bars and the wagon body. In the accompanying drawing, the letter A represents the body of a light carriage of suitable style. B and C are the axles of the carriage, and D, D, the wheels. The axles are connected, by springs, E, E, or otherwise, with the side-bars, F, F. These side-bars are made of hickory wood or other material. To the under side of the carriage body, A, are secured transverse springs, G, G, whose ends connect, by suitable couplings, with the side-bars, F, F, as is clearly shown in the drawing. These springs, G, G, can be made of metal or other material, and are semi-elliptic or flat springs, in contradistinction to the full elliptic springs heretofore used, as direct supports for carriage bodies on their axles."

The claim of the reissue is:

"The semi-elliptic springs, G, G, interposed between the side-bars, F, F, and the wagon-body, all combined substantially as specified."

It is obvious that the invention of the patentee, as explained in the original patent, consisted in altering a side-bar buggy having downwardly curved transverse springs over the axle in which the ends of the side-bars rest on the ends of the springs, by putting in upwardly curved springs transversely between the side-bars and the body of the buggy. The conception and aim of the patentee was to employ additional half elliptic springs in a side-bar buggy having half elliptic springs, so arranged in reference to each other that the body would be practically mounted on full elliptic springs for purposes of elasticity, and on half elliptic springs for purposes of elevation above the axle. The description fully and clearly, without ambiguity or obscurity, sets forth the exact invention made by the patentee, and the claim fully and precisely specifies it; and from both it is perfectly evident what invention the patentee intended to describe and sought to secure. So ample and exact are the specification and claim that it cannot be doubted he knew accurately the scope and limitations of his invention, and intended to describe and claim it as nothing more or less than an improvement upon a specific type of side-bar buggies, which consisted in interposing supplementary half elliptic springs between the body and the side-bars to re-enforce and co-operate with the half elliptic springs theretofore employed between the side-bars and the axles in the existing buggy. What the patentee did was to put two springs adapted to do that work into a buggy of that type. He might have put transverse semi-elliptic springs between the body and the side-bars of a buggy of a different type; but he did not do it, or think of doing it. Apparently he subsequently discovered that it would be desirable to do this, and concluded to get a patent for doing it; and he was probably advised that such a patent would give him a larger monopoly than he had secured originally, and would enable him to hold as infringers all those who should use the transverse semi-elliptic springs between the side-bars and the body of a buggy, whether in a buggy with or without semi-elliptic springs or any springs between the side-bar and the axle. The reissued patent is for an invention which apparently did not exist in the mind of the patentee when the original was obtained, and which also is of more doubtful inventive novelty than that in the original. The original is for a combination of half springs with other half springs in reverse, in a side-bar buggy, in which the parts co-operate to produce a given result. The reissue is for a combination of which half springs in reverse are not a part, and from which the essential characteristics of the original invention are eliminated. The use of the combination of parts claimed in the reissue would not be an infringement of the original patent. It must be held that the reissue is void, not only because it is for an invention not disclosed or suggested in the original, but also because, as in the case of *Coon v. Wilson*, 113 U. S. 268, 5 Sup. Ct. Rep. 537, there was no defective or insufficient specification, and no mistake inadvertently committed in the wording of the claim of the original. The defense of prior public use, which rests on the use of the springs

in the Robert Pierce buggy, is fully established, and is fatal to the validity of the patent. The fact of the use of semi-elliptic springs in that buggy, interposed between the side-bars and the body, at a date sufficiently early to defeat the patent, is not contested; but it is contended for the complainants that these springs were not the semi-elliptic springs of the patent. They were semi-elliptic springs of the class known as "scroll-ended" springs. This was a well-known class, used in carriages, and sold by dealers as semi-elliptic springs, previously to the date of the patent, as sufficiently appears by reference to the patent to George Groot, of July 13, 1869, for an improvement in carriage springs, without reference to the other testimony or exhibits in the case. That patent relates to the fastening of semi-elliptic springs transversely under the body of the carriage, to side springs, by means of saddle-clips. The drawings show a scroll-ended half elliptic spring, substantially such as was used in the Robert Pierce buggy, and the specification points out that the saddle-clips are to be adjusted according as the ends of the semi-elliptic springs "are made with or without scrolls." Another class of semi-elliptic springs was without scrolls at the ends, and it is contended for the complainant that it is to this class, and this class only, that the claim of the patent relates. The drawings in the patent show springs of this class. It appears by the testimony that the object of scrolling the ends of half springs is to get a somewhat greater length of spring between bearings a given distance apart, and thereby somewhat more elasticity and motion; and that the use of square-ended or scroll-ended springs is dictated by the degree of elasticity desired in a particular carriage spring. It is obvious, however, that the degree of elasticity depends largely upon the amount of material used in the spring, and that a scroll-ended spring may be practically as stiff as one without a scroll end, and one without a scroll end may be practically as elastic as one with a scroll-end. It is probably true that, as between springs of the two classes, when each has the same degree of elasticity as the other, the scroll-ended spring would lend a freer lateral movement to a carriage or buggy body than the other; and an ingenious argument has been advanced by counsel and by the experts for the complainant to show that in the class of carriages to which the patent relates it is desirable that there be practically no side-wise movement to the carriage body. If there were anything in the specification to suggest this, the somewhat shadowy difference of function between the two springs might be apprehended and emphasized to denote that one should not be treated as the equivalent of the other. But it could be urged with equal force that the semi-elliptic spring of the claim is one of either class, and that the use of scroll-ended springs, when interposed between the side-bars and the wagon body, would be an infringement of the claim. Indeed, in a former suit brought upon this patent, the alleged infringing springs were scroll-ended half elliptic springs, but the ends did not extend appreciably beyond the outside line of the side-bars; and the complainant's expert gives it as his opinion that the use of such scroll-ended springs between the side-bars of the wagon body would be an infringement of the patent.

In the absence of any language to indicate that a semi-elliptic spring of a special form is an element of the claim, it must be held that the claim specifies one of any well-known form adapted to be interposed between the side-bars and the wagon body. Consequently such springs as were used in the Robert Pierce buggy are the springs of the patent, and the defense of prior public use is established. The bill is dismissed, with costs.

SHELDON AXLE Co. v. STANDARD AXLE-WORKS.

(Circuit Court, E. D. Pennsylvania. February 21, 1889.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT AND LICENSE—SUBSEQUENT PURCHASERS OF ARTICLE.

Where patentees transfer all their right and interest within specified territorial limits, together with any improvements and reissues which may thereafter be made or granted, subsequent purchasers, from the patentees, of the patented articles, with notice of such assignment, take subject to the rights of the assignees, and cannot use the articles within their territory.

2. SAME—NOTICE.

Where such purchasers purchase the patentees' remaining interest, knowing that the assignees have an interest, and, on being informed by the latter of the extent of their interest, renounce the contract, and purchase the articles, they will be held to have had actual notice of the assignment, though they testify that the patentees denied the assignees' statement respecting their interest.

In Equity. Bill by the Sheldon Axle Company against the Standard Axle-Works, to restrain defendant from using a certain patented machine within territory claimed exclusively by complainant.

John R. Bennett, for complainant.

Fleming & McCarrell, for defendant.

BUTLER, J. The principal objections made to the plaintiff's title are met by the amendment to the record just filed. The transfer from the Philadelphia Axle Company is properly executed. The state statute relating to the execution of deeds by such companies has application to transfers of real estate.

The plaintiffs owned the interest acquired by the Philadelphia Axle Company. The patentees transferred to this company all their right and interest in the patent, and any improvements and reissues which might thereafter be made or granted, within the territorial limits specified in the transfer. The company thus took the exclusive monopoly of the manufacture, use, and sale within these limits. The patentees thereafter could not interfere with the enjoyment of this monopoly, and consequently could not authorize any one else to do so. Subsequent assignees of interests, and purchasers of machines, (with notice,) took subject to the company's rights. This seems entirely clear. It is urged, however, that *Adams v. Burke*, 17 Wall. 453, decides other-

wise, as respects the use of machines subsequently purchased; that such use may be enjoyed within this territory. It would be strange, indeed, if this were so. It is as clear as language can make it that the right to use within the territory is as distinctly conveyed as the right to manufacture and sell. It is not, of course, questioned that the latter right cannot be interfered with. On what ground, then, can such a distinction be supported? None has been suggested, and we can see none. It is urged, however, that this distinction is drawn in *Adams v. Burke*. We do not so understand that case. There the patentees assigned their right to manufacture, use, and sell, within certain territorial limits, and subsequently transferred their remaining interest to another. The patented article was a coffin lid. The purchaser of a lid from the first assignee used it outside the prescribed limits. Of this use the second assignee complained. The question thus raised was one of construction. Its decision turned on the interpretation of the first assignment. If the use of lids sold under this instrument was intended to be confined to the territory named, the complaint was well founded; otherwise it was not. The court (laying stress on the character of the article,—the fact that it is incapable of continuous use) held that the use was not intended to be so confined; that the right to sell (which is distinct from the right to manufacture and use) contemplated a use of the lids sold, everywhere; consequently that the second assignee took subject to this right, and therefore had no just cause of complaint. The case stands on this interpretation of the contract. The court says: "It would ingraft a limitation not contemplated, * * * nor within the reason of the contract, to say that it [the lid] could only be used within the ten-mile circle," to which the right of sale was confined. This construction seems to rest on the conclusion that as a sale by the patentees before assigning, conferred a right to such unrestricted use, the assignment of their authority to sell conferred on purchasers under it the same unrestricted use. The court distinguished (as it had done before) between the right to manufacture and use and the right to sell, and held that the territorial limitation was not intended to restrict the use of lids sold. What is said in this case of the patentee's "receipt of compensation for the use outside the territory," of a sale "emancipating the patented article from the monopoly," etc., was applicable there, but it is inapplicable to the case before us. The defendants here did not pay for a use within the plaintiffs' territory,—a use which they knew the patentees had previously sold and received compensation for. Their purchase could not emancipate the machine from a monopoly which their vendors did not own and could not interfere with. The distinction (which seems to be broad and plain) between our case and *Adams v. Burke* consists in the facts that the assignment here (under which the plaintiffs hold) is first in the order of time, conferring upon them the entire monopoly of the patent within their territory, and that the second assignment (under which the defendants hold) is subject to this; while in *Adams v. Burke* the plaintiff's assignment was subsequent to that under which the defendant purchased,—by which latter assignment, as the court held, a right was transferred to

use the article so purchased everywhere. The situation of the parties in *Adams v. Burke* is here reversed, which makes all the difference in the world,—rendering the decision in that case wholly inapplicable to this. Other decisions of the supreme court, cited by the defendants, lend no support to their position. *Bloomer v. McQuewan*, 14 How. 549, determines no more than that the lawful purchase of a patented machine confers a right to use it until worn out, notwithstanding the patent may have expired and been renewed in the mean time. General observations made by the court in disposing of such a case can have no influence in deciding the question before us. *Chaffee v. Belting Co.*, 22 How. 217, and *Mitchell v. Hawley*, 16 Wall. 544, are equally inapplicable; the facts involved bear no relation to those before us. Nor are the cases cited from the circuit courts entitled to greater influence. We had occasion to consider them in *Hatch v. Adams*, 22 Fed. Rep. 434, and nothing need be added to what is there said on the subject.

The foregoing is predicated on the supposition that the defendants and their predecessors, Ives and Miller, had knowledge of the previous assignment to the Philadelphia Axle Company. Had they such knowledge? Notice may be actual or constructive. The latter (which results from an authorized record) Ives and Miller had not. The duty of recording was neglected until after they had purchased. It is entirely clear, however, that they had actual notice. A review of the testimony respecting this is unnecessary. The fact is abundantly proved. Ives and Miller first purchased the patentee's entire remaining interest, some months after the transfer to the company, with knowledge that the latter had an interest; and later, on being informed by the company of the character and extent of this interest, they refused to pay the consideration, returned the property, and entered into a contract for 20 machines, one of which was sold to the defendants, brought within the plaintiffs' territory, and used. It is unimportant that Mr. Miller says the patentees denied the company's statement respecting its interest. The latter was not required to do more than inform Ives and Miller of it. Ives and Miller, however, acted as if they believed it; declining to carry out their contract, and returning the property. It is unnecessary in this case to invoke the rule that knowledge of facts sufficient to put a prudent man to inquiry is notice. Direct, explicit notice is proved. That the defendants also had notice (constructive as well as actual) is equally clear. The assignment was on record several years before their purchase; and the evidence abundantly shows that they had actual knowledge of the plaintiffs' rights. Their correspondence with Ives and Miller puts this beyond doubt. It shows not only that they were fully apprised of these rights, but that they directed their most earnest efforts to the discovery of means whereby the enjoyment of them might be circumvented and defeated. They were slow to believe that a purchase outside this territory would confer a right to use the machine within, (in view of the exclusive right vested in the plaintiffs,) and they consequently demanded a guaranty from Ives and Miller. This being refused, however, they resolved to take the risk. A decree must be entered for the plaintiffs.

HOOD *et al.* v. BOSTON CAR SPRING CO. *et al.*

(Circuit Court, D. Massachusetts. March 1, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—COATING METALS WITH RUBBER.

The invention described in letters patent of May 6, 1879, to Isaac Adams, Jr., for an improvement in coating metallic articles with rubber, consists in interposing between the metallic article and the rubber a thin film of any metal, preferably copper, which at the temperature of vulcanization has a considerable tendency to unite with the sulphur in the rubber. In view of the fact that the patent proceeds on the theory that the film must be very thin, and that copper is the best metal, because a firm cohesion may be obtained from a very thin film of it, and in view of the opinion on granting an injunction, (21 Fed. Rep. 67,) recognizing such to be the theory of the invention, *held*, that defendants are not in contempt by using an alloy of copper and zinc, which need not be thin.

In Equity. On motion for an attachment for contempt.

T. W. Clarke, for complainants.

John L. S. Roberts, for defendants.

COLT, J. This is a motion for an attachment for contempt. The complainants contend that the defendants are violating an injunction order of this court. The question turns upon whether the defendants are using the Adams process for covering metallic articles with rubber, described in his patent of May 6, 1879, which patent has been sustained by this court, and the defendant adjudged to have infringed. 21 Fed. Rep. 67. In order to determine the scope of the Adams patent, it is well to refer to the opinion of Mr. Justice GRAY in this case. He begins by referring to the specification, which states that great difficulty has been experienced in making rubber adhere securely to metals, and that by the patented improvement a firm adhesion may be obtained. The invention consists in interposing between the metallic article and the rubber a film of any metal which, at the temperature of vulcanization, has a considerable tendency to unite with the sulphur always contained in the rubber compounds. Of the metals possessing such tendency, the films of which may be interposed, the most suitable are copper and silver, and of them copper is the easiest, as well as the cheapest, to apply. Lead and zinc may likewise be used; but there is greater difficulty in obtaining a suitable deposit of these metals for the interposing film. The opinion proceeds:

"The specification throughout insists upon the necessity of making the interposed film very thin. It states that the film must not be of the same metal as the article on which it is deposited; that it may be produced either by dipping or by electro-plating; that in covering iron, steel, or tin articles with copper, the method of dipping is preferable, and the article must be immersed in a weak solution of sulphate of copper just long enough to produce a bright copper-colored deposit; and that, when the method of electro-plating is adopted, great care should be taken that too thick a film be not deposited, and a film such as is known as 'coloring' or 'striking' is sufficient. * * * According to the evidence, the peculiar value of this invention consists in the very thin film of copper or other suitable metal which, in the process of vul-

canizing, is acted on by the sulphur contained in the rubber, so as to unite or combine with the sulphur, and be absorbed into the rubber, and to hold together the rubber and the metal which has been coated with the film, and make the rubber stick so fast to that metal that it cannot be forced off without tearing the rubber itself. If the film of copper is too thick, the whole of it is not absorbed into the rubber, and so much of it, modified by the action of the sulphur, as is not absorbed, has so little coherence that the rubber may be readily detached * * * Each of Sterne's three patents speaks only of brass, a compound of copper and zinc, as the metal to be deposited; and the complainants contend that even a very thin film of brass would, by reason of securing a less perfect adherence, differ from the invention of Adams, in which the film is of a single metal. But it is unnecessary to consider that point, because it is quite clear that neither of the Sterne patents contemplates or points out the necessity of making the film very thin, or gives any directions by which a person of competent skill would be led to make the film so thin as to produce the result described in and obtained by the patent of Adams."

The meaning of this decision seems to me to be clear. The Adams patent, as interpreted by the court, is not confined to copper alone, though that metal may be preferable, but the gist of the invention lies in pointing out the necessity of having the film very thin, and giving directions by which a person of competent skill would be led to make the film so thin as to produce the results described; and herein lies the main distinction between the Adams and the prior patents of Sterne. As shown by the record in the case and the opinion of the court, the theory which lies at the basis of the Adams invention is this: that in order to produce adhesion between the rubber and the metal the film of interposed metal must be very thin, and that copper produces the best film, because you obtain a firm cohesion from a very thin film of that metal. Now, it is clear to my mind that if the defendants continue to use the thin film of copper, or of any metal, in the manner described, and to produce the results obtained by the Adams patent, they are, under the decision and decree of this court, guilty of contempt.

But the difficulty of the complainants' position is this: the defendants do not deny that the Adams process may have merit, but they contend that rubber will adhere to an alloy of copper and zinc, and to iron plated therewith, no matter how thick the plating may be; and that it will not adhere to copper, nor to iron plated with copper, unless an exceedingly fine film is deposited. They further say that since the decision in this case they have not used a solution of copper, but of brass, or an alloy of copper and zinc.

If this position of the defendants be true, it undermines, to some extent at least, the great merit of the Adams patent. And I must say that upon the whole evidence before me, and an examination of the exhibits produced, the defendants have made out with a fair degree of certainty that the thin film called for by the Adams patent is not necessary when an alloy of copper and zinc is used; in other words, that cohesion under these conditions does not depend upon the thickness of the plating. I am also of opinion that the defendants have shown by the weight of evidence, strengthened by circumstances and probabilities, that they do not

use the copper solution or the process contemplated by the Adams invention, but that they do employ an alloy of copper and zinc which is deposited by the ordinary electro-metallurgical process, and not with a view, because not necessary, of obtaining the very thin film called for by the Adams patent. Upon the facts as they appear to me in this case, it is manifestly my duty to deny the present motion. Motion denied.

SAWYER SPINDLE CO. v. BUTTRICK *et al.*

(Circuit Court, D. Massachusetts. February 28, 1889.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—SPINDLES.

The object of the invention described in letters patent No. 264,054, issued September 12, 1882, to George H. Allen, is to provide means for a loaded or unbalanced spindle to move at its lower end to find its true center of rotation, and thus avoid the effects of gyration; and claim 1 is for the spindle, supporting tube, bolster tube, and step fitted loosely into the bolster tube, and adapted to receive within it the end of the spindle, combined with the pin, also to hold the step loosely. The pin prevents the step from rotating with the spindle, but allows it to move in the bolster tube, as the foot of the spindle travels to find its true center of rotation. *Held* infringed by a device which has in place of the pin a spring, one end bearing against a shoulder on the step, and the other against a shoulder inside the supporting tube, and the upper section of the supporting tube of which operates the same as the bolster tube, though made of two metals,—iron and brass.

2. SAME—ANTICIPATION.

In the Mason patent of 1880, the step is not restrained from rotation. The object of the invention described in the Buttrick and Flanders patent of 1879 was to produce certain improvements in the surroundings of the spindle, so that it might be covered, protected, and kept in position while the step was removed and replaced, and might also be arrested at any time. There was no statement that the device was intended to increase the speed of the spindle, or to decrease its gyrations, and the step was not described as having a lateral movement. Neither invention was designed for use with a sleeve-whirl movement, as in the Allen patent. The Draper patent of January 31, 1882, does not show the pin and step. *Held* no anticipation.

In Equity.

Bill by the Sawyer Spindle Company against Charles G. Buttrick and others for the infringement of a patent.

Chauncey Smith and Livermore & Fish, for complainant.

James E. Maynardier and James H. Young, for defendants.

Court, J. The bill of complaint alleges that the defendants have infringed letters patent No. 264,054, issued September 12, 1882, to George H. Allen for an improvement in spindle bearings. The object of the invention is to provide means whereby a loaded or unbalanced spindle may move at its lower end to find its true center of rotation, and thus avoid the effects due from gyration. The invention consists of a spindle and supporting tube, combined with a bolster tube located therein, a step placed loosely in the bolster tube, and a pin, fitting the step loosely,

to prevent it from rotating with the spindle, yet permitting the step to move in the bolster tube, as the foot of the spindle travels to find its true center of rotation. The present controversy is confined to the first claim of the patent, which is as follows:

"The spindle, supporting tube, bolster tube, and the step fitted loosely into the bolster tube, and adapted to receive within it the end of the spindle, combined with the pin, *f*, to also hold the step loosely, as and for the purposes set forth."

The invention is for an improvement on what are termed "self-centering" spindles. The characteristic of these spindles is that they have loose bearings, which yield to the spindle as it vibrates from side to side under the influence of an unbalanced load. The first spindle of this type which came into general use is found in the Rabbeth patent of May 4, 1880. Certain troubles were found incident to the Rabbeth device, owing to the fact that, when the spindle gyrated, the bolster moved with it, thus tending to tear the packing. The Allen patent is an improvement upon Rabbeth, and it consists in carrying the step up into the bolster tube, and adding the restraining devices to prevent the step from turning with the spindle. In his specification Allen states that he does not claim broadly a loose bolster tube held loosely by a pin, as that is shown and claimed in a prior application for a patent, filed by him April 19, 1882. The question before us is whether Exhibits Nos. 1 and 2, Buttrick and Flanders spindle, contain the combination of devices set forth in the first claim of the Allen patent. In place of the pin, *f*, in the Allen device, the defendants have substituted a spring for the purpose of restraining the revolution of the step. One end of this spring bears against a shoulder on the step, and the other end against a shoulder on the inside of the supporting tube. This spring performs the same duty as the pin, though it may also perform other duties. A pin or a spring is commonly used to restrain the rotation of rods in various contrivances, and they may be said to be the equivalents of each other. Again, the defendants deny that the upper section of what they term the "supporting tube" is in fact the bolster tube of Allen. But this is not made out, because this upper section is a bolster tube, and operates the same as Allen's. The fact that the defendants' bolster tube is made of two metals,—one iron and the other brass,—can make no difference; nor does it make the brass lining of the tube the bolster tube, as contended for by the defendants, because both metals constitute but one tube. I find in defendants' contrivance, *first*, a spindle; *second*, a supporting tube; *third*, a bolster tube fast in the supporting tube; *fourth*, a step fitted loosely into the bolster tube, and having a bore in it to receive the end of the spindle; and, *fifth*, the spring and its shoulders to hold the step loosely, the latter being the equivalent of the pin and holes of the Allen device; and therefore it seems to me clear that the defendants infringe the first claim of the Allen patent.

There is nothing in the prior art which serves to protect the defendants from this charge. In the Mason patent of 1880 the step is not restrained from rotation. The object of the Buttrick and Flanders 1879

patent was to produce certain improvements in the surroundings and bearings of the spindle by means of which it might be covered, protected, and kept in its position, while the step is removed and replaced for any purpose, and might also be arrested at any time in its motion when desired. There is no statement that the device was intended to increase the speed of the spindles, or to decrease their gyrations. The step is not described as having a lateral movement. Neither the Mason, nor the Buttrick and Flanders structures, are designed for use with a sleeve-whirl spindle of the Allen class. The Draper patent of January 31, 1882, does not show the pin and step of Allen, and is clearly, therefore, not an anticipation. Decree for complainants.

UNDERWOOD *et al.* v. GERBER *et al.*

(Circuit Court, E. D. New York. March 6, 1889.)

PATENTS FOR INVENTIONS—ACTIONS FOR INFRINGEMENT—AMENDMENT.

In a suit to restrain the infringement of a patent, complainant was defeated because he sued on one only of two patents relating to the same invention. The evidence introduced would be necessary under a bill based on the omitted patent. *Held*, that he should be permitted to amend by bringing in the other patent, and alleging its infringement, and that the case should be opened for taking additional testimony, but that relief should be granted only on condition that complainant give an undertaking to pay the expense of such additional testimony, including witness fees, mileage, master's or examiner's fees, and printing.

In Equity.

Motion for leave to amend and take further proofs. The complainants in this case were defeated at final hearing because they declared only on one of the patents granted for their invention. *Ante*, 682. Thereupon complainants moved for leave to amend the bill by declaring also upon the other patent, and charging infringement thereof, and to re-open the case for the purpose of letting in such further evidence as may be necessary.

James A. Hudson, for complainants, cited: *Neale v. Neales*, 9 Wall. 9; *Tremaine v. Hitchcock*, 23 Wall. 518; *Hamilton v. Gold Co.*, 23 Fed. Rep. 563; *U. S. v. Parrott*, McAll. 447; *Hardin v. Boyd*, 113 U. S. 761, 5 Sup. Ct. Rep. 771.

Briesen, Steel & Knauth, for defendants, cited, (in addition:) *Shields v. Barrow*, 17 How. 144; *Battle v. Insurance Co.*, 10 Blatchf. 426; *Snrad v. McCoull*, 12 How. 422; *Clifford v. Coleman*, 13 Blatchf. 210.

LACOMBE, J., (after stating the facts as above.) The amendment asked for does not involve an entire change of the character of the action. It is still a suit for the infringement of the same invention as that touching which the evidence already taken was introduced. So much of that ev-

idence as was properly taken under the original bill would be necessary under the bill if amended as complainants pray. It would certainly be very unreasonable to require the parties at great additional expense to take it over again, after both patents are declared upon. No good reason is shown why the court, if it has the power, should not also allow the record to be supplemented by such additional testimony as may be rendered necessary in consequence of the amendment. An early disposition of the case upon its merits at the least possible expense, and, so far as appears, without doing injustice to either party, would be thus secured. The authorities cited by counsel show that the granting of the relief now asked for is a matter of discretion, and within the power of this court at this stage of the case. The complainants may amend their bill by the insertion of apt words so that the same shall declare on the omitted patent, (No. 348,072,) and also charge infringement of the invention therein set forth. Upon service of the amended bill defendants may amend their answer as they may be advised, or may plead or demur to the amended bill. Upon the raising of an issue as to the omitted patent the case is re-opened, and additional testimony pertinent to that issue may be taken before a master or examiner. This relief is granted only upon the complainants undertaking to pay the expenses of taking all such additional testimony, (whether introduced by complainants or defendants.) Such expense to include witness fees, mileages, master's or examiner's fees, and printing.

MARTHA WASHINGTON CREAMERY BUTTERED FLOUR CO. v. MARTIEN.

(Circuit Court, E. D. Pennsylvania. February 15, 1889.)

TRADE-MARKS—RIGHT TO USE—PURCHASER OF MACHINE FOR PREPARING THE ARTICLE.

In a suit to restrain the infringement of a trade-mark complainant alleged a license to defendant to use the trade-mark and machine for manufacturing the article bearing it, and a default in paying royalties. Defendant alleged that he had purchased of complainant's predecessor machines for making the article, and suited to no other purpose. It did not appear that such purchase had any connection with the license, or that its use was subject to restriction or revocation. On motion for preliminary injunction, *held*, that defendant may use the machine until worn out, and sell the article made by it, and that as the trade-mark appears to be intended to designate the article manufactured by the invention, and not that made by complainant personally, defendant may use it on the article so made by him.

In Equity.

On motion for preliminary injunction. Suit by the Martha Washington Creamery Buttered Flour Company of the United States, Limited, against Alfred Martien, individually and as trading as the Brunswick Manufacturing Company, to restrain the infringement of a trade-mark for prepared flour. Complainant alleged a license to defendant to use the trade-mark, together with the machines covered by certain letters pat-

ent, in the manufacture and sale of the flour. This license contained covenants by defendant to make returns and pay royalties. Defendant contended that at the request and solicitation of complainant's assignor he had expended a large sum of money in the purchase of mixing-machines for manufacturing such prepared flour, and that such machines were constructed and adapted solely to that purpose.

Walter D. Edmonds, for complainant.

Horace Pettit, for defendant.

BUTLER, J. In disposing of motions for preliminary injunction it is not usual to assign reasons, where the motion is disallowed. To avoid misunderstanding, however, in this case, it is proper to say that the unanswered allegation of the respondent, (found in his deposition,) that he purchased machines of the complainant's predecessor, Thorpe, at large expense, designed for manufacturing the flour referred to in the bill, and suited to no other purpose, stands in the way of allowing the motion, without reference to other important questions raised by the record and presented on the argument. It does not appear that the purchase of these machines had any connection with the contract of license referred to in the bill, nor that their use was subject to restriction or revocation. On the contrary, judging by what is before me, the purchase was entirely independent of this contract, and conferred the same rights on the respondent that he would have taken if no such contract existed. These rights are to use the machines until worn out, in the manufacture of flour which they are designed to make, and to sell the same in the market. This flour the respondent may lawfully represent to be the flour described in the bill, by the use of labels, and otherwise. In so doing he imposes on no one, and transgresses no one's rights. The privilege of using the labels originally adopted by Thorpe, the inventor, extends to every one who acquires his right to manufacture and vend the flour. These labels were not intended to designate the flour manufactured by the inventor personally, or any particular individuals to whom he transfers rights, but the especial kind and quality of flour covered by his invention. To allow the motion would therefore be improper. At final hearing the case may present a different aspect. As presented, the complainant might possibly be entitled to an injunction so limited and confined as to avoid the difficulty above stated. This, however, I have not felt called upon to consider in disposing of the motion before me. I would suggest the propriety of preparing the case, as well as the two others pending, intimately connected with it, speedily, for final hearing, when the court may enter a decree with full knowledge of all facts involved.

THE CARONDELET.

UNITED STATES *v.* THE CARONDELET *et al.**(District Court, S. D. New York. February 15, 1889.)*

1. NEUTRALITY LAWS—CARRIAGE OF ARMS—COMMERCIAL TRANSACTION.

The steamer C., chartered by the consul of the Dominican government to carry a cargo of arms to Samana, in the Dominican republic, deliverable, as per bill of lading, to the representatives of that government, was seized, with the cargo, for an alleged violation of the neutrality act, (section 5283, Rev. St.,) for being fitted out and armed to aid Hippolyte, who headed one of the warring factions in Hayti, against Legitime, the head of the opposing faction. *Held*, upon proof that the C. was designed only to transport the cargo to Samana, and that the arms were there deliverable to the Dominican government, that both vessel and cargo must be discharged, the transaction being a legitimate, commercial one.

2. SAME—AIDING WARRING FACTIONS.

It having been declared by the president of this country that Hayti is in a state of anarchy, and that Legitime and Hippolyte, with their followers, were regarded as warring factions, neither of whom constituted any responsible government, *semble*, that neither neutral obligations, nor our statute, apply to such a case.

In Admiralty. Seizure for breach of neutrality laws.

This libel was filed on the 6th of February, 1889, to obtain a judgment of condemnation and forfeiture of the steamer Carondelet and her cargo, for alleged violation of section 5283, Rev. St. U. S. The libel charged that the steamer was loaded with cannon, arms, and ammunition, and other material of war, "with intent to enter into the service of a certain district and people of Hayti, to-wit, certain rebels in insurrection against the organized and recognized government of the republic of Hayti, and to commit hostilities against the subjects, citizens, and property of that republic;" and that she was "fitted out and armed within this district with that intent." The steamer was seized by the marshal on the same day. Answers were filed on the 8th of February, denying the alleged grounds of forfeiture, the New York & Texas Steam-Ship Company, by Mallory & Co., their agents, claiming the steamer; and Leoncio Julia, as consul of the Dominican republic, claiming the cargo. The vessel was a freight steamer only, unfitted for warlike purposes. Before seizure she had cleared for Samana, a port of the Dominican republic. She had been chartered by Mr. Julia, as consul, to transport her cargo of arms, to be delivered to the Dominican government at Samana; and bills of lading were delivered by the steamer, making the cargo deliverable there to the representatives of the Dominican government. For the libelant it was claimed that the arms were designed to aid the Hippolyte faction in Hayti, as against Legitime; and that they were not intended to go to Samana. By consent the trial was commenced on the 9th, but on that day, counsel for the government not being in readiness, an adjournment was had until the 12th, and the cause was heard on that and the following day.

Stephen A. Walker, U. S. Atty., and Abram J. Rose, Asst. U. S. Atty. McFarland, Boardman & Platt, for the claimants.

BROWN, J., (*after stating the facts as above.*) Section 5283 of the Revised Statutes, under which the Carondelet and her cargo were seized, provides for the forfeiture of any vessel that, "within the limits of the United States," is "fitted out and armed," or attempted to be fitted out and armed, with the "intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace."

The libel charges the fitting out and arming of this vessel with the intent to be employed "in the service of a district and people of Hayti, to-wit, of certain rebels, to commit hostilities against the subjects, citizens, and property of the recognized government of the republic of Hayti, with which the United States are at peace."

A doubt arises at the threshold whether the statute above cited has any application to a mere struggle between contending factions, neither of which is recognized by our government. The case sought to be proved by the libelants is that the vessel and arms were designed to aid Hippolyte as against Legitime in the struggle for supremacy now going on in Hayti. It is not a case even of an insurrection against a recognized power. In August, 1888, the existing government in Hayti was overthrown, the president being deposed and banished. As stated in President Cleveland's message of December 3, 1888, the country has since then been in a state of anarchy, in which there is a struggle of warring factions, neither of which is recognized by the United States as constituting any responsible government. Section 5283 is designed, in general, to secure our neutrality between foreign belligerent powers. But there can be no obligation of neutrality except towards some recognized state or power, *de jure* or *de facto*. Neutrality presupposes at least two belligerents; and, as respects any recognition of belligerency, *i. e.*, of belligerent rights, the judiciary must follow the executive. To fall within the statute, the vessel must be intended to be employed in the service of one foreign prince, state, colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of another, with which the United States "are at peace." The United States can hardly be said to be "at peace," in the sense of the statute, with a faction which they are unwilling to recognize as a government; nor could the cruising, or committing of hostilities, against such a mere faction well be said to be committing hostilities against the "subjects, citizens, or property of a district or people," within the meaning of the statute. So, on the other hand, a vessel, in entering the service of the opposite faction of Hippolyte, could hardly be said to enter the service of a foreign "prince or state, or of a colony, district, or people," unless our government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done. In the view of the president's message, neither

the party of Legitime nor that of Hippolyte constitutes the "Republic of Hayti," or represents the government, or a district, or the people of Hayti.

The words "colony, district, or people" in section 5283, come from the act of April 10, 1818, by which those words were added as an amendment to the act of June 5, 1794. Section 3 of the act of 1794, like the first rule of the Geneva arbitration under the treaty of Washington of 1871, mentions only a state or prince. 3 Whart. Intern. Dig. § 402a. The English foreign enlistment act is much broader. The intent of the amendment of 1818 doubtless was to extend the statute to cases of colonies or districts engaged in revolutionary struggles, many of which were then in progress between Spain and her dependencies. The struggle in Hayti is not for independence, or separation, nor between different districts or people; but between warring "factions" only, so far as our government has recognized them. The statute is a highly criminal and penal one; it is not to be enlarged by construction beyond the fair import of its terms. I do not find it necessary, however, to decide upon this point, as the libel must be dismissed for other reasons.

The Carondelet was not intended "to cruise or commit hostilities" against any one. She was neither fitted, nor adapted, nor intended for such uses. She was chartered by Mr. Julia, the consul of the Dominican government at this port, to carry a cargo of arms and munitions of war to Samana, a Dominican port, for delivery there to the Dominican government. Her charter is in evidence, as well as her bills of lading, which state that the arms are to be so delivered. She has cleared for Samana in the ordinary way. Mr. Julia has testified that the cargo was bought by him for his government, and by its orders. One of the firm of Hartley & Graham, by whom a considerable part of the cargo was supplied, testifies to the same effect; and also that his firm has a running account with the Dominican government, and has been accustomed to sell them arms largely for the past 15 years. These are marks of a simple and legitimate commercial transaction. The consul, as a commercial officer, was an appropriate agent for such a transaction by the Dominican government.

On the other hand, it is said that this is but a false pretense, and a pretext for an indirect mode of aiding Hippolyte against Legitime; that the arms are to be paid for by Hippolyte's agents; that either on the high seas or at Samana the arms are to be transferred to the steamer Madrid, now fitting up for warlike uses at this port, and nearly ready to sail; that the Madrid, thus armed, is to join Hippolyte's forces; and that the Carondelet is a mere tender to this enterprise.

Beyond the fact that the Madrid is now undergoing repair and strengthening for naval uses, the evidence wholly fails to sustain these charges. There is nothing in the evidence that goes beyond mere suspicion, or the possibility that the arms after arrival at Samana may be employed in aid of Hippolyte. If so, it can only be through the direct acts of the Dominican government. Mere suspicion or possibility would be insufficient, even if the consignee were not the Dominican government it-

self. Lawful traffic cannot justly be interfered with upon vague suspicion; much less, vessels and cargoes condemned. Commercial transactions by neutral nations in contraband of war, according to the long-established doctrine of this country, it must be remembered, are as legitimate and free as traffic in any other description of merchandise, subject only to the risk of capture by the belligerents. A vessel, by merely engaging in *bona fide* contraband trade, does not violate the statute, or our neutral obligations, even if the trade be in armed vessels. *The Bermuda*, 3 Wall. 514, 551-555; *The Santissima Trinidad*, 7 Wheat. 283, 340; *The Florida*, 4 Ben. 452; *U. S. v. Two Hundred and Fourteen Boxes Arms*, 20 Fed. Rep. 54; 3 Whart. Intern. Dig. 509-517; *Ex parte Chavasse*, 4 De Gex, J. & S. 655.

If there were reasonable grounds to suspect that the Madrid is not designed to go to Samana, to be delivered there in completion of a contract of sale to the Dominican republic, but to go direct to Hippolyte, taking her armament, by a preconcerted arrangement, from the Carondelet on the high seas, in that case, whether the Carondelet could or could not be refused a clearance under section 5290, the Madrid, according to the cases of *The Meteor* and *The Mary N. Hogan*, 18 Fed. Rep. 538, might be seized and forfeited under section 5283; but not the Carondelet; for the latter, upon the facts assumed, would not be designed "to cruise or commit hostilities" against any one, but only to complete the arming of the Madrid, which is not a ground for forfeiting the Carondelet. She might be captured by the belligerents, but would not come within our statute. There is no evidence, however, of any such design, even as respects the Madrid. According to the evidence, she is to be delivered to the Dominican government at Samana, on payment of the unpaid balance of the purchase price, which is more than half of the cost, including the cost of the alterations.

The suit against the Carondelet, therefore, necessarily fails; and, that failing, the forfeiture of the arms fails also; since the statute forfeits the latter only when the vessel for which they are procured is found liable to forfeiture.

When it appears that the transaction is an official one in behalf of an independent government, with which our own government is at peace, and that government is the *bona fide* consignee at one of its own ports, it must require a very clear case to justify arrest and condemnation, even if it could be lawfully done at all, whatever the ulterior purpose of that government, might be. It is no part of the design of our statute to enforce neutrality upon other states. There is no need of any statute of neutrality for such a purpose, nor appropriateness in such an application of it, since every recognized power is presumed to be responsible for what it does, and for what it permits to be done within its own jurisdiction. When the arming is on the high seas, through another vessel, proof that both were dispatched from our ports as parts of a concerted scheme made here, is justly held proof of "an attempt, within the limits of our jurisdiction, to fit out and arm" the vessel with intent to commit hostilities, and hence within the statute. That construction is

necessary to avoid easy and manifest evasions of neutrality; for arming on the high seas is not an act within the limits of any other jurisdiction. No other state has any power, control, or responsibility in the matter; but our own ports become in such cases the real base of hostile operations. It is otherwise when the arming is designed to be in a foreign port, and under the observation, the control, and the responsibility of another government. That is not an attempt here to fit out and arm the vessel, but only an attempt to send her to a foreign port for arming. The statute does not include that, and ought not to be extended to such a case. There is no precedent, and no sufficient reason for it. Still more should a *bona fide* delivery to an independent government be deemed to end the adventure, so far as our merchants are concerned. Subsequent acts, under the authority or permission of that government, are too remote for the operation of our statute. And where such a *bona fide* delivery alone is the design of the owner and shipper, the adventure is commercial only, and there is no violation of section 5283, whether the articles are contraband, or are vessels armed or unarmed. The libel is dismissed.

HARDMAN *et al.* v. BRETT.

(Circuit Court, S. D. New York. February 6, 1889.)

1. CARRIERS—OF GOODS—LIABILITY FOR LOSS—SET-OFF.

A common carrier who has brought suit against a wrong-doer to recover for the destruction of goods which had been intrusted to him for transportation, and has recovered for their amount, is liable to the owner of the goods for the sum recovered, and cannot recoup against the claim the expenses incurred in the litigation with the wrong-doer.

2. MARINE INSURANCE—SUBROGATION.

Plaintiffs insured a cargo of lumber on a schooner, of which defendant was the managing owner. By a collision with a steam-ship, in which a court of admiralty, at the libel of defendant, decided both vessels in fault, the cargo was lost. The court also held that both parties were liable for the full value of the cargo, and that the steam-ship was liable to the schooner for one-half the damage done to the latter. These sums were paid, under order of court, to defendant's proctor, who, after deducting his fees, paid the residue to defendant. *Held*, that plaintiffs, who had succeeded to the rights of the owner, could recover the full amount paid to the proctor, without deduction of proctor's fees and expenses of litigation.

At Law.

Action by Hardman and others to recover of one Brett a sum of money received by him as the value of a cargo of lumber lost at sea, which plaintiffs had underwritten. Trial by the court without a jury.

J. Langdon Ward, for plaintiffs.

Wm. W. Goodrich, for defendant.

WALLACE, J. The plaintiffs are underwriters, who had insured a cargo of lumber shipped in July, 1878, on the schooner *S. B. Hume*, which

cargo was lost by a collision between the schooner and a steam-ship, and sue to recover a sum of money representing the value of the cargo, which came to the hands of the defendant in the progress of a suit in admiralty brought by the owners of the schooner against the steam-ship to recover damages sustained by the collision, including the loss of the cargo. The plaintiffs have succeeded to the rights of the owners of the cargo by subrogation. The defendant was the managing owner of the schooner, and the active party in prosecuting the suit in admiralty in behalf of the owners. The libel in the admiralty suit averred in respect to the cargo that the owners of the schooner were entitled as carriers to recover the value. The court decided in the admiralty suit that both the schooner and the steam-ship were in fault for the collision, and decreed that both parties to the suit were liable to the owners of the cargo lost for the full value thereof; and also decreed against the steam-ship in favor of the owners of the schooner for one-half the damages sustained by the schooner in the collision. The sum found by the decree to be owing for loss of the cargo was \$3,496.92; and the sum awarded for the half of the damages to the owners of the schooner was \$4,426.22. After the decree was rendered, and pending an appeal from the district court to the circuit court, the owners of the steam-ship paid into court so much of the sum awarded against the steam-ship as would satisfy the claims of the owners of the cargo, to-wit, \$3,496.92; and this was done in order that the owners of the steam-ship might discharge themselves from liability to the cargo-owners in a suit threatened or brought in another jurisdiction by the cargo-owners against the steam-ship. The decree of the district court having been affirmed by the circuit court upon the appeal, the owners of the steam-ship paid the balance of the decree to the proctor for the owners of the schooner; and shortly thereafter such proctor made an application to the court, and obtained an order, that the \$3,496.92 which had been paid into the registry of the court by the owners of the steam-ship be transferred to him in behalf of the owners of the schooner. This order was applied for by the instructions of the present defendant, and the defendant received the money from the registry of the court, less the sum of \$1,000, which was retained by the proctor for his services in the cause.

The theory of the present action is that the money paid into court, and withdrawn by the intervention of the defendant, is the proceeds of the cargo, for which the defendant is liable to the plaintiffs, who are the real owners, as for money had and received. The defendant insists that he is entitled to retain out of these moneys such proportion of the expenses of the litigation between the owners of the schooner and the steam-ship, including counsel fees, as the amount recovered for the cargo bears to the whole amount of the recovery against the steam-ship; and he asserts that upon an adjustment of the expenses incurred in the litigation upon that basis only the sum of \$873.84 remains due to plaintiffs.

The delivery of goods to a carrier for transportation vests in him a special property, which authorizes him to maintain an action against any person who disturbs his possession, or does any injury to the goods. Every

bailee has a temporary qualified property in the thing of which possession is delivered to him by the bailor, which entitles him to maintain an action against any stranger who injures it; and the reason is because he is answerable over to the bailor, and ought not to be responsible for the loss without being able to resort to the person who was the original cause of the injury. Story, Bailm. § 93. A carrier by vessel for hire, whether strictly a common carrier or not, assumes the ordinary obligations of a common carrier, and is bound to carry the goods shipped to their destination, unless prevented by the act of God or the public enemy, or the act of the shipper, or one of the excepted perils expressed in the contract of shipment. *The Maggie Hammond*, 9 Wall. 435; *The Commander in Chief*, 1 Wall. 43, 51; *The Niagara v. Cordes*, 21 How. 7. It is just, therefore, that he should be permitted to indemnify himself from a wrong-doer against his liability to the shipper or owner. In prosecuting the suit against the steam-ship the defendant did not assume to act as an agent for the owners of the cargo; but he claimed to recover the value of the goods lost by virtue of his special property in them as a carrier. It is familiar law that the special right of property conferred by a bailment is sufficient to enable the bailee to recover the full value of the property of a wrong-doer who destroys it; and this, whether the bailment is for a consideration, or is merely a naked bailment. Thus a traveler was allowed to recover in trover against a steam-boat company the full value of a satchel intrusted to his care by a friend, (*Moran v. Steam-Packet Co.*, 35 Me. 55;) and the finder of a jewel was permitted to recover its whole value for a conversion by a stranger, in the leading case of *Armory v. Delamirie*, 1 Strange, 304. Inasmuch as the law does not allow a defendant to be vexed twice for the same wrong, a recovery by the person having a special property, and satisfaction by the wrong-doer, discharges the latter from all liability to the owner. *White v. Webb*, 15 Conn. 305; *Smith v. James*, 7 Cow. 328; *Harker v. Dement*, 9 Gill, 7.

When the defendant received the money in question from the owners of the steam-ship he thereby absolved them from any further liability to the plaintiffs. The plaintiffs took no part in the suit, were not consulted, and had no opportunity to intervene in any way. As is said in the opinion of the court in *The Commander in Chief*, *supra*, doubtless they might have intervened and petitioned the court for the transfer of the money to them at any time before the distribution of the fund in the registry of the court. But they were under no obligation to do this, and were at liberty then, as they had been at any time after their right accrued, to bring an action against the owners of the schooner, and recover the value of the cargo, which had not been delivered pursuant to the duty of the carrier. In such an action it could not be maintained by the carrier with any color of plausibility that he should be permitted to retain, or recoup against the demand of the cargo-owner, any sum which he might have expended in prosecuting a suit brought for his own protection and indemnity against a wrong-doer by whose act the cargo was lost. Such a defense would be preposterous in a case where the loss of the cargo was caused by the misconduct of the carrier; and such was the fact in the

present case. Instead of bringing such a suit for the value of the cargo, the plaintiffs have elected to sue the defendant, who has received a fund which, in legal contemplation, is the cargo itself. If the defendant had sold the cargo and received the proceeds, the plaintiffs could maintain an action against him for the amount, upon the promise implied by law to pay them to the true owners. What the defendant has done is equivalent to that, because he had no right to appropriate the fund to any other object than that of paying it to the true owners in order to exonerate himself. Although he has not been guilty of a technical conversion, he has sought to retain money to which, as against the plaintiffs, he has no equitable claim. The action for money had and received, which is sometimes termed an equitable action, affords an appropriate remedy to the plaintiffs. If defendant has allowed his proctor to retain part of the money, he must account for it as though he had received it himself, and paid over to the proctor the amount, which the latter retained. Judgment is ordered for the plaintiffs for the sum of \$3,496.92, with interest from October 13, 1885.

GOLDSMITH v. TOWER HILL STEAM-SHIP CO.¹

(District Court, S. D. New York. February 20, 1889.)

CARRIERS OF LIVE-STOCK—DELAY IN SAILING—EXPENSE OF KEEPING STOCK—LOSS OF WEIGHT—LIABILITY OF CARRIER.

Where a steam-ship's sailing day was delayed, and in consequence libellant brought suit to recover alleged loss for the keep of his live-stock while awaiting shipment under a prior contract, as well as for their loss of weight during such delay, but it appeared that part of the original lot was sent forward by another steamer, and that the rest were sold in this city without any loss proved, and that the steamer's delay was without fault, and that the libellant had early notice of the expected delay, *held*, that libellant had sustained no damage on the original lot. But the evidence indicating that on a second lot, procured on notice from the ship, there was further delay, *held*, that libellant was entitled to recover for the keep and loss of weight on the last lot.

In Admiralty. Libel for damages for delay in transporting cattle.

The respondents on the 22d of September, 1888, agreed to transport upon the next voyage of their steamer Tower Hill, from New York to London, 275 head of cattle and 500 head of sheep; the cattle to be shipped on notice of the time of sailing, to-wit, about September 29th. On the arrival of the steamer she was found to have sustained some damage, which would cause detention, at first supposed to be slight; and notice was given to the libellant that she would sail on October 3d. It was afterwards found that the damages were much greater than supposed; and the steamer did not sail until the 15th, when she carried the agreed number of cattle and sheep. The libel is to recover damages for the ex-

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

penses of keeping the live stock, and the loss of weight in the mean time.

Butler, Stillman & Hubbard, for libelant.

Wing, Shoudy & Putnam, for respondents.

BROWN, J. The evidence shows that none of the cattle or sheep that were first designed to be sent by the Tower Hill were kept until she sailed. The libelant was in the business of purchasing cattle in the west, to be shipped to this port, and thence forwarded by steamer. Of those originally designed for the Tower Hill, 117 were forwarded by the steamer *Helvetia*, which sailed on October 7th, belonging to another line; the rest were sold to butchers in this city. All the sheep first brought were likewise sold. At the end of the trial two adjournments were had to allow the libelant to furnish legal evidence of the kinds of damage sustained. No further evidence was introduced; and, upon the cause thus submitted, there is no sufficient proof of any loss to the libelant on the cattle or the sheep sold. The libelant failed to appear for examination; and the evidence of his clerk and book-keeper is quite indefinite as to the small loss which he thinks arose on the sale of the sheep. No claim for that item was made on the respondents before suit.

As respects the 117 cattle for which damages are claimed for their keep and loss in weight from October 3d until the *Helvetia* sailed, on October 7th, there is no certain evidence that they arrived by October 3d, or any sooner than was necessary to ship them on the *Helvetia*. Again, from the failure to prove any loss on the remainder of the consignment that was sold, it must be inferred that the 117 could also have been sold without loss, had the libelant chosen to sell them. If so, he could not keep them here for the purpose of sending them on the *Helvetia*, and then charge the respondents for keeping them in the mean time. The inability of the respondents to have their vessel sail upon the day assigned, and the subsequent several delays, were all accidental, and without any fault on their part. The libelant had notice of the expected delays. In such a case, the other contracting party is held to reasonable care and exertion to render the injury as light as possible. *Hamilton v. McPherson*, 28 N. Y. 72, 77. If, therefore, the 117 cattle were kept over for the *Helvetia*, there is no evidence to show that the respondents are chargeable for this item. It was the libelant's voluntary act.

There is no evidence of any damages sustained in holding back the cattle or sheep first designed for the Tower Hill.

The respondents are liable for the keep and loss of weight on the second lot of cattle and sheep, upon the last postponement from October 14th to October 15th. The cost of "keeping" here is for cattle, 50 cents per head a day; and for sheep, 10 cents. This item is \$187.50; for loss of weight, \$266.87; making in all, \$454.37, for which a decree may be entered, with interest since October 15, 1888, with costs.

PETERSON v. THE WAYNE.

(District Court, N. D. Illinois. March 14, 1889.)

COLLISION—BETWEEN SAILING VESSELS—CONFLICTING THEORIES.

The libel for damages to the schooner P. by a collision while she was cruising around the entrance to Chicago harbor, waiting for daylight and a tug, charged that for some time before and at the time of the collision the wind was blowing strong from east-north-east, and the weather clear, so that the vessel's lights could be seen at least two miles away; that the schooner was on the starboard tack, close-hauled, with all hands on deck, in charge of the master, with a lookout forward and a seaman at the wheel; that a vessel's red light was reported over the starboard bow, and, as it approached without change in direction, a torch-light was shown, and repeated, but without change of course; that when the other vessel, which was the barge W., passed so that her red light appeared over the schooner's portbow, she suddenly changed her course, striking the schooner stem on, on the port bow, between the fore-rigging and the cat-head; that as the W. was sailing with wind free it was her duty to have kept out of the way. The answer denied these allegations, and charged that the wind was north-east; that the barge was heading south-west by south; that her crew discovered from her starboard side a torch-light on a vessel approaching her from her stern, and that the sails, as seen by the torchlight, appeared to be trimmed on the starboard side, and the vessel to be going in the same general direction as the W.; no side lights were seen on the schooner; that her course so converged to that of the W. as to cause her to run her jib-boom and bowsprit on her port bow against the W.'s starboard bow; and that it was the duty of the P. to have kept out of the way. The statements of the pleadings were supported by the testimony of the respective crews, but the crew of the W. admitted that they had no knowledge of the presence of the P. until they saw the torch-light. *Held*, that the proof from the P. was the most natural and consistent, and that the W. must be held liable for the damage.

In Admiralty. Libel for collision.

Schwuyler & Kremer, for libellant.

Robert Rae, for respondent.

BLODGETT, J. In this case libellant, as owners of the schooner *Phoenix*, seek to recover damages sustained by said schooner from a collision with the barge *Wayne* on the morning of November 24, 1887, on the waters of Lake Michigan, a few miles north-east of the entrance to Chicago harbor. The proof on the part of the libellant shows that the *Phoenix* was bound on a voyage from Milwaukee to Chicago, and arrived at the entrance to Chicago harbor at about 12 o'clock midnight; that, instead of coming to anchor, she cruised around about the mouth of the harbor, waiting for daylight, and a tug to take her in. The libel charges that some time before and at the time of said collision the wind was blowing a strong breeze from the east-north-east, and the weather was clear enough so that vessel's lights could be seen at least two miles away; that for some time before and at the time of the collision the schooner was on the starboard tack, close-hauled; all hands were on deck, a lookout was stationed forward, and a seaman at the wheel, and the deck in charge of the master; and, while sailing along in this way, the lookout discovered and reported a vessel's red light over the schooner's starboard bow. This was closely watched, and, as it approached without apparent change of course,

the schooner's torch-light was shown in the direction in which the vessel was approaching. This signal was repeated several times, but without change of course. The other vessel, which proved to be the barge Wayne, approached, and when she had passed so that her red light appeared over the schooner's port bow she suddenly changed her course, struck the schooner stem on, on the port bow of the schooner, between the fore-rigging and the cat-head, broke in the side, passing across the Phenix's bow, and carried away the bowsprit, boom, cat-head, stays, and sails, whereby the Phenix immediately became water-logged, but, being loaded with lumber, floated, and drifted into the vicinity of the Chicago harbor. That up to and just before the said collision the barge Wayne was sailing with the wind free and over her quarter, and it was her duty to have kept out of the way of the Phenix, which, from the time the Wayne's light was sighted, was kept standing on her course, close-hauled, on the starboard tack. That said collision was caused by and through the fault and want of skill of those navigating the said barge, and from no fault on the part of those in charge of the schooner. The answer denies all negligence and want of skill on the part of those in charge of the Wayne; insists that the Wayne was properly managed, and her crew all on deck, and her lights properly placed; charges that the wind was north-east; insists that said barge, with her full complement of men, all on deck, was heading south-west by south, with the wind steady from the north-east, and had passed about half-way from Grosse Point to the entrance of Chicago harbor, and was about six miles off the land, when her crew discovered a torch-light on the schooner approaching her from her stern; that this torch-light was seen from the Wayne's starboard side, but no side lights were seen on the approaching craft; and that the sails of the schooner first disclosed by the torch-light seemed to be trimmed on the starboard side of the schooner; that the said schooner was going in the same general direction with that of the Wayne, but converging to the course of the Wayne in such a manner as to cause her to run her jib-boom and bowsprit on her port bow against the Wayne's starboard bow; that when the Phenix was first seen by the officers and crew of the Wayne she seemed to be slowly overtaking the Wayne, sailing between the Wayne and the land, apparently heading south by west, and the Wayne actually heading, by the compass, south-south-west by south, and having her port tacks-a-board; that the Wayne was running light at a very low rate of speed, not exceeding one and a half or two miles an hour; and that it was the duty of the Phenix to have kept away from the Wayne; and that the failure on the part of those in charge of the Phenix to do this was the cause of the collision; and that said collision was not caused through any fault or negligence on the part of those in charge of the Wayne.

It will be seen that these statements of the direction in which the two vessels were running, as made in the libel and answer, are directly and wholly at variance with each other; the libel charging that the Phenix was going on the starboard tack, close-hauled, and that her course was north by east, with the wind east-north-east, and that the Wayne's course was about south by west or south-west, when the Wayne's lights were

made on board the Phenix; while it is insisted by the answer that the Wayne's course was south-west by south, with the wind steady from the north-east, and that the Phenix, going in about the same direction, or perhaps a little to the westward of the Wayne's course, overtook the Wayne, and attempted to cross her bows, and, in doing so, struck the Phenix's port bow against the Wayne's starboard bow, thereby doing the injury complained of.

The only testimony in the record, material to the issues made in the case, is from the decks of the colliding vessels, and it is admitted that this testimony is wholly irreconcilable, and that it is impossible to accept the statements of these two crews and to harmonize them. The question, therefore, is, which of these two crews tells the most probable story as to the manner in which this collision occurred? The testimony from the Phenix comes from the master, mate, wheelsman, and steward, who were all on duty at the time the collision occurred, and for some time before it; the lookout of the Phenix not being called as a witness by either side. The testimony of these witnesses from the Phenix is consistent and apparently natural. All the witnesses, with the exception of the steward, who was not on deck, but stood in the companion-way, agree that the course of the Phenix was north by east; that she was proceeding at a slow rate of speed, not to exceed two or two and a half miles per hour; that the wind was east-north-east; that she was standing upon the starboard tack, close-hauled, when her lookout reported the red light, which proved to be that of the Wayne, a point or two on her starboard bow. Of course all this would indicate that the Wayne was on the port tack, and had the wind free. That very soon after the Wayne's red light was reported, a torch was shown from the schooner's starboard quarter in such a position that it ought to have been seen from the Wayne as she was then running; and that the showing of the torch was repeated three or four times before the collision occurred, the last being just before the two vessels came together. All the testimony from the Phenix also tends to show that her course was not changed, and that the Wayne, after passing so that her red light was seen upon the Phenix's port bow, suddenly changed her course, and struck the Phenix on the port bow, completely breaking in her port bow, carrying away her lights, and put her into a condition in which she was water-logged within a very few minutes. This testimony seems to me to be natural, and carries with it an appearance of probability. The schooner was not obliged to come to anchor and wait, lying at anchor, for a tug in the morning. It was entirely optional with her whether she would anchor or cruise around about the mouth of the harbor until morning, and if she adopted, as her master and crew say she did, the course of keeping under sail, the course in which she was running, in view of the direction and character of the wind, was a natural and proper one. The theory of the defense is that, as the Wayne was standing upon her course, the Phenix suddenly appeared upon her starboard side, showing a torch, and running in such a course as to cross the bows of the Wayne, but that a collision at that moment was inevitable; that from the course of the schooner, and the

way she was seen from the decks of the Wayne, her crew concluded that the Phenix was sailing in a south-westerly direction, her course being a little to the westward of the course of the Wayne; and that she was sailing much faster than the Wayne, and had overtaken the Wayne, and attempted to cross her bows, thereby bringing on the collision. This theory, if sustained by the proof, would of course show the Phenix clearly at fault. She would have had no right, under the circumstances, to attempt to cross the bows of the Wayne. She, according to respondent's testimony, had the wind free as well as the Wayne, and, if she wished to get to the windward of the Wayne, her duty was to have gone under the stern of the Wayne, instead of attempting to cross her bows. The master of the Phenix was a trained seaman, had spent the most of his life as a sailor, and must have known the folly and madness of the attempt he is charged with by the respondent. The only way in which I can in any degree explain the testimony of the witnesses for the Wayne is that they were inattentive in looking out for lights and signals, and when the proximity of the Phenix was discovered on board of the Wayne the wheel of the Wayne was suddenly put to starboard, and her bows swung rapidly to port, so that for an instant preceding the collision, and while the last torch was being shown, the two vessels seemed to be along-side of each other, the port side of the Phenix showing along the starboard side of the Wayne. All the witnesses on the Wayne admit that they had no knowledge or notice of the presence of the Phenix until just at the instant before the collision, when the torch-light was shown from the deck of the Phenix. At that moment, undoubtedly, the position of the two vessels was such as that, if the Wayne's wheel was put to starboard, they might hastily have assumed that the Phenix had approached them from the inside, or was attempting to cross their bows. Therefore, without further attempt to reconcile this contradictory testimony, I simply say that I accept the proof from the Phenix as being the most natural and consistent, and, in the light of that proof, find the Wayne must have been at fault, and liable for the damage incurred.

ELLIOT v. THE STAFFORD.

(District Court, N. D. Illinois. March 14, 1889.)

COLLISION—BETWEEN SAILING VESSELS—FOG-SIGNALS.

The schooner M. was, between 4 and 5 A. M., running close-hauled on the port tack between Cat-Head point and the Manitou islands, Lake Michigan. Her course was about west-south-west, with the wind south by west. There was a dense fog, and two blasts of her fog-horn were sounded at proper intervals. Hearing a single blast of a fog-horn from a schooner, which proved to be the S., over the M.'s starboard bow, the M.'s captain assumed that she was running about south-east, close hauled on the starboard tack, and immediately ported, and went off two points to starboard, when, hearing another single blast about ahead, he ported another point, bringing his course west by north, which he held until the S. was disclosed through the fog running

about east-north-east, and so close that collision was inevitable. The S. claimed that the wind was south-south-east, but the evidence showed that it was from south by west to south-south-west, thus giving the S. the wind free. *Held*, that as by the supplemental rule 12, new sailing rules 1883, a vessel with the wind free is required to sound three blasts on her fog-horn, the S. was at fault in giving an improper signal.

In Admiralty. Libel for collision.

Schuyler & Kremer, for libellant.

W. H. Condon, for respondent.

BLODGETT, J. The libellant, as owner of the schooner *Morning Star*, seeks to recover damages sustained by his schooner from a collision with the *Stafford* on the waters of Lake Michigan. It appears from the pleadings and proofs that the *Morning Star*, bound on a voyage from Torch Lake to Chicago, with a cargo of cedar, was, between 4 and 5 o'clock in the morning of May 24, 1887, running close-hauled on the port tack between Cat-Head point and the Manitou islands. Her course was about west-south-west, with the wind south by west. There was a dense fog, and two blasts of her fog-horn were being regularly sounded at intervals not to exceed two minutes, when one blast of a fog-horn from a schooner, which proved to be the *Stafford*, was heard over the starboard bow of the *Morning Star*. Her captain, who was officer of the deck at the time, hearing the single-blast signal from the *Stafford*, assumed that she was running about south-east, close-hauled on the starboard tack, and at once ordered his wheel put to port, and went off two points to starboard, when he got the *Stafford's* horn—still a single blast—about ahead, when he ported another point, bringing his course west by north, and held this course until the *Stafford* was disclosed through the fog, running about east-north-east, and so close that a collision was then inevitable. The wheel of the *Stafford* was put to port, and the port bow of the *Stafford* struck the port bow of the *Morning Star*, doing the damage complained of.

I think the whole case turns upon the direction of the wind. It is claimed on the part of the *Stafford* that the wind was south-south-east, while a clear preponderance of the proofs from the deck of the *Morning Star*, and from the decks of the schooners *Simmons*, *Starke*, and *Nelson*, that were in the immediate vicinity and hearing of the accident, makes the wind from south by west to south-south-west. All the proof from the *Stafford* and the *Morning Star* makes the course of the *Stafford* from east by north to east-north-east; and with the wind south, or from any point west of south, the *Stafford* must have had the wind free,—that is, she had it from abaft the beam,—as I understand that, when a sailing vessel has the wind a-beam, or abaft the beam, she has the wind free. And all agree that if the *Stafford* had the wind free she should have blown signals of three blasts upon her fog-horn. See Supplemental Rule 12, New Sailing Rules of March 1, 1883. When the master of the *Morning Star* heard the signal of a single blast from the *Stafford's* fog-horn, he had the right to conclude that the *Stafford* was running close-hauled

on the starboard tack, and it was a proper thing for him to put his wheel to port, so as to pass astern of the Stafford, as the Morning Star was on the port tack, and obliged to keep out of the way of the Stafford on the starboard tack, unless he knew the Stafford had the wind free. If the Stafford had been sounding a signal of three blasts, the master of the Morning Star would have understood it was his duty to keep his course, and that it was the duty of the Stafford to keep out of the way, according to rule 17 of the new rules of March 1, 1883; but the master of the Morning Star was misled, and caused to change his course, by the erroneous signal of the Stafford; and while the change of the Morning Star's course may have brought about the collision, such change was made through the fault of the Stafford in not sounding the proper signal required by usage and the sailing rules. A decree for damages may be entered in favor of the libellant.

THE AMERICA.¹

MILLS v. THE AMERICA.

(Circuit Court, S. D. New York. March 18, 1889.)

1. COLLISION—BETWEEN TUGS—CROSSING BOWS.

A tug which, on sighting another tug showing its red light, crosses the latter's bow to the starboard instead of passing port to port, is in fault for a collision occurring thereupon.

2. SAME—DELAY IN REVERSING—EMERGENCY—FAILURE TO CHANGE COURSE.

The tug A., when 300 to 400 yards from the tug T., which showed both lights, blew a single whistle. Getting no response, it slowed, and blew again, still seeing both lights: but the red light then became invisible, and the T. gave two whistles. The A. immediately thereon reversed, and gave the danger signal. The testimony as to the distance of the vessels apart varied from 150 to between 500 and 1,000 feet. A collision occurring, *held*, that the A. was not in fault for not reversing sooner, or in not starboarding her helm when the T. indicated an intention to cross her bow.

In Admiralty. Libel for damages. On appeal from district court. 32 Fed. Rep. 845.

This is an action by the owner of the steam-tug *Talisman* to recover from the steam-tug *America* the damages sustained by a collision between the two tugs on the night of March 5, 1886, in the North river. The *Talisman* left Weehawken at 11:15 p. m., bound for pier 5, N. R., and had passed Castle Point, lying about 400 or 500 yards from the Jersey shore, and heading generally down the river, but angling slightly for the New York shore. The *America* left Jersey City, bound for Thirty-Fifth street, New York. She went up along the Jersey shore about 300 feet or so off the piers, until near the Lackawanna docks, when she sheered

¹ Modifying 32 Fed. Rep. 845.

off for New York, heading for the high red light on top of Twenty-Third street ferry. The witnesses differ radically as to the respective signals given. According to the navigator of the *Talisman*, he first signaled, blowing two whistles, received an answer of one, again blew two, and to that received an answer of two. He had starboarded about the time of the first signal, and did not alter his helm until in the jaws of the collision, when he ported to swing his stern out of the way. He also slowed upon the non-assenting answer, and hooked up when his signal of two whistles was, as he supposed, agreed to. The navigator of the *America* testified that he first signaled, and with one whistle, when at a distance of about 400 yards; the *Talisman* being then opposite the Bremen docks. That, receiving no answer, he slowed, and again blew one whistle. To that he received a signal of two whistles, whereupon he stopped, backed, and blew an alarm-whistle—three sharp blasts.

W. W. Goodrich, for libelant, cited *The Non-Pareille*, 33 Fed. Rep. 526; *The W. H. Vanderbilt*, ante, 118.

Henry G. Ward, for claimant, cited *The Britannia*, 34 Fed. Rep. 552; *The Gen. U. S. Grant*, 6 Ben. 467; *The Free State*, 91 U. S. 203.

LACOMBE, J., (after stating the facts as above.) I have no doubt from the testimony that the last signal blown by the *America* was an alarm of three short blasts, which was misunderstood by those on the *Talisman* as an affirmative response to their two-whistle signal. The evidence as to the situation of the tugs when they first sighted each other is conflicting, the witnesses for the *Talisman* insisting that the *America* showed her green light and those on the latter that she showed the red. There are no new proofs in this court, and the district judge's conclusion, viz., that she showed the red, seems in accord with the weight of evidence. Having the *America* on her starboard hand, the *Talisman* was bound to keep out of the way, and the decision of the district judge that she was in fault for not porting, and for undertaking to cross the *America's* bows to starboard instead of passing port to port, is sustained.

The *America*, as her witnesses swear, while yet from 300 to 400 yards off,—both lights on the *Talisman* showing,—blew a single whistle. Getting no response, her navigator ordered the engines slowed, and blew again,—still seeing both of the *Talisman's* colored lights. Directly after the last signal he observed the *Talisman's* red light shut in, leaving her green light visible, and heard her signal of two whistles, the change of course and signal indicating for the first that she was hauling towards the New York shore and across the *America's* bows. Thereupon the captain of the *America* gave a danger-signal of three short blasts, and ordered his engine reversed. I am unable to agree with the district judge in the conclusion that he delayed reversing longer than was justifiable. How far apart the vessels were at the time is not entirely clear; the estimates vary from 150 to "over 500, and less than 1,000, feet." That the order to reverse, however, followed immediately upon the *Talisman's* manifesting her intent to cross the *America's* bows, is testified to affirmatively by the latter's witnesses, is contradicted by no one, and I find nothing

in the other testimony indicating that their evidence in that respect is incredible. The *America* held on the course which would take her from the fourth situation, where she was, to the right of the other, as required by inspectors' rule II. She slowed while awaiting an answer to her single whistle, and reversed when the change of lights and two-whistle signals of the *Talisman* indicated that the latter was about to disregard the rules, and navigate so as to involve risk of collision. The *America* therefore fulfilled her whole duty, unless she was also bound, as the district judge found, to starboard her wheel as soon as the *Talisman* indicated an intention to cross her bows. It has been repeatedly held that there is no such thing as right of way to run into unnecessary collisions, and a careful examination of the situation after the event no doubt shows that, had the *America* changed her course by starboarding, the collision might have been avoided. In determining, however, whether or not it was faulty navigation not to make such change, the situation must be considered from the point of view of the individual who is first called upon to decide the question. Rules prescribing courses are enacted for the purpose of avoiding collision, and are framed on the theory that a scrupulous adherence to them will render such a mishap impossible. Before a navigator departs from a rule directing him to hold a particular course, the existing situation should afford reasonable assurance that such a change will prevent an accident otherwise imminent, and will not itself tend to produce the very mishap it was intended to avoid by co-operating with a belated effort on the part of the other vessel to return to her true course, or to reverse,—an effort induced perhaps by the very danger-signal he has given. Tried by this test, I do not think the facts in this case warrant a finding that the *America* was in fault for not shifting her helm to starboard at the moment the lights and whistles of the *Talisman* indicated an intent to cross her bows. The *Talisman* is therefore solely in fault. Decree accordingly, with costs.

THE POMONA.

LOUISIANA & T. R. & S. S. Co. v. THE POMONA AND HER CARGO.

(*District Court, D. South Carolina. March 2, 1889.*)

SALVAGE—DISTRIBUTION OF AWARD.

Where a rescue is made by a steam-ship, and there is no danger or risk or extra trouble to the crew, and \$2,000 are awarded as salvage, including the charge for a tug, the owners should be awarded four-fifths of that sum. And the master having undertaken the service on his own responsibility, and having been commended for it, is entitled to \$200. The remainder should be divided among the other officers and employees,—the steam-ship having no passengers,—in proportion to their wages.

In Admiralty. On distribution of an award for salvage.

Barker, Gilliland & Fitzsimons, for libellant.
T. M. Mordecai, for claimant.

SIMONTON, J. By decree filed 29th January, 1889, libelants were allowed as salvage \$2,000, including the charge of the tug for towing the *Pomona* over the bar into the harbor of Charleston. *The Pomona*, ante, 444.

The only remaining question is as to the distribution of this sum among the salvors. The crew of the steam-ship *New York* have intervened, setting up their claim for part of the award. Under the rule once prevailing in admiralty, the owners of the salving vessel could not receive more than one-third of the award, (*The Blaireau*, 2 Cranch, 240; *The Henry Ewbank*, 1 Sumn. 426; *The Cora*, 2 Wash. C. C. 80;) unless there were unusual circumstances of peril to the salving vessel, (*The Henry Ewbank*.) In *The Island City*, 1 Black, 129, it seemed to be admitted that where the salving vessel was a steamer, and so capable of rendering the most efficient aid, her proportion should be greater; and this is recognized in *The Raikes*, 1 Hagg. Adm. 246; *The Earl Grey*, 3 Hagg. Adm. 363; *The Beulah*, 1 W. Rob. 477; *The William Penn*, 2 Hughes, 144. In *The C. W. Ring*, 2 Hughes, 99, decided by Judge BRYAN, late judge of this district, as referee, before his court was organized; in 1866, the question was considered, and the proportion of the salving vessel—a steam-ship—in the award was raised to three-fifths. In *The Leipsic*, 5 Fed. Rep. 108, Judge CHOATE, of New York, had this question before him. The circumstances of that case were almost the same as in the case of *The Pomona*. A steam-ship, disabled because of a broken shaft, dependent upon her sails, which were uninjured, was rescued by a passing steamer; there being no present imminent danger to the salving vessel or her crew, the essential feature of the service being its prompt and efficient action. Judge CHOATE allowed the salving steamer three-fifths of the award. He adopted the same rule in *The Adirondack*, 5 Fed. Rep. 215. In the present case there was no danger, or risk, or extra trouble to the crew. The service was by the ship entirely. The loss of time was hers only. I will increase the proportion, and make it four-fifths. The next question is as to the apportionment among the officers and crew. The master of the *New York*, upon his own responsibility, undertook the service. He has been commended for it. Following the cases, especially the two of Judge CHOATE and *The Henry Ewbank*, supra, let the master of the *New York* have \$200. Let the remainder of the one-fifth be divided among the other officers and the persons employed upon the steam-ship *New York*, (she had no passengers) in the proportion of the wages received by them; the counsel fees of this suit to libellant's proctor to be charged on the fund.

BELDING v. GAINES *et al.*¹

(Circuit Court, E. D. Arkansas. March 1, 1887.)

COURTS—FEDERAL COURTS—CITIZENSHIP—COLLUSIVE JOINDER—PARTITION.

Complainant, a citizen of Texas, the heir of B., sued his co-heirs, citizens of Arkansas, claiming from the first defendant, who had obtained the legal title to the ancestor's property, a one-fourth interest, and from the other two defendants, partition. The last two defendants filed a cross-bill, claiming separate ownerships of one-fourth interest, and also partition. *Held* that, although the interests of the last two defendants and that of complainant were the same as against defendant who claimed the legal title, their interests were not so identical in other respects as to require their being joined as complainants; and a plea in abatement to the jurisdiction on the ground that they were collusively made defendants to give the federal court jurisdiction, should be overruled.

In Equity. On plea in abatement to the jurisdiction.

U. M. & G. B. Rose, for plaintiff.

M. W. Benjamin, for defendants.

Before BREWER and CALDWELL, JJ.

BREWER, J. The complainant is a citizen of Texas, the defendants all citizens of Arkansas; *prima facie*, therefore, this court has jurisdiction. But these facts appear, and upon them a plea in abatement to the jurisdiction has been filed. One Belding died, having the equitable title to a tract of land in Arkansas, and leaving four heirs. One of them, a defendant herein, obtained the legal title. The complainant is one of the heirs, and files this bill claiming as against such defendant a one-fourth interest in the property, and as against all the defendants—the other heirs being made defendants—partition. Such other heirs file a cross-bill, claiming their separate ownerships of one-fourth interest, and also asking partition. It is insisted that the interests of these two defendants are the same as those of the complainant, and that they are collusively joined as defendants for the purpose of giving this court jurisdiction; that the court should ignore the action of the pleader, rearrange the *status* of the parties litigant, and place such last-named defendants on the side of the complainant; and, so placing them, there would be a suit between citizens of this state, of which this court could not take jurisdiction. I think this is a mistake. It may be true that the complainant and the two defendants are alike interested in divesting the other defendant of whatever right and protection he may claim from holding the legal title, but there their identity of interest ceases. Each seeks to recover for himself, and not for the three jointly, his one-fourth share of the property. Partition implies a setting apart to each owner his hitherto undivided interest, and each owner has a separate interest in establishing the fact and extent of his title, and in securing his separate share of the estate. Take an ordinary law action. There must be a unity of interest, not merely in the subject-matter of the action, but also in the relief sought,

¹Publication delayed by failure to obtain copy of opinion at time of its delivery.

before two parties can be joined as plaintiffs. Take, for illustration, a case I have just decided in the Eastern district of Missouri (*Keary v. Life Ass'n*, 30 Fed. Rep. 359.) A man took out a policy in an insurance company. The policy provided for the payment of \$10,000 upon his death, not to his heirs in bulk, but separately,—\$2,000 to one, \$1,000 to another, and so on, specifically naming each. Upon his death the heirs joined as plaintiffs in a single action. I sustained a demurrer on the ground of misjoinder of several causes of action. All were interested in the subject-matter of the action,—the establishing the policy as a valid contract upon which the company was liable,—but they were not jointly interested in the relief sought. Each had his separate cause of action for the money due him by the terms of the policy, and neither was interested in the money claimed by the others. So here the three may be interested in striking down any adverse claim which may be set up by the holding of the legal title, but neither of them is interested in the recovery by the other of his one-fourth. That is a matter which concerns and benefits each claimant separately. There might, in fact, be more antagonism between the several interests of the three than between the several plaintiffs in the law action referred to. It is true, as stated in *Barney v. Baltimore City*, 6 Wall. 280, all part owners are so interested in the partition that they should be made parties; but where full partition is sought each owner has his separate and individual interest to assert and protect, and that individuality of interest enables him to maintain an action in his separate name. The fact that one party denies all part ownership by the others, and that they therefore make common cause to establish their claim against such denial, does not take away their individuality of interest in the partition consequent upon their success in the first matter of controversy. So far as the case of *Bland v. Fleeman*, 29 Fed. Rep. 669, conflicts with the views above expressed, I do not think it should be followed. The plea in abatement will be overruled.

CALDWELL, J. I concur in the conclusion reached by the circuit judge. The plaintiff was compelled to make all the heirs parties, and, according to a well-settled rule of equity pleading, he had the right to make them defendants, without regard to the question of the attitude they occupied towards each other or the plaintiff. But it is said that the defendants in this state, whose interests harmonize with the plaintiff's, are "collusively joined as defendants." It does not follow that, because some of the parties to the suit have common interests with the plaintiff, they must be made plaintiffs, or so treated for any purpose. "In a suit by joint tenants or tenants in common for a partition, all must be before the court; but it is not necessary of course that all should be plaintiffs." Pom. Rem. § 254. It was a rule of common-law pleading that all persons having the same interest should stand on the same side of the suit, but that rule never had any application in a court of chancery. All that the rules in chancery pleading require is that all parties materially interested in the subject of the suit be brought on the record either as

plaintiffs or defendants. Story, Eq. Pl. § 72; *Bank v. Seton*, 1 Pet. 306. Certainly parties cannot be said to be collusively joined for the purpose of perpetrating a fraud on the jurisdiction of the court, when they are indispensable parties to the suit, (*Barney v. Baltimore City*, 6 Wall. 280,) and when by the settled rule of chancery pleading the plaintiff had an undoubted right to make them defendants, and when their *bona fide* citizenship, and that of the plaintiff, is such as to give the latter the right according to the very letter of the constitution and act of congress to sue them in the federal court. By no rule of law or logic can the contention be supported that the rules of chancery pleading as to parties shall be abrogated, and a rule the converse of that which has obtained from time immemorial adopted, in order to deprive a citizen of another state from his constitutional right to sue in this court. If the defendants' contention is sound, then a plaintiff suing in a federal court must join with him as plaintiffs all persons whose interests are supposed to be like his own, whenever such joinder would have the effect to defeat the federal jurisdiction, and for that very purpose. By a parity of reasoning, where the federal jurisdiction would exist by the plaintiff joining with him all persons having the same interest, he would be required to make them defendants, if by so doing the federal jurisdiction would be ousted. But a compulsory rearrangement of the parties to a suit, rightfully brought under the act of congress and the rules of chancery pleading, with a view to oust the federal jurisdiction, is without precedent, and opposed to the doctrine and spirit of the rules on the subject of federal jurisdiction when that jurisdiction is dependent on citizenship. By equity rules 22 and 47 necessary and proper parties may be dispensed with when the effect of making them parties would be to oust the jurisdiction of the court. So far from treating as plaintiffs those who are properly made defendants under the rules of chancery pleading, for the purpose of ousting the jurisdiction, they will, when not sued, not be permitted to make themselves plaintiffs, if the effect would be to oust the jurisdiction; but the court will on its own motion make them defendants in order that the jurisdiction may be maintained. On this point Mr. Justice BLATCHFORD says:

"In regard to the petition presented by Wheeler, asking to be made a co-plaintiff in the bill, I think the point is disposed of by the rules in equity prescribed by the supreme court. A case like this one was probably foreseen, and is provided for in the forty-seventh and forty-eighth of the rules of practice for courts of equity. * * * These rules have been acted upon ever since they were adopted in reference to cases of this kind, particularly in regard to corporations where the stockholders are numerous, and reside in various places. But, independently of all that, it is apparent that, in this case, to make Wheeler, who is a citizen of the state of New York, a party plaintiff, would oust the jurisdiction of the court; and under those circumstances, irrespective of the rules referred to, the rule of equity would be to make the person a party defendant, and not a party plaintiff. It is not at all necessary, in order to give to Wheeler, as a stockholder in the Pacific Mail Company, the benefit of this suit, that he should be made a co-plaintiff. He may come in and contribute to the expenses of the suit, and avail himself of the benefits of it by being made a defendant." *Brown v. Steam-Ship Co.*, 5 Blatchf. 535.

The case of *Barney v. Baltimore City*, *supra*, goes to support the jurisdiction in this case. In that case Mary Barney, a citizen of Delaware, and one of the heirs of Samuel Chase, filed her bill in the circuit court of the United States for Maryland against the city of Baltimore and several individuals, co-heirs with her, certain of them being citizens of Maryland, and certain others, (William, Ann, and Matilda Ridgely,) citizens of the District of Columbia, for partition and an account of rents and profits of real estate of which it was alleged Chase died intestate. It is obvious from the statement and the opinion in the case, that the interests of the plaintiff and the other heirs who were made defendants were identical, and that the city of Baltimore occupied in that case the attitude the Gainesses do in this, and that the city was the only defendant claiming adversely to the plaintiff. The court held all the heirs of Chase were indispensable parties to the suit, and that as three of them were citizens of the District of Columbia and could neither sue nor be sued in a federal court, the case must be dismissed. But neither the counsel nor the court intimate that the common citizenship of some of the heirs, made defendants, with the city of Baltimore, would deprive the court of jurisdiction. On the contrary, Mr. Justice MILLER, who delivered the opinion of the court, said: "The first question which the record before us presents is, whether the circuit court of the district of Maryland, sitting as a court of chancery, could entertain jurisdiction of the case. The difficulty arises in reference to the interest of William, Ann, and Matilda Ridgely," who were the heirs residing in the District of Columbia. The counsel for Gaines invokes, and attempts to apply to this case the doctrine applicable to the removal of suits which is thus stated by the supreme court:

"For the purposes of a removal the matter in dispute may be ascertained and the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all citizens of different states from those on the other, the suit may be removed." *Removal Cases*, 100 U. S. 457.

This doctrine is applied alone in cases brought originally in a state court, and then in aid of the federal jurisdiction, or, as expressed by the supreme court, "for the purposes of a removal." It is to prevent plaintiffs from depriving defendants of the right of removal by uniting with them as defendants persons whose citizenship would prevent a removal, and who either have no real interest in the suit, or whose interests are on the side of the plaintiff. *Arapahoe Co. v. Railway Co.*, 4 Dill. 277; *Sewing-Machine Co. Case*, 18 Wall. 586. The doctrine has no application in the case at bar. The cross-bills filed by the Beldings are proper. *Peay v. Schenck*, 1 Woolw. 175.

BIRDSEYE v. SHAEFFER *et al.*

(Circuit Court, W. D. Texas. December 20, 1888.)

1. REMOVAL OF CAUSES—ACT OF 1887—PENDING CAUSES—CONSTITUTIONAL LAW.

Since the inferior federal courts owe their existence and powers entirely to congress, that body has full powers over them. The provision of the act of March 3, 1887, therefore, that the circuit court shall remand a cause removed on the ground of local influence and prejudice when on application it has examined the affidavit and its grounds, and not become satisfied that the removing party will not be able to obtain justice in the state court, is not, as regards pending causes, unconstitutional.

2. SAME.

An order setting aside another order remanding a cause to the state court, from which it had been removed on the ground of local prejudice, is not a final order, and the cause remains pending. Hence the provision of the act of March 3, 1887, for an inquiry into the question of local prejudice, applied to a cause at such a stage when the act was passed.

3. SAME.

An order remanding the cause after such an inquiry does not deprive the removing party of his property without due process of law, because after the order retaining the cause he had spent money in preparing for trial.

4. SAME.

The removing party is not left remediless by a remand, since the removing order did not absolutely take away the state court's jurisdiction, but merely held it in abeyance while the cause was in the circuit court, and the state court is now bound to resume it.

5. SAME.

It is no objection to the remand that the evidence taken will not be admissible in the state court. That is a matter for the state legislature.

At Law. Motion to set aside an order remanding the cause to the state court.

Action by Lucien Birdseye against F. W. Shaeffer and others, to recover certain land.

Hancock, Shelly & Hancock and Bethel Coopwood, for plaintiff.

John A. Green, N. O. Green, McCampbell & Welch, and Stoyton & Kleberg, for defendants.

MAXEY, J. This is a motion made by the plaintiff, in which he seeks to set aside an order, granted at a former day of the present term, remanding the cause to the state court. The suit was originally instituted by the plaintiff, a citizen of the state of New York, in the district court of Nueces county, against Shaeffer *et al.*, citizens of Texas, to recover a large and valuable tract of land situated in Nueces county.

Under the local prejudice clause of the act of 1867, (Rev. St. § 639, subd. 3,) plaintiff filed in the state court a petition, bond, and affidavit in the statutory form to remove the cause into this court. September 2, 1885, the district judge entered an order authorizing the removal of the suit in the following form: "It is ordered that the security offered by the plaintiff be accepted, and said bond approved, and that this court proceed no further in this cause, and that this cause be removed into the United States circuit court in and for the Western district of Texas, at

San Antonio." In obedience to the order of removal, the transcript was filed in this court on the 2d day of November, 1885. November 3, 1885, the defendants filed a motion to remand the suit to the state court, and the motion was granted; but no inquiry into the truth of the affidavit made by the plaintiff for removal of the suit was sought in that motion, and no such inquiry at that time was entered upon by the court. On the 5th day of November, 1885, the remanding order was set aside, and the cause retained in the circuit court for trial. On October 14, 1887, the defendants, in accordance with the provisions of the act of March 3, 1887, presented to the court an application, under oath, in which they deny the existence of prejudice against the plaintiff in Nueces county, and pray that the truth of plaintiff's affidavit for removal, and the grounds thereof, be inquired into, and for an order remanding the suit to the court of original jurisdiction. Upon the issue thus raised each party took the testimony of a number of witnesses by deposition, and others were personally present, and the question was finally submitted at this term for determination. After hearing the proofs and the arguments of counsel, the court was not satisfied that the plaintiff would not be able to obtain justice in the district court of Nueces county, and an order was accordingly made remanding the suit to that court. The present motion seeks to set aside the last-mentioned order on the ground that so much of the act of March 3, 1887, as authorizes causes then pending in the circuit courts, and properly removed thereto under the provisions of a prior act, to be remanded to the state courts, is in contravention of the constitution. The particular clause of the act complained of by the plaintiff reads as follows:

"At any time before the trial of any suit which is now pending in any circuit court, or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe, and did believe, that from prejudice or local influence he was unable to obtain justice in said state court, the circuit court shall, on the application of the other party, examine into the truth of said affidavit, and the grounds thereof; and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto." Laws U. S. 1887-88, p. 435.

The law, in its terms, applies to removed suits pending in the circuit court, and which have not been determined. "At any time," says the statute, "before the trial of any suit pending," an examination shall be made into the truth of the affidavit for removal, and the grounds thereof. It cannot be said, therefore, that congress intended by the act to deprive a person of the fruits of a judgment which had been previously recovered. The order of November 5, 1885, retaining the cause in this court, cannot be so regarded, for the reason that it is in its nature interlocutory, a proceeding *in fieri*, and subject to revision and correction by the court, if deemed erroneous, until the cause had passed beyond its jurisdiction to an appellate tribunal after the entry of final judgment. This rule of practice would obtain without the aid, and in the absence, of the act of 1887.

Speaking upon this point, it is said, in the case of *Ayres v. Wiswall*, 112 U. S. 190, 5 Sup. Ct. Rep. 90, that—

“The fifth section of the act of March 3, 1875, makes it the duty of the circuit court of the United States to remand a cause which has been removed from a state court when it shall appear to the satisfaction of the court, at any time after the suit has been removed, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court. For this purpose the circuit court retained its power over the suit and the parties until the end of the term at which the final decree was rendered. The parties were not, in law, discharged from their attendance in the cause until the close of the term, and the decree, though entered, was ‘in the breast of the court’ until the final adjournment.”

Prior to the passage of the act of March 3, 1887, therefore, no final judgment had been entered in the cause, and the suit stood as other suits upon the docket awaiting disposition according to law and the rules of practice of the court. And no reason is perceived why the former order of the court may not have been reconsidered, if erroneous in point of law, and an order made remanding the cause pursuant to the provisions of previous statutes, subject, however, to the plaintiff's right under those statutes to have it reviewed by the supreme court. *Railroad Co. v. Kootz*, 104 U. S. 15, 16. That being the *status* of the suit on March 3, 1887, congress on that day passed the act authorizing, in one of its clauses, an inquiry to be made into the truth of the affidavit made by the plaintiff for removal, leaving it discretionary with the courts to remand or retain the cause as the ends of justice, upon the case shown by the testimony, should demand. See act *supra*.

Was the objectionable clause of the statute enacted by congress in pursuance of a power conferred by the constitution? The question here is simply one of constitutional power. The policy of the law, right or wrong, wise or unwise, is a matter remitted entirely to the wisdom and discretion of the law-making power. Nor can the courts inquire into the motives of the legislature; they can only examine into its power under the constitution. *Ex parte McCordle*, 7 Wall. 514. And while the courts may declare an act of congress to be repugnant to the constitution, “the duty is one of great delicacy, and only to be performed where the repugnancy is clear, and the conflict irreconcilable. Every doubt is to be resolved in favor of the constitutionality of the law.” *Mayor v. Cooper*, 6 Wall. 251. Bearing in mind these cardinal principles which guide the courts in construing statutes, let us examine into the power of congress to enact the law under consideration. To arrive at a correct understanding of the question it will be necessary to look to the powers of the circuit courts, and the sources whence they derive their jurisdiction. “The judicial power,” by the constitution, “shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish.” Const. U. S. art. 3, § 1. The inferior courts, therefore, while authorized by the constitution, owe their powers and jurisdiction immediately to congress, and can have no powers not conferred by congress. Upon this point it is said by the supreme court in *Cary v. Curtis*:

"That the judicial power of the United States, although it has its origin in the constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of congress, who possess the sole power of creating the tribunals (inferior to the supreme court) for the exercise of judicial power, and of investing them with jurisdiction, either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority. Certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the constitution and laws of the United States. Perfectly consistent with such an admission is the truth that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. * * * The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law." 3 How. 245, 246.

The court uses this language in *Sheldon v. Sill*:

"The third article of the constitution declares that 'the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may, from time to time, ordain and establish.' The second section of the same article enumerates the cases and controversies of which the judicial power shall have cognizance, and, among others, it specifies 'controversies between citizens of different states.' * * * And it would seem to follow, also, that, having a right to prescribe, congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all. The constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit court. Consequently, the statute, which does prescribe the limits of their jurisdiction, cannot be in conflict with the constitution, unless it confers powers not enumerated therein." 8 How. 448, 449.

Discussing the constitutionality of the act of 3d March, 1863, and the act amendatory thereof, passed May 11, 1866, authorizing the removal of certain cases, the supreme court say:

"How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The constitution is silent upon those subjects. They are remitted without check or limitation to the wisdom of the legislature." *Mayor v. Cooper*, 6 Wall. 251, 252; *Assessor v. Osbornes*, 9 Wall. 575; *Insurance Co. v. Dunn*, 19 Wall. 226, 227.

The authorities cited—and numerous others might be added—conclusively demonstrate that the jurisdiction of the circuit court, the mode of its exercise, the practice and procedure of those courts, are all matters

remitted to the discretion of congress, which may regulate the same according to its own pleasure. And as a result of these principles it has been held that, when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction. "And it is equally clear," says the supreme court, "that, where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction." *Insurance Co. v. Ritchie*, 5 Wall. 544. Upon examining the *Ritchie Case*, it will be seen that the suit, pending when the repealing act of congress was passed, fell with the repeal of the statute authorizing its institution. And the same principle is announced in *Assessor v. Osbornes*, 9 Wall. At page 575 the court say:

"Jurisdiction in such cases was conferred by an act of congress, and, when that act of congress was repealed, the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of congress."

To the same effect are the following authorities: *U. S. v. Boisdore's Heirs*, 8 How. 120, 121; *Norris v. Crocker*, 13 How. 440; *Ex parte McCurdle*, 7 Wall. 514; *Morey v. Lockhart*, 123 U. S. 56 *et seq.*, 8 Sup. Ct. Rep. 65; *Wilkinson v. Nebraska*, 123 U. S. 286 *et seq.*, 8 Sup. Ct. Rep. 120; *Sherman v. Grinnell*, 123 U. S. 680, 8 Sup. Ct. Rep. 260. In the case of *Boisdore's Heirs, supra*, the court express the rule in these words:

"It is true that this court can exercise no appellate power over this case unless it is conferred upon it by act of congress. And if the laws which gave it jurisdiction in such cases have expired, so far as regards claims in the state of Mississippi, its jurisdiction over them has ceased, although this appeal was actually pending in this court when they expired."

Mr. Chief Justice WAITE, speaking for the court, in *Railroad Co. v. Grant*, says:

"It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law." 98 U. S. 401.

The case of *Sherman v. Grinnell, supra*, arose under the removal act of March 3, 1887, and the question was presented whether the supreme court could take jurisdiction on appeal or writ of error if the order to remand was made while the act of March 3, 1875, was in force, but the writ of error not brought until after the act of March 3, 1887, went into effect. The court was of unanimous opinion that jurisdiction did not attach; and it is said:

"This is the logical result of what has already been decided. Until the act of 1875 there was no such jurisdiction. *Railroad Co. v. Wiswall*, 23 Wall. 507. The provision of that act giving the jurisdiction was repealed by the act of 1887 without any reservation as to pending cases, the proviso in the repealing section having reference 'only to the jurisdiction of the circuit court and the disposition of the suit on its merits.' As a consequence of this the repeal operated to take away jurisdiction in cases where the order to remand had been made, but no appeal or writ of error taken, because 'if a law conferring jurisdiction is repealed without a reservation as to pending cases, all such cases fall with the law.' It follows that we have no jurisdiction of this writ of error, and it is accordingly dismissed."

Upon the same subject, says Mr. Cooley:

"If a statute providing a remedy is repealed while the proceedings are pending, such proceedings will be thereby determined, unless the legislature shall otherwise provide; and if it be amended, instead of repealed, the judgment pronounced in such proceedings must be according to the law as it then stands." Cooley, Const. Lim. (4th Ed.) 449.

The above cases seem to furnish a conclusive answer to the position assumed by counsel for the plaintiff in this suit.

They insist a considerable sum of money was expended by their client in the preparation of this cause for trial after the order of court of November 5, 1885, was entered, returning the cause here, and that the act of 1887, which authorizes it to be remanded, deprives him of his property without due process of law. It may be proper to remark in this connection that, as disclosed by the record, all the interrogatories filed by the plaintiff in this suit, and the commissions to take the testimony of witnesses, were filed subsequent to the passage of the act of March 3, 1887. The expense incident thereto was therefore incurred with full knowledge of every provision of that act, including the clause which authorizes the remanding of pending causes to the state courts. In the cases above cited costs had necessarily accumulated with the litigation, of which, by the ruling of the court, litigants were deprived; but it was not intimated by the court that the existence of that fact constituted a valid objection to the constitutionality of the law. Costs are inevitable in the prosecution of judicial proceedings. They follow the litigation "as interest follows principal, or as shadow the substance." And if congress has power to confer jurisdiction upon, and withhold it from, the circuit courts at discretion, and to regulate the manner of its exercise and the practice and procedure of those courts, it cannot be truly said that costs incurred in the circuit court upon removal of a cause are divested "without due process of law" when the same is remanded to the state court pursuant to the legislation of congress; that is to say, legislation enacted in obedience to the authorization of the constitution. That the enactment of the clause of the act of March 3, 1887, assailed by the plaintiff in this suit, was a valid exercise of constitutional power on the part of congress, admits, in my judgment, of no question.

It is further objected by the plaintiff's counsel that a remanding of the cause will leave him remediless, inasmuch as the state court, upon removal of the suit, was absolutely divested of jurisdiction, which cannot be restored. The decision of the supreme court, to which reference has already been made, would seem to dispose of that objection. But is it true that no remedy remains? To properly appreciate the position assumed by counsel, the proposition submitted by them in argument will be stated in their own words. "By the removal," they assert, "the jurisdiction of the state court was completely divested, obliterated, lost, and as if the suit had never been commenced in that court;" and, in support thereof, reference is made to the following cases: *Gordon v. Longest*, 16 Pet. 97 *et seq.*; *Kanouse v. Martin*, 15 How. 208, 209; *Insurance Co. v. Dunn*, 19 Wall. 223, 224; *Virginia v. Rives*, 100 U. S. 317; *Railroad Co.*

v. Mississippi, 102 U. S. 135; *Kern v. Huidekoper*, 103 U. S. 493; *Railroad Co. v. Koontz*, 104 U. S. 5 *et seq.*; *Railroad Co. v. White*, 111 U. S. 134, 4 Sup. Ct. Rep. 353; *Davis v. South Carolina*, 107 U. S. 597, 2 Sup. Ct. Rep. 636; *Steam-Ship Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. Rep. 58. If the proposition of counsel be construed to mean that upon the removal of a cause the jurisdiction of the state court is so utterly divested, obliterated, and destroyed that it cannot be restored by a proper order of the court to which the cause was removed, it certainly can find no support in the authorities relied upon by them. Those cases, and many others which have been examined, simply decide that after a cause has been removed from a state to a federal court, the former is without jurisdiction to proceed further while the cause is pending in the latter, and if, notwithstanding the removal, the state court persist in the effort to exercise jurisdiction, its proceedings are null and void. Quite different is the case when the federal court voluntarily relinquishes its jurisdiction in favor of the state courts. In each of the cases cited the state court refused to let go its jurisdiction, and proceeded as if the cause had not been removed; thus ignoring the law of congress, and the right of the non-resident citizen to remove his suit in compliance therewith. That the orders made by the state court in a cause, under such circumstances, are void, will not be questioned at this late day in view of the uniform decisions rendered by the judicial tribunals of both the federal and state governments. See, also, *Dietzsch v. Huidekoper*, 103 U. S. 495 *et seq.*; *Durham v. Southern Co.*, 46 Tex. 186-188. But it surely does not follow that the state courts may not reacquire their lost or suspended jurisdiction when the cause is remanded by a proper order of the federal court. It would seem unnecessary to refer to authorities in support of a proposition so self-evident. It is the common practice of the federal courts to remand causes to the state tribunals, and for the latter to proceed to a final determination of the controversy without let or hindrance. A brief reference will be made, however, to a few of the cases which illustrate the principle, and indicate the proper practice of the courts in remanding causes. Thus it is said by the court in *Railroad Co. v. Koontz*:

"When the suit is docketed in the circuit court, the adverse party may move to remand. If his motion is decided against him, he may save his point on the record, and after final judgment bring the case here for review, if the amount involved is sufficient for our jurisdiction. If in such a case we think his motion should have been granted, we reverse the judgment of the circuit court, and direct that the suit be sent back to the state court to be proceeded with there as if no removal had been had. If the motion to remand is decided by the circuit court against the petitioning party, he can at once bring the case here by writ of error or appeal for a review of that decision without regard to the amount in controversy." 104 U. S. 15, 16.

We have already seen that the petitioning party is precluded by the act of 1887 from asserting the right of appeal or writ of error from an order remanding the case. *Sherman v. Grinnell*, *supra*. In *Ayers v. Chicago*, 101 U. S. 184, and *Hoadley v. San Francisco*, 94 U. S. 4, the court affirmed the order of the circuit court remanding the causes. In *Steam-Ship Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. Rep. 58, the court say

that every order made by the state court in the cause after its removal is *coram non judice* unless its jurisdiction be actually restored. See, also, *Insurance Co. v. Dunn*, 19 Wall. 223. The decisions of the supreme court of this state are in perfect harmony with the doctrine asserted by the supreme court of the United States, as reference thereto will clearly make manifest. *Kleiber v. McManus* is a case where this court remanded the suit, which had been removed to it from the district court of Cameron county. The state court, after the case was remanded, refused to proceed with the trial, "on the ground that the court had, by the order of removal theretofore made, lost, and never reacquired, jurisdiction of the cause." The supreme court, however, compelled the judge of the district court, by the writ of *mandamus*, to proceed with the trial. 66 Tex. 50. The suit of *Seeligson's Ex'r. v. Transportation Co.* was originally instituted in the district court of Harris county, and subsequently removed to the United States circuit court at Galveston. Upon motion of plaintiff in the latter court the suit was dismissed, and the order of dismissal affirmed by the supreme court of the United States. The mandate from the supreme court was thereafter filed in the circuit court, and also in the district court, of Harris county, and the latter court, on motion, dismissed the cause for want of jurisdiction. A motion to reinstate the case was duly entered and overruled by the court, from which ruling an appeal was taken to the supreme court. Upon the questions submitted to it, the supreme court stated its conclusions as follows:

"The court holds (1) that, no cause for removal existing, jurisdiction of the cause remained in the district court, save as in fact suspended by the attempted removal; (2) that no formal order by the circuit court, relinquishing jurisdiction, after the dismissal, was necessary to enable the district court to resume its proceedings; (3) that the certified copy of the mandate from the supreme court to the United States circuit court was competent evidence of the refusal of the circuit court to take jurisdiction; and (4) upon being so informed of the action of the federal courts, it devolved upon the district court to proceed with the cause as with other cases on its docket." 7 S. W. Rep. 708, 709.

But the court need not seek in adjudged cases the rule which should guide it in determining the course to be pursued in this case. The statute is unambiguous, leaving no room for doubt, and no latitude for construction. It provides that, "unless it shall appear to the satisfaction of said" (circuit) "court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto." The conclusions appears to be irresistible to my mind that the plaintiff is not without a remedy, but he may proceed without difficulty in the forum first invoked by him to determine, by due course of law, all questions involved in his suit. The statute does not profess, as claimed by plaintiff, to confer original jurisdiction upon the state courts. It has reference only to causes removed, and the effect of the order remanding them is simply the restoration of a jurisdiction previously acquired by the state court, but held in abeyance during the pendency of the cause in this court, rather than, as contended by the plaintiff, the investiture of original jurisdiction.

Under the act of 1867 and the Revised Statutes, it seems that whether prejudice or local influence, preventing justice being done, really existed, was not left open for investigation by the circuit court; or, in other words, the statutes in force prior to the act of 1887 made the removal in cases of that character depend upon the filing of the necessary affidavit in the state court, and the giving there of the required bond. *Malone v. Railway Co.*, 35 Fed. Rep. 628; *Fisk v. Henarie*, 32 Fed. Rep. 421. The act of 1887, however, expressly authorizes, as to causes pending at the date of its passage, an examination "into the truth of said affidavit, and the grounds thereof;" and the evident intention of congress was to supply the deficiencies of existing legislation in that respect, and restore to the local jurisdictions the class of causes embraced in the act, unless it should appear to the satisfaction of the circuit court that the plaintiff removing the suit would not be able to obtain justice in the state court. Under the act, the truth of the affidavit and the grounds thereof appearing, the cause remains in the circuit court for trial; otherwise, it goes back,—it is remanded to the state court for determination; and that court thus resumes, in a proper way, and in accordance with legal methods, its rightful jurisdiction and proceeds in its own way to determine the rights of the parties. The act of 1887 being, as already stated, clearly constitutional, is not less obligatory upon the state than the federal courts, (Const. U. S. art. 6, cls. 2, 3,) and it will not be presumed that the former will refuse to yield obedience to its requirements.

It is further said in argument that the testimony taken in the cause while the suit was here pending will be unavailing and inadmissible in the state court. In reply to that objection, the supreme court say:

"It will be for the state court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction." *Ayres v. Wiswall*, 112 U. S. 190, 191, 5 Sup. Ct. Rep. 90.

If the laws of the state are inadequate to afford the necessary relief in such cases, the legislature will doubtless cure the defect by appropriate legislation when the omission is called to their attention.

From the foregoing views, expressed at greater length than was perhaps necessary, it follows that the motion to set aside the order of the court remanding the cause must be denied; and it is so ordered.

D. M. OSBORNE & Co. v. MISSOURI PAC. RY. Co.

(Circuit Court, E. D. Missouri. March 11, 1889.)

INJUNCTION—REMEDY AT LAW—DELAY.

Complainant, a property owner on a street along which defendant was about to construct a railroad track, under authority of the city, filed its bill for equitable relief, on the ground that its property would be damaged, and that compensation had not been paid as required as a condition precedent by the state constitution, (Const. Mo. art. 2, § 21;) but no application for a temporary injunction was made, and in the mean time the track was laid, and in daily use. *He d.*, on final hearing, that the court would not grant an injunction, but would leave complainant to its remedy at law.

In Equity. Bill for injunction. On final hearing. For opinion on demurrer to answer, see 35 Fed. Rep. 84.

This was a bill to restrain the laying of a railroad track along Gratiot street in the city of St. Louis, as authorized by a municipal ordinance and by the general statutes of the state. Complainant owned a lot abutting on the street, on a portion of which lot it had erected a warehouse used for the storage of agricultural machinery. It based its right to relief on the ground that the laying of a railroad track along the street in front of its property would cut off access to one entrance of its warehouse, and lessen the market and rental value of its property, and that under section 21, art. 2, of the constitution of the state of Missouri, the track in question could not lawfully be laid until such damages had been ascertained and paid. Section 21 is as follows:

"Private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners, * * * and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein divested."

Section 4, art. 12, Const. Mo., referred to in the opinion, contains the following provision:

"The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."

Mills & Flitcraft, for complainant.

Thomas J. Portis and Bennett Pike, for defendant.

THAYER, J., (after stating the facts as above.) The first question that presents itself in this case, now that the evidence has been heard, is whether the complainant is entitled to equitable relief, even conceding that the laying of the track in and along Gratiot street did, to some extent, damage complainant's property within the meaning of the constitution of the state. Article 2, § 21. It is most likely true, as claimed by complainant's counsel, that by virtue of section 4, art. 12, Const. Mo., complainant is entitled to have its damages assessed by a jury, and that the court cannot in this proceeding assess the damages sustained, and en-

ter a decree therefor, or make the right of the defendant to further use said track dependent upon its paying to complainant the sum so assessed. At all events, the court does not feel warranted in exercising powers of the doubtful nature last suggested; therefore, if it grants any relief, it must be an order of injunction restraining the defendant from using the Gratiot-Street track, until complainant's damages are duly assessed by a jury in some form of proceeding, and paid. Should the court, under the peculiar circumstances of this case, grant such relief? The testimony no doubt tends to show that the existence of a railroad track in Gratiot street lessens the value of complainant's property to some extent. Such depreciation in the value of the property seems to be largely due to the fact that the track is not laid for the full distance in the center of the street, but inclines to the north, and cuts the curb line at the west boundary of complainant's premises. That fact may lessen the value of the unimproved portion of complainant's lot, and render it less marketable than it would otherwise be. It may also be that the track along Gratiot street slightly interferes with the convenient receipt and delivery of goods at the south entrance of complainant's building on said street. There is some testimony before the court to that effect. But the inconvenience resulting from such interference is evidently very slight. I will also add that it is by no means certain that the value of complainant's property is impaired in the manner above stated. Opinions *pro* and *con* were expressed on that point by the various witnesses. A jury, called to try the issue and assess the damages, might reasonably find that no damage had been sustained in consequence of the laying of the track, or that the damages were inconsiderable. The court is of the opinion that the use of the track has not seriously obstructed, and will not in future seriously obstruct, access to complainant's premises, and that the damage done to its property in the way of lessening its market or rental value is in any event small. The bill in the present case was filed February 16, 1887, two days before the approval by the mayor of the city of St. Louis of the ordinance granting the defendant leave to lay the track in question. The track was not laid, as the evidence shows, until March 20, 1887. When work was begun by the defendant on the track, no application was made for an injunction to stay operations for the time being. The case was not brought to a final hearing until nearly two years had elapsed, to-wit, January 31, 1889. Since the 20th of March, 1887, the track has been used daily, and in the mean time complainant has made no application for a temporary restraining order. If the court should at this late day enter a decree enjoining the use of the track, it would probably put third parties to great inconvenience, who are in a measure dependent upon it either for shipments or for supplies.

As the case stands, I know of no proceeding which the defendant can take to obtain an assessment of the damages, if any, that complainant has or will sustain by the location and operation of the track in Gratiot street. Complainant, on the other hand, has an adequate and simple remedy by an action at law to recover such damages. As I remarked when this case was before me on demurrer to the answer, (35 Fed. Rep.

84,) the track was laid in pursuance of legislative and municipal authority, and is in no sense a public nuisance. Defendant has a right to use it, on condition, of course, of paying such damages as abutting proprietors may have sustained. Under the circumstances, the court is of the opinion that an injunction ought to be denied, and the complainant remitted to its legal remedy. If it had made a seasonable application for a temporary injunction, when the bill was filed, or when defendant began to construct the track, the court would undoubtedly have been authorized, on the averments of the bill and the showing now made, to grant such an order; but it does not follow that it ought, for that reason, to grant an injunction now. Injunctive relief should be applied for seasonably. Even when there are some grounds for such relief, it is in a measure discretionary with the court to grant or withhold it. *Bassett v. Manufacturing Co.*, 47 N. H. 436; *Railway Co. v. Smith*, 15 N. E. Rep. 256; 2 Wood, Ry. Law, 794; 1 High, Inj. p. 7, § 7. For the reasons thus indicated I shall enter an order directing a dismissal of the bill, without prejudice to complainant's right to sue at law for the damages which it claims to have suffered.

HAMILTON GAS-LIGHT & COKE CO. v. CITY OF HAMILTON.

(Circuit Court, S. D. Ohio, W. D. January 30, 1889.)

1. MUNICIPAL CORPORATIONS—GAS COMPANIES—EXCLUSIVE FRANCHISE.

Rev. St. Ohio, § 2480, provides that, if a gas company neglects for six months to lay pipes and light streets after requirement and notification by the common council of a city or town, the council may erect gas-works for lighting such streets and all other streets not already lighted. Section 2482 provides that neglect by any company to furnish gas to citizens and other consumers, or to the municipal corporation, in accordance with the prices fixed by the council, shall forfeit all rights of the gas company under its charter, and that the council may proceed to erect, or may empower any person to erect, gas-works for the supply of gas to such corporation and to its citizens. Section 2486 confers upon the council a general power, to be exercised whenever deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase any gas-works already erected in the corporate limits. *Held*, that although a company had erected gas works in a city by the authority of the city, and had complied with all the requirements of the common council, there was nothing in the above sections which precluded the city from building its own gas-works.

2. SAME—VESTED RIGHTS.

A company chartered under the laws of Ohio for the manufacture of gas was authorized by a city to erect works, and occupy its streets for the purpose of laying pipes and gas-mains. The city fixed the price of gas, and directed the manner of laying mains, as it had authority to do; and from time to time made contracts with the company for lighting the streets. The last contract made fixed the price of gas for public and private consumption for a period of five years, and required of the company, as a condition precedent, that it should lay pipes for public lighting along streets where for long distances there was no private consumption. *Held*, that as the company did not have the exclusive right to the use of the streets for laying gas-pipes, and the city was under no obligation to purchase gas from the company, no vested rights

of the latter were disturbed when, on the termination of the five-years contract, the city refused to take any more gas of the company, and determined to build its own gas-works.

In Equity. Motion for injunction.

Thos. Millikin, A. F. Hume, John T. Neilan, and John F. Follett, for complainant.

E. E. Hull, J. E. Neal, Morey, Andrews & Mooney, and Israel Williams, for defendant.

SAGE, J. This is a motion for a temporary injunction. It appears from the bill that the complainant company was duly incorporated under the general laws of the state of Ohio, and organized in the city of Hamilton in the year 1855 for the purpose of manufacturing and supplying gas for the use of the city and of its inhabitants; and that the city by ordinance granted the use and occupation of its streets, alleys, and public places for the laying of pipes and gas-mains. The complainant accepted the terms and conditions of the grant, and at large cost erected gas-works, provided the necessary machinery and appliances, and laid pipes and mains for the delivery of gas for public and private lighting. The defendant, for more than 30 years, has accepted complainant's services in furnishing gas as aforesaid, has repeatedly exercised its power, conferred by the laws of the state, over the complainant, fixing from time to time the price of gas for public and for private use, appointing gas inspectors, and compelling complainant, under its directions, to lay its mains; and there are at present buried in the streets about 30 miles of gas-mains and pipes so laid, the same extending all over said city, and covering its three and a half square miles of territory, defendant having compelled complainant to lay its mains along streets on which for long distances there are no buildings of any kind, and no private consumption of gas. Complainant further avers that by order of the defendant it has erected upon said streets and connected with said mains 532 public lamp-posts, with lamps, burners, and all other appliances complete, the same being the property of the defendant; that its works are ample to supply all the gas required for public and private use; that it has always complied with every condition and requirement imposed by its charter, or by law, or by the ordinances of the city, or by contract or otherwise, and that it is ready and willing to continue so to do, as it has repeatedly notified the defendant both before and after January 1, 1889. On the 27th day of November, 1883, the city council, by ordinance, fixed the price of gas for public and for private consumption for the period of five years from and after January 1, 1884, the ordinance also providing, as a condition precedent to its taking effect, the laying of certain mains by complainant, which were required exclusively for street lamps along streets, a great portion whereof were without dwellings. The complainant assented in writing to the terms of said ordinance, and during the time that it remained in force laid, under the orders and direction of said city council, about eight miles of street mains as aforesaid. On the 2d of January, 1889, defendant notified complainant that it would no longer

receive or use any of the complainant's gas for any purpose; and that it would not pay for any gas furnished by complainant, nor would it allow or permit complainant to use any of said street lamps for the purpose of lighting the streets and public grounds and places of said city, after the 1st of January, 1889; and further ordered complainant to remove without delay all connections between said mains and said lamps, and ordered and directed its servants and employes to light its public buildings by some means other than by complainant's gas. The bill further avers that the defendant, in furtherance of its purpose to light its streets, public grounds, and public places by other means than by complainant's gas, and intending to destroy complainant's property and investments in its said gas works, mains, and pipes, "so acquired and made under the laws of the state of Ohio, and the ordinances of said city," has already passed an ordinance to issue \$150,000 of its bonds to erect gas-works and manufacture its own gas, and lay gas-mains in said streets, including the streets already occupied by complainant's mains, and thereby forever deprive complainant of all right to manufacture and supply gas for said public lighting, and that defendant now threatens to remove, and, unless restrained by the order of this court, will remove and disconnect all said lamp-posts and street lamps from their attachments with complainant's said mains, and provide some other means for temporarily lighting said streets and public grounds until said gas-works can be completed, and then forever deprive complainant of all rights acquired by its charter, and render its said property valueless, by taking away from complainant said public lighting, and also by entering into competition with it for the private consumption of gas. The bill charges that said ordinances and proposed action of the defendant impair the obligation of its contract with the complainant under which complainant's gas-works were constructed, and the investments of complainant's property were made; and that they are contrary to the provisions of section 10, art. 1, of the constitution of the United States, and, if carried into effect, will destroy the value of complainant's property, and convert the same to the use of the defendant without due process of law, and in violation of the provisions of the fourteenth amendment of the constitution of the United States. Finally, the bill charges that no provision has been made by defendant for compensation to complainant for its property so proposed to be taken and appropriated for public use, and that, if said ordinances are permitted to be carried into effect, said property will be taken and appropriated to public use without compensation to complainant, in violation of the provision of the constitution of the United States.

The defendant, admitting the main facts stated in the bill, presents by affidavits copies of the contracts made in pursuance thereof, from time to time, by and between the city and the complainants, fixing the price of gas to private consumers, and the terms and conditions of public lighting, and also of the orders and provisions for laying street mains. There is no controversy upon any material fact, nor is there any claim that the complainant has at any time been in default, or failed or refused to perform its contracts, or the orders of the city council. The defendant ad-

mits that it has refused to receive or pay for gas for the use of the city or for the lighting of its streets from and after January 1, 1889, and that it intends to build and operate gas-works of its own to the exclusion of the complainant from any public lighting, and it avows that it has no intention to buy or use any of the mains, pipes, or property of the complainant.

The defendant further denies the jurisdiction of this court, contending that it has the right and the power to do what it proposes to do, and that the acts complained of do not impair any vested rights of the complainant, nor amount to an appropriation or deprivation of its property. If the defendant is right in this its contention, no federal question is involved, and this court has no jurisdiction. But the statement of the defendant's propositions makes it clear that the question of jurisdiction is so intimately connected with the merits that the two must be considered together. The complainant was organized under a general law subject to amendment or repeal; the constitution of Ohio forbidding the passage of special acts conferring corporate powers, and providing that corporations may be formed under general laws, which may from time to time be altered or repealed. These constitutional provisions by no means operate to prevent the acquisition of vested rights, nor do they authorize the impairment of those rights when once granted. There is no substantial difference in this regard between a corporation chartered or organized under general laws and subject to the constitutional provisions above quoted, and corporations organized under the old constitution, and under special charters, which reserved to the legislature the right of amendment or repeal. Vested rights are as secure in the one case as in the other; the material difference between the two being that under the new system the right and privilege to be incorporated is open to all, whereas under the old system it was limited or might be limited to a favored few. The provisions of law in force when the complainant company was organized have been substantially carried forward into subsequent acts, and they are to be found, without material change, in the Revised Statutes of Ohio, in the chapter relating to gas companies, beginning at section 2478, and in the chapter providing for lighting corporations, beginning at section 2492.

The three sections upon which the questions decisive of this case arise are:

First. Section 2480, which provides that if gas companies refuse or neglect for six months to lay pipes and light streets, alleys, or public grounds, after requirement and notification by the council, the council may lay pipes and erect gas-works for lighting such streets, alleys, or public grounds, and all other streets, alleys, and public grounds not already lighted; and such companies shall thereafter be precluded from using or occupying any of the streets, alleys, public grounds, or buildings not already furnished with gas pipes of such companies.

Second. Section 2482 enacts that a neglect to furnish gas to the citizens and other consumers of gas, or to the corporation, by any company, in accordance with the prices fixed by the council, shall forfeit all rights of the gas company under its charter, and that the council may proceed to

erect, or by ordinance empower any person to erect, gas-works for the supply of gas to such corporation and to its citizens, provided that nothing in this section or in section 2480 shall operate to impair any contract "heretofore" made between the municipal corporation and the gas company.

Third. Section 2486 provides that the council of any city or village shall have power, whenever it may be deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase any gas-works already erected therein.

Now it is claimed that section 2480, by application of the maxim *expressio unius, exclusio alterius*, limits the power of the city to erect gas-works and lay pipes in the streets to the conditions expressed in the section. We are of opinion that the true construction of this section is that it states the only conditions, excepting those stated in section 2482, under which the city may erect gas-works and lay pipes for lighting streets, to the exclusion from those streets of a gas company already in operation and having its pipes laid in other streets. It is to be noted that under this section the city is empowered to lay pipes in those streets and public places only which are not already lighted. Upon the failure or neglect for six months to furnish gas to the city and to provide consumers, the gas company, under section 2482, forfeits all its corporate franchises and rights, and the city is authorized either to erect gas-works and supply gas to the entire city, and to all consumers, or to empower any person so to do. Section 2486 confers upon the city council a general power, to be exercised whenever deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase any gas-works already erected therein. This section was not enacted until after the complainant had built its works and entered upon the business of furnishing gas as aforesaid. The proposition that it confers only alternative power, so that its true construction is that the city may erect gas-works if there be no gas company already established and in operation, and that, if there be such a gas company, the city has no power to erect works excepting as provided in sections 2480 and 2482, but is limited to the authority to purchase the gas-works already erected therein, is not sound. The true construction is too clearly indicated by the language of the section to be misunderstood. It means exactly what it says, that the city may either build or buy; and the city of Hamilton in this case is not precluded from building by the fact that it has authorized the complainant company to erect gas-works, and lay its pipes in the streets of the city, and that the company has not made itself liable to forfeiture under section 2480 or section 2482.

Now, the complainant contends that, upon this construction, section 2486 is in conflict with the constitution of the United States, because it interferes with its vested rights, and impairs its property, by diminishing, if not destroying, its value, and in effect appropriating it to public use without making compensation. The specifications of this charge have already been stated as set forth in the bill. To clearly understand the matter certain propositions must be taken into account.

1. The complainant never had an exclusive right to the use of the streets of the city of Hamilton, for laying pipes for conveying gas. That was settled by *State v. Coke Co.*, 18 Ohio St. 262. Section 2485, Revised Statutes of Ohio, which in terms prohibits the grant to any gas company of an exclusive privilege to use the streets, alleys, and public places of the municipality for gas purposes, was enacted subsequent to the incorporation of the complainant; but the decision in 18 Ohio St. was based upon the law in force when the complainant was organized, and granted the use of the streets by the defendant. The city might therefore at any time have authorized the use of the streets for that purpose by another and competing company.

2. The city, when it notified the complainant, on January 2, 1889, to sever the connections between its mains and the street lamps, which are the property of the city, and that it would no longer receive or pay for gas from the complainant, had no contractual relations with the complainant. The contract of January 1, 1884, for five years, had expired by its own limitation. The city had, from time to time, made gas contracts with the complainant, as it had authority to do. But it must be remembered that the power to make a contract necessarily implies and includes the power to refuse to make a contract, and the city had therefore the right to refuse to further contract with the defendant.

3. There is nowhere in any statute, and there has not been, any provision requiring the city to take gas from the complainant any more than there is or has been any provision requiring any citizen to take gas. Will it be for a moment contended that the complainant could maintain a suit for an injunction to restrain a citizen from refusing to take gas from it, or using coal oil or gasoline, or putting up his own gas-works, on his own premises, on the ground that the chartered rights of the complainant were thereby invaded, and the constitution of the United States violated? Would not the citizen, in such case, be entitled to at least suggest that he too had constitutional rights to be protected?

4. Inasmuch as the city has the right to permit the use of its streets by another gas company, and has also the right to purchase any gas-works erected within its limits, what is the difference in a legal or constitutional view, or so far as any impairment of the vested rights or property of the complainant is concerned, between its permitting another gas company to erect its works and lay its pipes in the streets, and then purchasing those works and pipes for the purpose of itself manufacturing and selling gas, and itself in the first instance erecting gas-works, and operating them?

5. The fact that the complainant, while the contract of January 1, 1884, was in force, laid about eight miles of pipe, under orders from the city council, for lighting streets along which there were very few dwellings or buildings, and in many places, for considerable distances, none at all, and that the loss of the street lighting will leave those pipes buried in the ground, unused, and comparatively valueless, while it indicates a great hardship, and we may admit also, for the sake of the argument, a great injustice, it does not raise a constitutional question, or give

this court jurisdiction; for, by the force of the propositions above stated, although the complainant was compelled under penalty of forfeiture to lay those pipes, it was compelled also to take the risk, which has ripened into certainty, that the city at the expiration of the contract would refuse to renew it upon any terms, and would erect its own works.

6. If, as we have found, the city has the right in its discretion to erect gas-works, it necessarily follows that it has the right to levy taxes to meet the expense, and that the complainant's property within the city will be, precisely as all other property, subject to that taxation.

7. The authorities cited by complainant are not in conflict with the above propositions. In *Gas Co. v. Louisiana, etc., Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252, the gas company was incorporated with the exclusive privilege of making and selling gas in New Orleans, and its *faubourgs*, and in Lafayette, for a term of years, and this exclusive privilege was the basis of the decision. In *Greenwood v. Freight Co.*, 105 U. S. 13, the charter of the street-railroad company was special, and without any reservation of the right of repeal, and it was held that a repeal and attempted transfer of the company's franchises and track to another impaired the obligation of the contract with the company. In *New Jersey v. Yard*, 95 U. S. 104, it was held that the right to alter, amend, or repeal was not reserved. In *Water-Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. Rep. 273, the company had by legislative grant an exclusive right to supply water to the municipality; and such was also the fact in *Gas Co. v. Gas Co.*, 115 U. S. 683, 6 Sup. Ct. Rep. 265. In *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. Rep. 1190, the holding that "the remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and that any subsequent law of the state, which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution, and is therefore void," does not affect this case for the reason that here no contract is violated. The right of complainant to furnish gas to citizens and other private consumers is not attacked nor threatened. All that is done is the refusal of the city to contract for or receive or pay for gas for its own use, and the declaration of its intention to erect works and enter into competition with the complainant for the supply of gas for private consumption, and each of these things it has a right to do. In *Water-Works Co. v. Atlantic City*, 6 Atl. Rep. 24, the city had exhausted its power as to providing a water supply, and the complainant's franchise was exclusive. In the *Binghamton Bridge Case*, 3 Wall. 51, the company was granted the franchise to build a bridge across a river in New York, and the charter provided that it should be unlawful for any one to erect a bridge or establish a ferry within a distance of two miles on that river. In this case there is no exclusive grant to the complainant, and no obligation imposed upon the defendant to buy the complainant's gas. Moreover, the complainant was always liable to competition. The circuit judge concurs in the opinion that no federal question is involved in this cause, and that this court has therefore no jurisdiction. The motion for a temporary injunction is overruled, and the bill dismissed.

THOMAS *et al.* v. ST. LOUIS & C. R. Co. *et al.**(Circuit Court, S. D. Illinois. February 9, 1889.)*

EMINENT DOMAIN—FERRIES—RECEIVERS—SALES.

While the Illinois water-craft act (act July 1, 1877) may prohibit the petitioner railroad companies from condemning land on the Ohio river at Cairo for purposes of a ferry landing, yet where a leasehold interest in the land sought to be condemned is in the custody of receivers of this court, and all parties interested are before the court, leave will be granted the petitioners to purchase the unexpired leasehold interest in the land mentioned in the petition, if the sale will not be detrimental to the interests of stockholders and creditors of the insolvent.

Condemnation Proceedings.

Before GRESHAM and ALLEN, JJ.

John M. Butler and Samuel P. Wheeler, for complainant.*E. L. Russell, John M. Lansden, and Greene & Humphrey*, for defendants.

GRESHAM, J., (*orally.*) The Cairo Transfer Company leased to the Cairo, Vincennes & Chicago Railroad Company, for 10 years, a piece of land on the bank of the Ohio river at Cairo, upon which the latter company constructed an inclined track, to enable it to transfer its cars to roads terminating on the opposite side of the river, and receive cars from that side. The St. Louis & Cairo Railroad Company owns a line of road terminating at Cairo, which it leased to the Mobile & Ohio Railroad Company, whose road terminates on the south side of the river, immediately opposite Cairo, and these two latter companies are seeking by this proceeding to condemn part of the land owned by the Cairo Transfer Company, and the leasehold interest of the Cairo, Vincennes & Chicago Railroad Company in the same, to enable the petitioners to construct an incline and landing for the transfer of their cars, and thus avoid the alleged unreasonable charges which are exacted by the owners of the present transfer facilities. The legislature of Illinois, on July 1, 1877, passed an act known as the "Water-Craft Act," the first section of which reads:

"Be it enacted by the people of the state of Illinois, represented in the general assembly, that all railroad companies incorporated under the laws of this state, having a terminus upon any navigable river bordering on the state, shall have power to own for their own use any water-craft necessary in carrying across such river any cars, property, or passengers transported over their line, or transported over any railroad terminating on the opposite side of such river, to be transported over their lines: provided, that no right shall exist under this act to condemn any real estate for landing for such water-craft, or for any other purpose, and this act shall only apply to such railroad companies as own the landing for such water-craft."

After describing the lands sought to be condemned the petition states:

"That the business and operation of your petitioner's railroad requires the construction of a railroad incline on the Ohio river, in the city of Cairo, for the transfer of cars across said river and the Mississippi river, and to connect

with similar railroad inclines of other railroads now in use on the other side of such river."

This is not an effort to condemn land to enable the petitioners to construct an incline down to an existing ferry landing. There is no ferry landing or structure upon the ground sought to be condemned, and the petitioners are therefore seeking to condemn land for a landing, as well as land to reach a landing. When this question was before us last year, (*Railroad Co. v. Thomas*, 34 Fed. Rep. 774,) I stated that I thought it was within the water-craft act, and I still think so. The district judge, however, is of opinion that the facts stated in the petition do not bring it within that act. It may be that the act is not an obstacle to the condemnation of land to enable a railroad company to reach an established ferry, as such a proceeding would not be an appropriation of land for a landing; but that question is not before us. It is conceded that there is no ferry landing or superstructure upon the land sought to be condemned, and it follows that the petitioners are seeking to appropriate land for a landing, which is expressly prohibited by the statute. If it be true—as we think it is—that, independent of the water-craft act, railroad companies in this state may condemn land bordering upon the Ohio and Mississippi rivers, and construct thereon wharf-boats, warehouses, and docks, when necessary in the management of their business, this is not a proceeding for that purpose. The land leased by the Cairo Transfer Company to the Cairo & Vincennes Railroad Company, including the lands sought to be condemned, is now in the custody of Tracy & Thomas, as receivers of this court under the lease, more than one-half of which has expired. Presumably the lessee is insolvent, and it will be necessary to sell its property and franchises, and distribute the proceeds among creditors according to their rights and equities, unless some plan of reorganization shall be agreed upon which will render a sale unnecessary. The fee and leasehold, and all parties interested in both, are before the court, and if it is satisfied that the petitioners need the land for the purpose stated, and that the interest of the lessee in it can be sold without injury to the rights of others, the court can and should direct its sale. Such action should not be taken, however, if it would injure the just rights or interests of creditors and stockholders. Leave will be granted the petitioners, if they desire it, to make application to purchase the unexpired leasehold interest in the land described in the petition. Section 1, art. 11, Const. Ill., declares that the charter of corporations shall not be extended by special laws, and section 22, art. 4, declares that the general assembly shall pass no local or special laws granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise. If prior to the passage of the water-craft act railroad corporations were not authorized to own ferry landings and ferry-boats, and operate them as provided in that act, then it conferred the right or franchise to do so upon such companies only as then owned land on the rivers bordering the state, and such as might thereafter be able to acquire it by purchase. All companies then not owning land upon the banks of such rivers, and unable

to purchase it, were denied the right to exercise the new franchise. The act was undoubtedly intended to benefit a particular road or roads against all others. In the very nature of things, the conditions which entitled corporations to enjoy the additional privilege or franchise can exist at very few points on the borders of Illinois, and it is admitted in argument that Cairo is the only point at which they do exist. If the petitioners are unable, as they seem to be, to avail themselves of the benefit of the water-craft act by purchasing land, then they are denied the right of transferring their cars to the opposite side of the river, unless they pay tribute to the owners of the present facilities on such terms as they choose to impose. While the water-craft act does not purport to be a special or local statute, it is within the spirit of the constitutional provisions referred to, and we are inclined to believe that it is also within their letter. Courts cannot be expected to look with favor upon legislation which is intended to benefit a particular road or roads as against all others and the public; but, inasmuch as this question has not been discussed by counsel, we are not prepared to hold that the act is unconstitutional. No order will be entered until the court is informed that the parties are unable to agree upon a settlement.

PADDOCK v. ATCHISON, T. & S. F. R. Co. *et al.*

(*Circuit Court, W. D. Missouri, W. D. March 16, 1889.*)

1. CARRIERS OF PASSENGERS—EJECTION FROM TRAIN—SMALL-POX.

Where a passenger on a train breaks out with eruptions, and the best medical advice that can be and is obtained is unable to disclose whether they proceed from small-pox, and where from any prior conduct of such passenger, or any statement he had made, there is a well-grounded, clear, and honest belief that small-pox is developing, the officers of the train are justified in ejecting him; but they must eject him where there is every reasonable ground to believe that he can find accommodations.

2. SAME—LIABILITY.

Where a passenger is wrongfully expelled from a Pullman car of a train by the officers of the company operating the road, the Pullman Car Company is not liable; and, if expelled by the officers of the latter, the railroad company is not liable.

3. SAME—DAMAGES—MEASURE.

The measure of damages for wrongful ejection from a train is the amount paid out for resulting expenses, the value of the time lost, and compensation for pain and suffering which result from the expulsion, and for any permanent injury resulting therefrom.

At Law.

Action by Thomas W. Paddock against the Atchison, Topeka & Santa Fe Railroad Company, and Pullman's Palace Car Company, for damages for ejection from a train.

Lewis, Buxton & Lewis and *G. M. Barbour*, for plaintiff.

Geo. R. Peck and Gardiner Lathrop, for Atchison, Topeka & Santa Fe Railroad Company.

John S. Runnells, for Pullman's Palace Car Company.

BREWER, J., (*orally charging jury.*) The plaintiff, who was a passenger in a Pullman palace car on the train of one of the defendants, the Santa Fe Railroad Company, from the Pacific coast towards Kansas City, brings this suit, and says that he was forcibly removed from that car, and that by reason of such removal he has suffered damages. I may premise by saying that some questions have been suggested by counsel in respect to which you need pay no attention. The matter of the tickets you may lay to one side, under the case as it now stands, the pleadings, and the evidence.

The first question is whether he was expelled, or whether he voluntarily left the train. That is a question of fact. The testimony you have heard, and nearly all of it to-day, so that it is fresh in your minds. It would be useless for me to repeat it, and the question of fact in that respect is, did this plaintiff, when he got to Las Vegas, leave the train of his own volition, or was he put off? If he left of his own choice, freely, he cannot recover any damages. If he was expelled,—that is, if he was forcibly put off the train,—then the question arises, by whom was he expelled? Was he expelled by the officers or agents of the railroad company, or by the officers or agents of the Pullman company? If he was expelled solely by the officers of the one company, and the officers of the other company had nothing to do with it, then that other company is not liable. That is a question of fact for you to settle also. If he were forcibly expelled by the officers of either company, then the defendants say they had a right to remove him, and that it was done without unnecessary force, and with no personal injury; that all that was done, if there was a forcible removal, was just simply that he was required to leave the train, and that they had a right to do it, and that it was their duty to do it, under the circumstances. They say that at the time, or just prior to the time, of the removal there had developed what they thought, and what the people in the cars thought, might be small-pox—a loathsome, contagious, infectious disease,—and that what they did, if there was a forcible removal, was for the safety of the other passengers, and as a part of their duty. If the plaintiff had been in fact breaking out with the small-pox,—a loathsome and contagious disease,—then, unquestionably, it was the duty, as well as the right, of the railroad company to protect the other passengers in the best way possible at the time. If it was necessary to remove him it was its duty to remove him in order to protect the other passengers; for while, when it takes a passenger, it is its duty to carry him safely to the end of his journey, yet it is equally its duty to carry the other passengers safely. If a man should become drunk and quarrelsome, or boisterous, on the train, or if he breaks out with a loathsome and contagious disease, it is its duty to protect the other passengers from the misconduct or misfortune of this one passenger. But it appears from the testimony that, whatever the symptoms may have been,—eruptions, etc.,—there was in fact no small-pox; that it turned out afterwards to be a case of measles, and only that. Now, that is not

the loathsome disease as calls for such treatment as small-pox. Of course you all understand that. But in that respect the law is this. If a passenger breaks out with eruptions which the best medical advice that can be and is obtained is unable to disclose whether they proceed from small-pox; and if, from any prior conduct of the plaintiff, or from any statement he had made, there is a well-grounded, clear, and honest belief that small-pox was developing itself, then the officers of the company are justified in removing him from the train, although afterwards it may turn out that they were mistaken. I do not mean to say, of course, that any mere guess or surmise or suspicion that it may be small-pox would justify such action; but when the advice of the best physicians at hand is obtained, and the past history of the plaintiff, as disclosed by himself, or as known to the officers of the company, creates a well-grounded, a clear and honest belief that that which is breaking out on the passenger is a case of small-pox, then they are justified in acting upon that conviction as though it were small-pox. They are under no obligations to wait until the disease has gone so far that the lives and the health of all the other passengers become endangered. Of course, in the exercise of this right, and the discharge of this duty for the protection of the health and safety of the other passengers, they may not act wantonly, or recklessly, or with disregard of the safety or comfort of the passenger removed. Take another illustration: Suppose a man on the train becomes boisterous from drunkenness, becomes quarrelsome, so as to endanger the lives of passengers. It would be a very extreme case that would justify the conductor in putting him off the train out on the prairie, and far from the conveniences of a town or village. But, when the train reaches a city or stopping-place where he could be taken care of, the duty of the railroad company is completed when it puts such drunk and quarrelsome passenger off the train. It is not its duty to go beyond that, for its business is only that of a common carrier, and it is not under any other obligation. And so, in this case, if you should find all these things; if you should find that the plaintiff was forcibly removed, and that he was removed because there was, as indicated, a well-grounded belief that he was breaking out with the small-pox; and if there was no other reasonable way of protecting the other passengers from danger,—then its duty was to put him off at some place where he could find accommodations, or where there was reasonable ground to believe he could find accommodations. It could not stop out on the prairie, and put him off where there was only a hamlet or a single house, where he could not possibly obtain medical attendance; but it could put him off where there was every reasonable ground to believe that he could procure medical attendance, and ample accommodations; and, if it there removed him from the train without unnecessary force, it has discharged its full measure of duty. Those are all the questions of law.

On the question of damages, if you find for the plaintiff, you have the right to take into account all the money he has paid out necessarily in expenses, and the value of the time which he lost by reason of his detention; and you will take into consideration the pain and suffering which

he endured consequent upon his removal. I do not mean to say that that pain and suffering and injury which would come in the natural course of events from the disease would be damages for which the railroad company would be responsible; but anything which came by any increase in the disease, aggravated by the expulsion, or brought about by the expulsion. And so any permanent or continued injury to his system which has flowed from that act in any way is to be taken into account. Of course, as to the mere claim for money spent, and the value of his time, that is a matter of mathematical calculation, and of easy computation; but the other matter is a matter left to the solemn judgment of 12 men taken from the body of the country to say what is fair compensation. If you find for the plaintiff, the form of your verdict will be: "We, the jury, find for the plaintiff, and assess his damages at \$———," naming the sum you fix upon; provided you find against both defendants. If you find against one of the defendants, the form of your verdict will be: "We, the jury, find for the plaintiff as against ——," naming it, such defendant, "and assess his damages at \$———." If you find for the defendants your verdict will be: "We, the jury, find for the defendants." In either case you will sign same with the name of one of your number as foreman.

EASTMAN *et al.* v. SHERRY.

(Circuit Court, E. D. Wisconsin. February 25, 1889.)

1. COSTS—RIGHT TO COSTS IN FEDERAL COURTS.

Rev. St. U. S. § 968, providing that a plaintiff recovering less than \$500 in a case which cannot be brought in a federal court unless the matter in dispute, exclusive of costs, exceed that sum, shall not be allowed costs, was taken from the judiciary act of September 24, 1789, which placed the minimum jurisdictional amount at \$500. It was not changed when the minimum amount was changed by act March 3, 1887. *Held*, that the courts cannot construe it, as changed, to conform to the new amount.

2. WITNESS—FEES—VOLUNTARY ATTENDANCE.

Witnesses may become entitled to fees as having attended a federal court "pursuant to law," though they have done so voluntarily, without being subpoenaed.

3. SAME—MILEAGE.

Rev. St. U. S. § 848, allows a witness mileage to and from his residence. Section 876 provides that a subpoena may run into another district as to witnesses living not more than 100 miles from the place of trial. Section 863 authorizes depositions by witnesses living more than that distance. *Held*, that witnesses voluntarily attending a court more than 100 miles distant from their residences can only recover mileage for 100 miles.

At Law. On motion to tax costs.

Trespass by Charles E. Eastman and Peter McArthur against Harry Sherry. Verdict for plaintiff.

Mr. Sutherland, for plaintiff.

Mr. Hooper, for defendant.

JENKINS, J. Subsequent to the judiciary act of March 3, 1887, (24 St. at Large, 552,) the plaintiffs brought suit in trespass, claiming damages in \$5,000. At the trial they recovered over \$500, and less than the sum limited by the statute.

1. It is now objected for the defendant that the plaintiffs are not entitled to costs. By Rev. St. § 968, it is provided that a plaintiff recovering less than \$500 in a case which cannot be brought in a federal court unless the matter in dispute, exclusive of costs, exceed that sum, shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs. This provision is first found in the judiciary act of the 24th of September, 1789, by which act the minimum jurisdictional amount is placed at \$500, exclusive of costs. It cannot be denied that the then design of the legislative authority was to deny costs in every case where the recovery did not equal the amount necessary to confer jurisdiction, although the damages laid might show jurisdiction by the record. Upon change of the minimum amount essential to jurisdiction, this restriction as to costs, either by design or misprision, remained unaltered. It was not changed to conform to the changed conditions of jurisdiction. It is urged that by analogy he who recovers less than the present jurisdictional limit should not recover costs, notwithstanding the provisions of section 968 remain unchanged. It must be borne in mind that at common law costs were unknown. They are the creature of statute. It rests with legislative authority to grant or deny them, and to determine in what cases, and under what circumstances, they should be allowed. It may seem appropriate that this law should be altered to conform to changed conditions. That, however, is matter for the legislative, not the judicial, authority. Courts can only administer the law as it is found. The plaintiff must be held to be entitled to costs.

2. Certain witnesses, resident without the district, and not within 100 miles of the place of trial, attended at the trial voluntarily, and not under subpoena. It is objected that fees and mileage may not be allowed for such witnesses, or, if taxable, that mileage should be restricted to 100 miles. Upon both of these questions there exists much conflict in the various circuits. The cases are assembled in *U. S. v. Sanborn*, 28 Fed. Rep. 299; *Spaulding v. Tucker*, 2 Sawy. 50; *Haines v. McLaughlin*, 29 Fed. Rep. 70; *The Vernon*, 36 Fed. Rep. 113,—where the argument on both sides is well presented. It needs only to state the conclusions to which my mind is constrained upon a careful consideration of the questions. The conclusion that a witness attends “pursuant to law” only when present in obedience to a subpoena is, to my thinking, quite too narrow a construction of the statute. The object of the law is to reimburse the prevailing party for the necessary expenses of his evidence. The only purpose of the writ is to compel attendance. But, voluntarily attending, the witness is clothed with all the immunities of a witness served with process. He subjects himself to the jurisdiction of the court, and, when sworn, is subject to like penalties and protection as one at-

tending in obedience to a writ. He attends pursuant to law when he subjects himself to the law. He waives the formal service of the writ. That is matter personal to himself and to the party who calls him.

As to the remaining question, I am of opinion that in case of a witness resident without the district the mileage must be restricted to not exceeding 100 miles. The various statutory provisions governing the subject are *in pari materia*, and to be construed together. By section 848 mileage is allowed for going from and returning to the place of residence of the witness. By section 876 the writ of subpoena may run into another district as to witnesses living at a distance not exceeding 100 miles from the place of trial. Section 863 authorizes the deposition of witnesses resident more than 100 miles from the place of trial. It seems clear to me that congress intended to allow mileage only to the extent that a subpoena would run. The statute should be read as though the words "within the jurisdiction of a writ of subpoena" were added to section 848. A different construction would open the door to great abuses. A defeated party might be charged with the mileage of witnesses from across the sea, or from distant points in the United States, rendering litigation oppressive, if not ruinous. As the testimony of witnesses resident more than 100 miles from the place of trial may be taken by deposition, I think it was designed to limit the mileage to the running of the writ of subpoena. It may be that oral evidence delivered in court is more potential than that taken by deposition. That consideration, however, should not avail to a construction of the statute that would work oppression. The law has provided an inexpensive mode of obtaining the testimony of non-resident witnesses. If personal attendance at the trial is deemed essential, the expense, except as to 100 miles, should be borne by the party inducing such attendance.

THE CITY OF SALEM.

(*District Court, D. Oregon. February 12, 1889.*)

1. NAVIGABLE WATERS—INTERSTATE REGULATIONS.

The power to regulate commerce among the several states comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried, and to this end congress may make any regulation concerning such navigation, including the vessels engaged therein, as may be necessary and proper to secure and maintain the safety and convenience of the water-way; which regulations are so far applicable to vessels engaged only in intrastate commerce thereon as to those engaged in interstate commerce.

2. SAME—CARRIERS OF PASSENGERS.

The regulation contained in section 4465 of the Revised Statutes, forbidding a steam-boat to carry more passengers than allowed in her certificate of inspection, *held* to apply to such boats engaged in carrying passengers on a navigable water of the United States between ports of the same state only.

(*Syllabus by the Court.*)

At Law.

W. Scott Beebe, for libelant.

Charles J. Macdougall, for owner and claimant.

DEADY, J. This suit is brought by the libelant, A. F. Reed, against the steam-boat City of Salem and Robert Thompson, her owner, to recover sundry penalties for carrying more passengers than is allowed by the vessel's certificate of inspection.

An exception is filed to the libel, to the effect that the transportation of passengers in question was wholly within the state, and is therefore not within the grant of power to congress to regulate commerce nor the jurisdiction of this court.

Section 4399 of the Revised Statutes declares: "Every vessel propelled in whole or in part by steam shall be deemed a steam-vessel within the meaning of this title," (52;) and section 4400 of the same provides: "All steam-vessels navigating any of the waters of the United States which are common highways of commerce, or open to general, or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats * * * for navigating canals, shall be subject to the provisions of this title" (52.)

It is also provided in this title that there shall be an inspector of hulls, and one of boilers, in each district, who shall inspect all steam-vessels, and when they "approve a vessel and her equipment" they shall make a certificate to the collector to that effect. Section 4421, Rev. St.

In case of a steamer "carrying passengers, other than ferry-boats, the number of passengers of each class that any such steamer has accommodation for and can carry with prudence and safety" shall be stated in said certificate, (section 4466, Id.) and, if any steamer shall "take on board" any more passengers than the number stated in the certificate of inspection, the owner shall be liable to any person who may sue for the same in the penalty of \$10 for each such passenger, (section 4465, Id.,) and such penalties shall be a lien on the vessel. (Section 4469, Id.)

It appears from the libel that on July 4, 1888, the City of Salem was a vessel wholly propelled by steam, and engaged in navigating the Wallamet river, and was duly enrolled and licensed therefor; that by her certificate of inspection she was only entitled to carry 60 passengers; that on said day said vessel was engaged in carrying passengers from the port of Portland to other points and places on said river, and within this district, and did on four such trips carry, in the aggregate, 2910 more passengers than allowed by her certificate.

The precise question raised in this case has never been passed on by the supreme court. In the district courts there have been apparently conflicting decisions on the point.

In *The Grctna Green*, 20 Fed. Rep. 901, it was held that a steam-boat "regularly enrolled and licensed" for the navigation of the Ohio river, "and subject to the laws of congress," was not liable under section 4492 of the Revised Statutes for carrying passengers in barges in tow, the same not being equipped as prescribed by the supervising inspectors, between

different ports of the same state. But the opinion leaves it in doubt whether the steam-boat would be liable for carrying passengers on her own decks between the same points, contrary to the laws of the United States on the subject.

After substantially admitting that congress has the power to prescribe the law of the highway, so far as may be necessary to protect interstate commerce, the court says:

"The steamer which had these barges in tow being subject to the navigation laws of the United States, the mere fact that she took in tow the barges had nothing to do with any interference with the proper navigation of the Ohio river."

In *U. S. v. Ferry Co.*, 21 Fed. Rep. 331, it was held that the owners of the vessel engaged in navigating the waters of the Mississippi, carrying passengers between two ports in the state of Iowa, in excess of the number authorized by a permit issued under section 4466 of the Revised Statutes, are liable for the penalties prescribed in section 4500 of the same.

The court held that congress has power to regulate the navigation of vessels on the navigable waters of the United States, when engaged exclusively in interstate commerce, and that when a steam ferry-boat, contrary to section 4466 of the Revised Statutes, carries passengers between ports of the same state, in excess of the number allowed in her permit, she is guilty of a marine tort, and a district court of the United States has jurisdiction of a suit in admiralty against her owners to recover the penalty prescribed by section 4500 of the Revised Statutes for the same.

In *The Seneca*, 1 Biss. 371, it was held that a steam-boat employed in carrying passengers between two ports of the state of Wisconsin was not liable to a penalty for not having her hull and boilers inspected under the steam-boat act of 1852.

In the case of *The Oyster Police Steamers of Maryland*, 31 Fed. Rep. 763, it was held that three steam-vessels belonging to the state of Maryland, not engaged in carrying freight or passengers, but used to enforce the state fishery laws in the Chesapeake bay, are liable to the penalties prescribed by section 4499 of the Revised Statutes, for failing to have their hulls and boilers inspected by the United States inspectors, under sections 4417 and 4418 of the Revised Statutes.

The court held that the "supreme and exclusive control" of congress of the navigable waters of the United States "might be defeated or rendered less effective for its objects if there were to be recognized a class of vessels privileged to use them, without being subject to those provisions which congress determines are required for the safety of all. I am therefore unable to assent to the contention that the fact that the vessels in the present case are not used in commerce, but solely for the police purposes of the fishery force, prevents congress from having the constitutional power to legislate with regard to them. It is not their use, but the fact that they navigate the highways of commerce, which brings them within the constitutional grant of power, and within the language of section 4400 of the act of congress."

In *Lord v. Steam-Ship Co.*, 102 U. S. 541, it was held by the supreme court, in the language of the syllabus, that "while navigating the high seas, between ports of the same state, a vessel of the United States is, together with the business in which she is engaged, subject to the regulative power of congress."

Mr. Chief Justice WAITE, in speaking for the court said, in substance, that the Ventura, while navigating the Pacific ocean, although bound from and to ports in the state of California, was without the state, and on a highway of nations, and therefore "engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of congress."

This case falls within the language of the statute (sections 4399, 4400, Rev. St.) defining what vessels shall be subject to the provisions of title 52.

The City of Salem is a vessel propelled by steam. On the occasion in question she was navigating the Wallamet river, a navigable water of the United States, (*Hatch v. Bridge Co.*, 7 Sawy. 136, 6 Fed. Rep. 326; *Bridge Co. v. Hatch*, 9 Sawy. 648, 19 Fed. Rep. 347,) which "is a common highway of commerce, and open to general and competitive navigation."

Unless the act of congress, so far as the carriage of the passengers in question is concerned, is unconstitutional, the vessel is liable for the penalties prescribed for carrying more passengers than the law allows.

In my judgment, the solution of this question depends wholly on whether the regulation limiting the number of passengers which a steamboat may carry over a navigable water of the United States, between ports of the same state, is necessary to maintain this highway of foreign and interstate commerce in a safe and desirable condition for the use of vessels and persons engaged in the same.

The power to make this regulation cannot, in my judgment, be derived from the grant of admiralty jurisdiction. The admiralty jurisdiction of the United States is a part of its judicial power, and not its legislative. It extends "to all cases of admiralty and maritime jurisdiction." Const. U. S. art. 3, § 2. And while it does not authorize congress to create admiralty cases, yet, if in the exercise of its power derived from other clauses of the constitution, it should do so, as the power to regulate commerce, the grant of judicial power would extend to them, and include them, because in their nature and constituents they would be cases of admiralty and maritime jurisdiction.

Take this case as an illustration. The City of Salem is alleged to have violated a law of the United States, to which a penalty is affixed, and made a lien on the vessel. The act was committed on a navigable water of the United States, and the admiralty has jurisdiction of the case, to hear and determine it. But if congress had not the power to pass the law in question the suit must fail, because no wrong was in fact committed.

The power to make this regulation must be derived, if at all, from the power granted to congress "to regulate commerce with foreign nations, and among the several states." Id. art. 1, § 8.

In *Gilman v. Philadelphia*, 3 Wall. 724, Mr. Justice SWAYNE, speaking for the court, said:

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of congress."

And in the case of *The Daniel Ball*, 10 Wall. 564, Mr. Justice FIELD, speaking for the court, said:

"The power to regulate commerce authorizes appropriate legislation for the protection of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient or safe navigation of all navigable waters of the United States, whether that legislation consists in regulating the removal of obstructions to their use, in prescribing the form and size of vessels employed upon them, or in subjecting the vessels to inspection and license in order to insure their proper construction and equipment."

That in the case of steam-boats, the inspections of their hulls and boilers, the licensing of their pilots and engineers, the carrying of prescribed lights, and the giving and answering of prearranged signals when meeting and passing, do materially increase the safety and convenience of navigable water, considered as a highway of commerce, there is no doubt, and therefore there is no question that congress may make regulations on these subjects, which are applicable to vessels engaged in intrastate commerce as well as foreign or interstate commerce.

The power to regulate the navigation of the waters of the United States being comprehended in the grant of power to regulate commerce, not merely as an incident, but a part of it, congress has power "to make all laws which shall be necessary and proper for carrying into execution" such power. Const. U. S. art. 1, § 8.

In *McCulloch v. Maryland*, 4 Wheat. 421, Chief Justice MARSHALL said:

"Let the end be legitimate,—let it be within the scope of the constitution,—and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

And again; (Id. 423:)

"But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

Upon this exposition of the law is this regulation limiting the right of steam-boats to carry passengers on a navigable water of the United States to the number prescribed by the certificate of inspection of the local inspectors, a necessary and proper regulation of navigation, when such boat is engaged in carrying passengers on such water between different ports of the same state only?

That it is so, is at least not so apparent as in the instances mentioned, in which it appears there is no doubt on the subject.

In what particular a boat carrying more passengers than allowed by

her certificate of inspection or special permit affects the safety or convenience of the highway has not been suggested by counsel. That the passengers so carried are inconvenienced, and, it may be, endangered, is likely. But the question is, how is the safety and convenience of the highway thereby unfavorably affected as to other vessels engaged in interstate or foreign commerce thereon? If it was shown that an overloaded boat was more difficult to handle, or more likely to become unmanageable or burst her boiler or steam-chest, the danger resulting to other vessels on the highway would be apparent. But there is no proof on this subject, and I am not satisfied that it is within the limits of judicial knowledge.

One thing is probable. If a steam-boat is allowed to carry passengers between the ports of any state over the navigable waters of the United States, in excess of the number prescribed in its certificate of inspection, the boats running between said ports, and from or beyond, to ports of another state, will be compelled to do the same thing, or substantially abandon what may be called their "way business;" for any one can understand that a vessel can carry 200 passengers much cheaper per head than another one of the same character and dimensions can carry half the number for. The result would be to nullify the regulation, or make its enforcement difficult in cases where it is admitted to be legal and presumably beneficial.

It may be said that, when it is determined that the carrying of passengers between different ports of the same state is not within the power of congress to regulate, the state will make proper regulations on the subject. But it is not probable that any state regulation on this subject would be either effective or well enforced.

Congress has expressly declared (sections 4399, 4400, Rev. St.) that this regulation shall apply to steam-boats carrying passengers over any part of a navigable water of the United States. The regulation, when applied to the carriage of passengers between ports of the same state, is a beneficial one, and its enforcement tends to the safety of human life. Without it, the excursion boats, which on festive occasions ply between ports of the same state, would often become floating coffins.

If this regulation, as applied to vessels engaged in intrastate commerce, is really calculated to promote the safety and convenience of interstate and foreign commerce in any appreciable degree, the enactment of it is within the discretion of congress. And while I am not as clear in my mind, on this point, as I would like to be, I have an impression that I feel more certainly than I can express, that the regulation in its effect and operation does materially tend to maintain the safety and convenience of this highway of interstate and foreign commerce,—the Wallamet river.

On this view of the matter I do not feel warranted, sitting here in the district court, in declaring this act of congress unconstitutional. It is a proper case to go to the supreme court.

The exception is disallowed.

LEHMAN *et al.* v. FELD.

(Circuit Court, S. D. Mississippi. January 15, 1889.)

1. GAMING—CONTRACTS FOR FUTURE DELIVERY—CONFLICT OF LAWS.

Contracts for the future delivery of cotton, made by a commission merchant in New Orleans, to be performed there, for his principal, residing in the state of Mississippi, are governed by the laws of the state of Louisiana, and, if valid in that state, will be enforced by the circuit court of the United States in the state of Mississippi.

2. SAME—INTENT—BURDEN OF PROOF.

A contract for the future delivery of cotton is valid and binding unless shown by those challenging its validity that it was mutually agreed and understood by the parties to the contract when it was made that there was to be no delivery of the property, but that only the differences in the price were to be paid at the time the contract by its terms required delivery should be made.

3. SAME—CUSTOMS AND USAGE—VALIDITY.

The rules and regulations adopted by the New Orleans Cotton Exchange in the settlement and substitution of contracts for the future delivery of cotton, when not used to promote a gambling transaction, are valid and legal, and are binding upon all persons familiar with such rules and regulations, or chargeable with knowledge thereof, when they employ members of said exchange to buy or sell on the floor of said exchange cotton for future delivery, and who in good faith so buy and sell in accordance with the said rules and regulations.

4. SAME—FACTORS AND BROKERS—RIGHT TO COMMISSION.

A commission merchant, who in good faith buys and sells cotton for future delivery under the directions of his principal, without knowledge or reason to believe that said principal had no intention to deliver or receive said cotton, but only expected to pay the differences in the price at the maturity of the contracts of purchase or sale, may recover from said principal compensation for services performed, and money advanced at his request, notwithstanding the existence of such illegal intent on the part of the principal.

5. SAME—RIGHT TO DEMAND MARGINS.

When, under the rules and regulations of the New Orleans Cotton Exchange, a commission merchant becomes the guarantor for the performance of the contract entered into by him for his principal, he has the right to demand margins from said principal to secure him against loss on account of said contract, and to close out said contract in the event the principal fails to remit said margins on demand, and said commission merchant may, upon the default of his principal in the remittance of said margin when so demanded, close out said contract, and recover the losses sustained by him, although the party with whom the commission merchant dealt for his said principal has made no demand for any margin.

6. PRINCIPAL AND AGENT—LIABILITY OF AGENT.

Where the agent, at the time of making a contract, discloses the name of his principal, he is not personally liable or bound to those who are thus notified that he acts as agent, for the default of the principal.

(Syllabus by the Court.)

At Law.

Miller, Smith & Hirsh, for plaintiffs.

McCabe & Anderson, for defendants.

HILL, J. The questions for decision are presented by a motion for a peremptory instruction to the jury to find for the plaintiffs, and a motion for a similar instruction to find for defendant. This action is brought

by the plaintiffs to recover from the defendant the indebtedness stated in the declaration, alleged to be due them for commissions in making the purchase of contracts for cotton to be delivered at a future time, and for money expended by them on their guaranty that defendant would comply with the contracts. To the charges made in the declaration the defendant has pleaded the general issue, and given notice in writing of special defenses. The correspondence between the parties and the other written and uncontradicted evidence adduced establish the following facts:

The plaintiffs are, and have been for a number of years past, cotton factors and commission merchants doing business in the city of New Orleans, and are members of the New Orleans Cotton Exchange, and are engaged, as such cotton factors and commission merchants, in making purchases and sales of cotton to be delivered at a future time, on behalf of and for the interest of their principals or customers, under the rules and regulations prescribed by that institution, to be compensated by the commissions thereby allowed. These rules and regulations do not require the members purchasing or selling on the floor of the exchange to disclose the names of those for whom they sell or purchase, but each member or firm making such sales or purchases must guaranty, and become personally bound for, the performance of all contracts so made, as though each was a principal, instead of an agent. The members of the exchange may at stated times, or whenever it is agreed upon between themselves, "ring out" or "close out" the said contracts of purchases or sales, by striking a balance, or setting off one contract against another, so as to substitute one for the other; the seller being still prepared and liable to deliver, and the purchaser to receive and pay for the same quantity of cotton, of the grade and at the price stipulated in the original contracts at the time stated for delivery; each being bound to the other upon the guaranty assumed, but on behalf of the unknown principals. These rules and regulations further provide that, to secure the performance of the contracts by each individual or firm so contracting a margin of one dollar per bale shall be deposited at the time of the contract, and shall be renewed from time to time, as the rise or fall in price may require, according to the conditions prescribed in these rules and regulations, by which all the members are governed. The defendant had for some years previous to the dealings with the plaintiffs stated in the pleadings made contracts for the purchase and sale of cotton for future delivery through other cotton factors and commission merchants belonging to and doing business in the Cotton Exchange of New Orleans, and was required by them to put up the necessary margins, or furnish the money for said purchases or sales, and that, when sales were made at a loss, he was required to pay said loss. He was a member of the Vicksburg Cotton Exchange, had visited the New Orleans Cotton Exchange several times, and was well informed as to all the technical terms and phrases used by the members of the said New Orleans Cotton Exchange in making these contracts, and in transacting business under the rules and regulations thereof, by which these purchases and sales were made, and therefore must be presumed to

have understood them, and the duties, rights, and obligations of the members of said New Orleans Cotton Exchange to each other in relation to the contracts made by them for their principals, and of the obligations of the principals to them. On the 23d day of November, 1887, defendant, by letter, applied to the plaintiffs to ascertain the commissions charged by them for making purchases or sales of cotton futures, to which plaintiffs responded stating the commissions they would charge; after which defendant from time to time directed the plaintiffs to make purchases of cotton for future delivery at the stated prices per pound, to be delivered 800 bales in April, 300 bales in May, and 800 bales in June, 1888, in all 1,900 bales, on behalf of himself and others, but did not state the names of the other persons for whom purchases were requested to be made, except the name of Philip Feld; and he was therefore liable for the contracts of those whose names were not given, as well as for those purchased on his own account. Plaintiffs, in compliance with said instructions, made contracts of purchase at different times for the 1,900 bales, to be delivered at the time and for the price directed by defendant. The defendant advanced the money for the deposits of the margins required when these contracts were made, and continued to advance the money for that purpose, when called for, until the 2d day of March, 1888. On that date a further decline in the price of cotton occurred, and thereupon plaintiffs wrote to defendant, notifying him of the decline and requiring a further advance of \$2,000 to make the margins good. The letter was received by defendant on Saturday, the day after it was written. To this demand no response was made. At the call on Monday morning a further decline took place, and plaintiffs telegraphed defendant to know if he had made the remittance called for in the letter, to which defendant made no reply. On the noon call of the same day the price was still tending downward, and the plaintiffs again wired defendant that, unless the margin called for was immediately forwarded, they would be compelled to close out the contracts to save themselves. Defendant declined to make the advance called for, and the plaintiffs testified that they closed out the contracts held by them for defendant at a loss of the amount stated in the declaration. Plaintiffs had closed out the original contracts with other parties, according to the rules and regulations of the cotton exchange, some time before this last margin was called for. The testimony of the plaintiffs is that they had purchased, or obtained upon adjustment of balances, as provided by the rules and regulations, other cotton contracts of the same grade, in the same quantity, to be delivered at the same time, and to be paid for at the same price, and held the same to replace those originally purchased, and it is these substituted contracts which were sold or closed out, resulting in the loss to recover which this suit is brought.

It is insisted on the part of the defendant that the proof does not show the plaintiffs set off on their books and appropriated these substituted contracts in place of the original contracts, so as to render those making them liable to the defendant; and hence, at the time of the alleged sale, producing the loss for which the action is instituted, plaintiffs held no

contracts on behalf of defendant or those for whom he acted. I am of the opinion that, if the plaintiffs then held them for the purpose of meeting contracts of purchases made for the benefit of the defendant, it was not necessary to place them on their books, to enable them to dispose of the same to protect themselves against the losses incurred by reason of their guaranty of the performance of these contracts of purchase. But it was necessary that the plaintiffs should have had contracts for the delivery of cotton of the same quantity, at the same price, and at the same time, provided in the original contracts of purchase,—contracts corresponding in all respects with the original contracts had they remained uncanceled and in force; in other words, contracts to be substituted for the original contracts.

The contracts were all made in, and were to be performed in, New Orleans, and consequently must be governed by the laws of the state of Louisiana then in force. Story, Conf. Laws, (8th Ed.) §§ 283, 285; *Ward v. Vosburgh*, 31 Fed. Rep. 12. The supreme court of the state of Louisiana has held valid the contracts made by the members of the New Orleans Cotton Exchange, acting as factors and commission merchants for their principals, according to the rules and regulations of the said cotton exchange, and not in violation of the laws of the state. *Conner v. Robertson*, 37 La. Ann. 815. These rules and regulations recognize the right and duty of the members to settle balances with each other, as before stated, so that the cancellation of the original contracts was not a violation of the duty and obligation of the plaintiffs towards those for whom they dealt. But this suit is not brought to enforce any of these contracts, or for damages for non-performance of them. It is a suit by the factors and the commission merchants against their principal, to recover commissions and money alleged to have been paid out for their principal, and necessarily expended to protect themselves against loss upon their guaranty of the performance of the contract made by them on behalf of the defendant; so that only the obligations and liabilities existing between them as such need be considered. The plaintiffs, being guarantors for the receipt of the cotton and the payment of the purchase money at the price fixed by the contracts, had a right to call upon the defendant from time to time for sufficient amount of money to make good the margins prescribed by the rules and regulations of the exchange, as well as for their own protection, and this right existed whether the other parties to the contract called for them or not, as they were authorized to do under the guaranty of the plaintiffs, and the plaintiffs would not have been relieved or discharged from the obligations of said guaranty by the failure to demand margins. So that, when defendant was notified to make the advances demanded, and failed and refused to do so, the plaintiffs were authorized to sell the contracts held by them for defendant, to protect themselves against further loss and liability upon their guaranty; and, if the sale resulted in a loss not covered by the former advances, they have a right to recover the amount from the defendant, whether the loss was paid in actual money, or by a settlement of balances with those holding the contracts. Therefore, upon this ques-

tion, the only fact to be ascertained is whether or not at the time of the alleged sale or closing out of these substituted contracts the plaintiffs held such contracts for the delivery of cotton of the quality and quantity, and at the price and time provided in the original contracts, and, if so, whether these contracts were sold or closed out at a loss not covered by the former advances, and which was paid in cash or by a settlement of balances. These are questions of fact proper to be determined by the jury from the evidence produced before them.

But it is urged as a complete defense to this action that it was a gambling transaction, and, whatever liability might otherwise exist, these contracts are void against public policy, and not enforceable in this or any other court. As before stated, this is not a suit to enforce any of these contracts, but for services performed and money paid out for the defendant. But if the contracts were gambling contracts, and the plaintiffs knew it, or—which is the same thing—had reason when the contracts were made to know or to believe that they were gambling contracts, and with this knowledge aided in making them, they would not be entitled to recover anything out of them, nor would the defendant be entitled to recover anything from them on account of said contracts, but they would be left where they stand, all being equally guilty. Under the law as settled by the supreme court of the United States, with few exceptions, these contracts for the future delivery of personal property are valid and binding, unless shown by those challenging their validity to be gambling and illegal contracts. *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160; *Clay v. Allen*, 63 Miss. 426; *Conner v. Robertson*, *supra*. To establish that they are gambling and invalid contracts, the proof must show that it was mutually agreed and understood by the parties to the contracts when they were made that there was to be no delivery of the property, but only the differences in the price were to be paid at the time the contracts by their terms required that delivery should be made. This agreement and understanding of the parties may be shown by any sufficient competent evidence; but, if only one party intends that no delivery of the property shall be made and only the differences paid, the contract will still be valid, and may be enforced by the other party to it, unless the party intending that the delivery shall be made knows at the time, or has sufficient reasons to believe, that the other party does not intend to comply with his part of the contract. But this knowledge must be satisfactorily established by the proof, and cannot be presumed or implied from slight circumstances. The defendant, in his testimony, states that he did not inform the plaintiffs that he had no intention of delivering the cotton contracted for, or to be contracted for; and one of the plaintiffs testified that the plaintiffs had no knowledge or reason to believe that the defendant, or those for whom he acted, did not intend to receive the cotton and pay for it, according to the terms of said contracts made and to be made. The fact that a large quantity of cotton is being constantly contracted for to be delivered in the future, and of which no delivery is made, but only the differences in price paid, is not competent evidence that such was the understanding between the parties

to these contracts. *Roundtree v. Smith*, 108 U. S. 269, 2 Sup. Ct. Rep. 630. This being so, the jury will be instructed that there is no evidence in the case to establish that the contracts between the parties were gambling and invalid contracts.

It is insisted upon the part of the defendant that the plaintiffs should have notified the defendant of the decline in price, and demanded the advance by telegraph on Saturday; but the defendant had personally instructed them not to telegraph, but to write, when more advances were required, and plaintiffs were therefore acting in accordance with the express directions of defendant, and this defense cannot prevail. It is also insisted that plaintiffs should have notified defendant of each sale and exchange of contracts. This, under the rules and regulations of the exchange, was not necessary; and for the reasons already stated defendant was put upon notice, and charged with knowledge of the said rules and regulations and the manner and mode of conducting business thereunder, and is bound by them in the transactions made by the plaintiffs in accordance with said rules and regulations. The result is that both motions must be overruled, and the questions of fact must be submitted to the jury on the issues as above stated, under instructions to be given them.

JUILLARD v. MAGONE, Collector.

(Circuit Court, S. D. New York. February 5, 1889.)

1. CUSTOMS DUTIES—WOOL-TOPS.

Schedule K, tariff act of March 3, 1883, (Heyl, Imp. D. 356,) imposing a double duty upon "wool of the sheep * * * imported in any other than ordinary condition, as now and heretofore practiced," etc., held not to be restricted to wool changed in its character or condition for the purpose of evading the duty, nor to wool reduced in value by the admixture of dirt or any other foreign substance, but to cover also wool advanced or improved beyond such "ordinary condition."

2. SAME.

"Wool-tops," which are wool advanced to an improved condition over ordinary "scoured wool," by the further processes of combing, gilling, and winding into balls, found to be "wool imported in other than ordinary condition," and liable to the double duty under Schedule K, (Heyl, Imp. D. 356b.)

At Law. Action to recover customs duties.

The plaintiff's firm of A. D. Juillard & Co., of the city of New York, on the 5th day of June, 1886, imported into the port of New York from Liverpool, by the steamer Republic, three cases of "scoured wool-tops," as described in their entry and invoice. The wool in suit belonged to class 2, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, was less than 30 cents per pound. The duty upon wools of the second class, of the value of less than 30 cents per pound, is 10 cents per pound, under Schedule K

(Heyl, Imp. D. 358a.) This wool had been concededly scoured. Schedule K, (Id. 356a) provides that "the duty on wools of all classes, which shall be imported scoured, shall be three times the duty to which they would be subjected if imported unwashed." The same schedule (Id. 356b) also provides that "the duty upon wool of the sheep * * * which shall be imported in any other than ordinary condition as now and heretofore practiced, or which shall be changed in its character or condition for the purpose of evading the duty, or which shall be reduced in value by the admixture of dirt or any other foreign substance, shall be twice the duty to which it would be otherwise subject." The double duty of 60 cents per pound was assessed upon this merchandise by the collector by virtue of the last clause above mentioned, and under the claim that the merchandise in suit was scoured wool, imported "in other than ordinary condition." The plaintiffs duly protested, appealed, and brought this suit, to recover the alleged excess of duty between 60 cents and 30 cents per pound, and for the determination of the question whether scoured wool-tops are dutiable at 30 cents per pound as scoured wool, or at 60 cents per pound as wool imported "in other than ordinary condition," under the provisions of the tariff act of 1883 above quoted. It was contended by the plaintiffs that the clause in paragraph 356 (Heyl, Imp. D.) "imported in any other than ordinary condition as now and heretofore practiced" was intended by congress to refer to some degradation, and not to any improvement, of the merchandise. On the part of the defendant it was claimed that the language of said paragraph covered any other than ordinary condition of wool as then or theretofore imported, whether such condition were a degraded or an improved condition. It was shown upon the trial that wool-tops were something more than scoured wool in its ordinary condition. To make wool-tops the wool in the bale is sorted, then scoured, then dried over a drying-machine, then put through the carding-engine, and then through the back-washing machine, which further cleanses it, oils it, and brings the fibers parallel to each other. After that, it is wound into balls, and these balls are placed in the combing-machine. The combing-machine takes the short fibers out, and also all foreign substances, such as vegetable matter. The refuse part is called the "noil," and the perfect part, after it comes from the comb, is a "sliver." Then it is gilled, and wound into balls, which are known as "wool-tops" in trade and commerce. In average wool about 35 pounds of tops are produced out of 100 pounds of wool, which is the shrinkage in weight from the wool as it comes in the bale to the completed article of wool-tops, and there is a corresponding increase in the value of the article.

Butler, Stillman & Hubbard, (A. H. Joline, of counsel,) for plaintiffs.
Stephen A. Walker, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for defendant.

LACOMBE, J., (orally, after stating the facts as above.) This case calls for the interpretation of paragraph 356, (Heyl, Imp. D.,) Schedule K, of the tariff act of 1883. It reads as follows:

"(a) The duty on wools of the first class which shall be imported washed shall be twice the amount of the duty to which they would be subjected if imported unwashed; and the duty on wools of all classes which shall be imported scoured shall be three times the duty to which they would be subjected if imported unwashed.

"(b) The duty upon wool of the sheep, or hair of the alpaca goat, and other like animals, which shall be imported in any other than ordinary condition, as now and heretofore practiced, or which shall be changed in its character or condition for the purpose of evading the duty, or which shall be reduced in value by the admixture of dirt or any other foreign substance, shall be twice the duty to which it would be otherwise subject."

The proviso here is grammatically separated into three subdivisions by the repetition of the word "which," preceded by the word "or," and should therefore be construed as covering three distinct categories, viz.: (a) Wool imported in any other than the ordinary condition, as practiced prior to the passage of the act of 1883; (b) wool changed in character or condition for the purpose of evading the duty; (c) wool reduced in value by the admixture of dirt or other foreign substance. As to the operation of the words "for the purpose of evading the duty," it is no doubt the rule, as contended for by plaintiff's counsel, that where there are several clauses separated by commas, and a general clause after all, the last and general one applies to all the preceding clauses; but the important feature in this case is that by the repetition of the word "which" the subject is introduced separately into each clause. Thus each clause is complete in itself, containing both subject and predicate. That circumstance seems to me controlling of the interpretation. It looks as if congress had been careful to choose and repeat words in order to indicate the divisions between the three classes it was providing for. The repetition of words is a more important circumstance than the presence of the comma. More attention is paid to the use of words than to the use of punctuation marks. There is only a single question for the jury, which I shall leave to them as a specific question.

The court then charged the jury as follows:

I propose to leave to you but a single question, which I will hand to you in writing, and to which you will return the answer "Yes" or "No." As you have gathered from the arguments here, congress has prescribed rates of duty with regard to wools of three classes: (1) Clothing wools; (2) combing wools; (3) carpet wools. As to the first and second classes the rate of duty is the same. The provisions with regard to the duty on wools are, in the first place, that they shall pay, if the value is 30 cents or less per pound, 10 cents per pound; that if washed, they shall pay twice that; and if scoured, they shall pay three times that. These wools concededly are scoured, and therefore were assessed at 30 cents per pound on that account. Then the act goes further, and provides that "the duty upon wool which shall be imported in any other than ordinary condition, as now and heretofore practiced, [and that means as practiced on the 3d of March, 1883, when the act was passed, and prior

thereto,] shall be twice the duty to which it would be otherwise subject." When this particular importation arrived, the collector determined that it made its appearance in a condition other than the ordinary condition in which wool which had been scoured was imported prior to March 3, 1883; and he therefore doubled the duty, and has collected 60 cents per pound. The question which I shall leave to you is whether the importation of wool in the condition of wool-tops (as represented by this sample of the importation) was an ordinary practice prior to March 3, 1883. On that question, upon the part of the plaintiffs, there is the evidence of one witness that he knew of a single importation at the port of Boston. Of course, one importation does not make a practice. There is also the evidence of another witness called by the plaintiff, as to whose testimony I shall have to trust to your recollection (the stenographer's notes do not agree with my own on that point) whether it was in response to a question if he knew of any importation, or if he knew of any importations. Your own recollection as to that question must guide you in determining what his testimony amounted to. It was of the very briefest character; and the mere answer "Yes" to the question so put to him gave no details whatever. On the other hand, the defendant called a number of witnesses, who were large dealers in wool, and who testified (as you will recollect) that they did not know of any importations of wool-tops into this country prior to March, 1883, except, as one or two of them said, in a single specific instance. I think that one of these witnesses testified as to one importation into the port of Boston, which was probably the same importation to which the plaintiff's witness referred. This, then, is the only question I shall leave to you: "Whether the importation of wool in the condition of wool-tops was an ordinary practice prior to March 3d, 1883."

Upon coming into court they rendered the following verdict: "No." Upon that answer to this question the court directed a verdict for defendant.

LEGG v. HEDDEN, Collector.

(Circuit Court, S. D. New York. February 4, 1889.)

1. CUSTOMS DUTIES—RIGHTS OF IMPORTERS—PROTEST—DIFFERENT CLAIMS.

A protest against the exaction of duty is sufficiently distinct and specific to satisfy the requirements of section 2931, Rev. St. U. S., notwithstanding it contains a number of different, and perhaps inconsistent, claims.

2. SAME—NON-ENUMERATED GROUND.

An importer cannot recover in an action against a collector on any ground not fully and distinctly set forth in his protest.

3. SAME—MISLEADING STATEMENTS.

Where an importer claims in his protest that his goods are dutiable as non-enumerated manufactured articles, under the provisions of section 2513, Rev. St., but also makes statements and allegations of fact in the protest which are calculated to mislead the collector, and relying upon which the collector finds the articles to be enumerated by virtue of the provisions of section 2499, Rev. St., for articles composed of two or more materials, he cannot recover in the action by proving facts which, while they tend to show that the articles imported are non-enumerated, are inconsistent with, and in contradiction of, the allegations of the protest on which the collector relied.

4. SAME.

Where an importer has alleged in his protest that articles imported by him are "composed of crude feathers or downs, feathers the component material of chief value," and claimed that they are dutiable at 25 per cent., under section 2499, Rev. St., and Schedule N of the act of March 3, 1883, as a manufacture of which crude feathers or downs are the component materials of chief value, and has also separately claimed them to be dutiable, as non-enumerated manufactured articles, at 20 per cent., under section 2513, Rev. St., and it appears upon the trial that down is the component material of chief value, the importer cannot recover upon the ground that down, the component material of chief value, is on the free list, and his articles are therefore non-enumerated, as that claim is inconsistent with the allegations of his protest.

At Law.

This was an action against a former collector of the port of New York, to recover duties alleged to have been exacted in excess of the lawful rate on certain feather trimmings imported by the plaintiff. The collector had classified the goods for duty under the provisions in Schedule N of the tariff act of March 3, 1883, for "feathers dressed, colored, or manufactured." The importer, protesting against the exaction of this rate of duty, served upon the collector a notice of dissatisfaction, in the following form:

"NEW YORK, Dec. 2, 1885.

"*Hon. Edward L. Hedden, Collector of Customs, New York*—SIR: We hereby protest against your decision and assessment of duties as made by you on our importations below mentioned, consisting of certain feather trimmings, other than millinery, composed of crude feathers or downs fastened with a gluish substance on strips of cotton cloth, imitating fur, feathers the component material of chief value, claiming said goods are not manufactured feathers in the meaning of the law, and are dutiable—*First*, as a non-enumerated manufacture, under section 2513, act March 3, 1883, at only 20 per cent. *ad valorem*; or, *second*, at only 25 per cent., as a manufacture of which crude feathers or downs are the component materials of chief value, under section 2499, and Schedule N, of said act; or, *third*, at only 30 per cent., under said section and schedule, as imitation of fur; or, *fourth*, at no more than

the highest rate chargeable on any of its component parts, viz., cotton cloth, under Schedule J of said section of said act, and not at 50 per cent. *ad valorem*, as manufactured feathers, or as charged by you.

[Signed]

"CHAS. CURIE, Attorney,
"44 Exchange Place, N. Y.
"For STRAUS, LEGG & Co."

At the beginning of the trial, plaintiff's counsel announced his intention of relying upon the claim that his article was a non-enumerated manufactured article, dutiable at 20 per cent. under the provisions of section 2513, Rev. St., without waiving or relinquishing any of the other claims of the protest. He also announced that he should base this claim upon the fact that feather trimming was not specifically enumerated in the tariff act, and that its component material of chief value was down, which was on the free list. The plaintiff then adduced evidence tending to show that the goods in question consisted of soft turkey down glued on strips of cotton cloth, and that the down was the component material of chief value. The defendant called several witnesses who had manufactured goods similar to plaintiff's importations, and who testified that they were made of turkey feathers, from which the quill had been cut away, leaving the soft outer part of the feather, which had been glued on the cloth. The court submitted to the jury for a special verdict the question whether the plaintiffs importations were made of feathers or of downs. The jury found that they were made of downs. Counsel for defendant thereupon moved for the direction of a verdict in favor of defendant on the grounds: (1) That the protest relied on by plaintiff did not distinctly and specifically set forth the ground of plaintiff's objection to the action of the collector in assessing duty, within the meaning of section 2931 of the Revised Statutes, for the reason that it contained four different and inconsistent claims, and showed that at the time of its service the importer had been himself unable to determine what provision of the tariff applied to his goods, or under which he should claim. (2) That as plaintiff had in the protest informed the collector that feathers were the component material of chief value, and that the goods were composed of crude feathers, or downs, (obviously using these as synonymous terms,) provided for in Schedule N of the tariff act, (where feathers are provided for and downs are nowhere mentioned,) he could not now be heard to claim that the component material of chief value was on the free list, thus rendering his article a non-enumerated manufacture, because such a claim was not made in his protest, but was inconsistent with, and in contradiction of, the averments of the same; that no such claim had ever been brought to the attention of the collector; and that plaintiff could not now shift his ground, and recover on a claim not distinctly and specifically made in the protest.

Charles Curie, Stephen G. Clarke, and Edwin B. Smith, for plaintiff, cited:

Elliot v. Swartwout, 10 Pet. 137; *Barney v. Watson*, 92 U. S. 451; *Cary v. Curtis*, 3 How. 236; *Thompson v. Perkins*, 57 Me. 290; *Nichols v. U. S.*, 7 Wall. 130; *Wright v. Blakeslee*, 101 U. S. 179; *Greely v. Burgess*, 18 How. 413; *Swanston v. Morton*, 1 Curt. 294; *Christ v. Maxwell*, 3 Blatchf. 129; *Converse v. Burgess*, 18 How. 413; *Boker v. Bronson*, 4 Blatchf. 472; *Mason*

v. Kane, Taney, 173; *Arthur v. Morgan*, 112 U. S. 495, 5 Sup. Ct. Rep. 241; *Oberteuffer v. Robertson*, 116 U. S. 516, 6 Sup. Ct. Rep. 462.

Stephen A. Walker, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., for defendant, cited:

Sadler v. Maxwell, 3 Blatchf. 184; *Davies v. Arthur*, 13 Blatchf. 34, 96 U. S. 148; *Smith v. Schell*, 27 Fed. Rep. 648; *Cummins v. Robertson*, Id. 654; *Thomson v. Maxwell*, 2 Blatchf. 392; *Stalker v. Maxwell*, 3 Blatchf. 188; *Swanston v. Morton*, 1 Curt. 294; *Kriesler v. Morton*, Id. 413; *Focke v. Lawrence*, 2 Blatchf. 508; *Crowley v. Maxwell*, 3 Blatchf. 404; *Curtis v. Fiedler*, 2 Black, 461; *Burgess v. Converse*, 2 Curt. 223.

LACOMBE, J., (*orally*.) The jury having found that the goods in suit are composed of downs; and the evidence showing that the downs in them are the component material of chief value; and it further appearing from the tariff act that downs are on the free list, the articles imported, under the decision of the late chief justice in *Hartranft v. Sheppard*, 125 U. S. 337, 8 Sup. Ct. Rep. 920, are dutiable properly at 20 per cent. *ad valorem*, under section 2513, as a non-enumerated article. To the registration of such a verdict, however, the defendant makes two objections, springing from the form of protest:

1. That it is multifarious. I appreciate fully the force of the argument, and the difficulties which will undoubtedly surround the entire subject, if multifarious protests are to be recognized by the law. If a man may state in the alternative two separate paragraphs, and claim that the article is dutiable under either, he may, if, for instance, there is any silk in it, enumerate every single one of the silk paragraphs in the statute, and claim that it is dutiable under some one of them. But I do not find in the language of the statute itself any express provision that the party protesting, or giving his notice of dissatisfaction, must restrict himself to any one particular rate of duty which he may claim that his goods should pay. Nor do I find that any of the authorities go to the length of holding that he shall do so. Under those circumstances, to stamp the protest as void because it is multifarious, would seem to be legislation, rather than a construction of the statute.

2. The other objection, however, is more serious. The position of the case is now (and of course that was the position of the case all the time) that the article is not to be taken as enumerated in any of the sections preceding section 2513, because its component material of chief value is on the free list. That is the only fact by reason of which it can be claimed that this was a non-enumerated article, and therefore open to the operation of section 2513.

Now, the question is, did this protest, when fairly interpreted, set forth that as the ground of objection to the collector's ruling? Did it express such an opinion in such plain and intelligible terms as would call the collector's attention to it? These documents of course are, as has been held many times, business documents. They are not prepared by lawyers, and they are not to be construed with the strictness that a legal document might be. It is to be assumed that they are prepared by the

merchants themselves; and that they are such documents, couched in such plain language, as would be used by a layman of intelligence, and of business capacity, to express the grounds of his objection. *Per contra*, they must be expressed in such terms that the collector, who is also a layman (for the statute does not require that he shall be a lawyer, although it happens that he frequently is one) will be able from them to gather plainly what the meaning of the protestor is. The rule has been best expressed in one of the latest cases,—that of *Arthur v. Morgan*, 112 U. S. 495, 5 Sup. Ct. Rep. 241,—where it is said that the protest need not be made with technical precision, but it is sufficient if it shows fairly that the objection afterwards made was at the time in the mind of the party, and was brought to the knowledge of the collector, to the end that he might ascertain the precise facts.

Looking at this protest I am unable to reach the conclusion that it plainly expresses, or, in the language of the court, that it shows fairly that the objection made was that because the component material of chief value was on the free list it was a non-enumerated article, and therefore open to the operation of section 2513. It is true that it uses the word "downs" in three or more places; but it always is as the alternate of the word "feathers." "Down" is nowhere referred to as the antithesis of "feathers;" nor is the circumstance that downs are on the free list in any wise indicated as operating to make the article non-enumerated. I do not think that the collector at that time, knowing all that we know now, on receiving such a protest as this, would fairly draw from it the conclusion that the real objection of the party on the other side was that, because the component material of chief value was a free-list article, therefore the operation of the component material clause of section 2499 would not apply; and that in consequence the article would, at the conclusion of the tariff paragraphs, remain unenumerated, and therefore open to the operation of section 2513. I therefore, despite the answer of the jury to the question, shall direct a verdict for the defendant.

SCOTT v. MEAD *et al.*¹

(District Court, S. D. New York. February 19, 1889.)

1. BANKRUPTCY—FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.

The bankrupt, M., in 1866, some years before his insolvency, had a judgment recovered against him by default by one L. Before that he had dealt in real estate in his own name, and then held some property on which the judgment was a lien. Thereafter, he continued and extended his real-estate business, making all contracts and obligations in his own name, but taking titles in his wife's name. In 1867 he bought several lots, paying for them out of his own means, taking title in his wife's name. In 1870 and 1871 he built five valuable houses thereon, doing all the business in his own name, and subsequently collecting the rents in his own name, and using them at his discretion. *Held* (1) that, there being no fraudulent intent as respects subsequent creditors at the time of the purchase of the lots, the wife, under the New York statutes, should retain the money invested in the lots, less the then existing judgment of L. (2) That the title taken in the wife's name was designed as a cover only for the husband's business; that the buildings were not within the same protecting statute as the lots; that they were not intended as a gift to her, and, if they had been, the gift was not reasonable in amount, as respects existing or subsequent creditors, and was invalid as against existing creditors and also as against subsequent creditors misled by the husband's apparent possession and ownership of the property.

2. EQUITY—CONVEYANCE SUBJECT TO LIEN OF JUDGMENT—MARSHALING ASSETS—RELEASE.

M. having conveyed a house and lot subject to the lien of L.'s judgment, but without any agreement on the part of the grantee to pay it, it appeared that the amount of the judgment was neither deducted from the consideration nor part of the price. *Held*, that M. had no equity to require the grantee to pay L.'s judgment, and that the land did not become the primary fund therefor; and that L.'s subsequent release of that property did not prevent his recourse against the houses and lots in suit; the same as regards his release of other property at M.'s request.

3. CREDITORS' BILL—WIFE'S EQUITY—RENTS AND PROFITS.

Upon decree charging the property with payment of the bankrupt's unsecured debts, *held*, (1) wife first entitled to the proceeds of a house and lot previously settled upon her in good faith, the proceeds being probably used by the husband in payment of debts incurred in the new buildings; (2) wife answerable for such rents and profits only as came to her hands.

In Bankruptcy. Creditors' bill.

For facts, see decision on demurrer to amended complaint, 9 Fed.

Rep. 91.

Nelson Smith and Coleridge A. Hart, for complainant.

Miller, Peckham & Dixon, for defendants.

BROWN, J. The complaint was filed in August, 1880, by John H. Platt, assignee in bankruptcy of Abraham Mead, to have applied to the benefit of the estate five houses and lots on the corner of Fifty-Fifth street and Sixth avenue, the title to which had been taken in the name of Sarah J. Mead, the bankrupt's wife, alleged to be in fraud of creditors. Upon the death of Mr. Platt, Mr. Scott, the succeeding assignee, was substituted as complainant. The general facts as charged in the bill are stated in the decision on the demurrer to the amended complaint, (9 Fed. Rep.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

91,) where some of the other legal questions involved are also considered. It is unnecessary to repeat what is there stated. The answer denies all allegations of fraud.

The lots were bought by Mead in February and May, 1867, for about \$31,000, of which \$16,000 remained upon mortgage, and \$15,000 was paid by Mead in cash, or its equivalent. The title was taken in the name of his wife, Sarah J. Mead. In 1870 and 1871 Mead built upon the lots five houses, at a cost variously stated by Mead as from about \$115,000 to \$165,000, begun in the latter part of 1869, and completed in 1871. Of this sum \$76,000 was obtained upon bond and mortgage upon the same premises during the progress of the work; the rest was raised by Mead in various ways, from the sale of other real estate standing in his own or in his wife's name, from moneys borrowed by him, and by discounts which he obtained on accommodation notes at the Sixth National Bank.

Mead was by occupation a plumber. For some years prior to 1866 he had dealt to some extent in real estate, always taking title in his own name, excepting one house in Thirty-Sixth street, bought early in 1865, where he resided for a number of years, the title to which was taken in his wife's name, and, as he testifies, was "designed to be hers from the start." In 1866, Littlefield obtained a judgment against him by default for \$3,183.83, which was a lien on two houses and lots in Forty-Third street, then standing in his name. He was afterwards allowed to come in and defend, the judgment meantime standing as security. The case was litigated by him until 1876, when final judgment was entered for \$5,118.28. During this interval from 1867 to 1873 his speculations in real estate were gradually much enlarged. His obligations became heavy. All titles after 1866 were taken in the name of his wife or partner, except as to one house in West Twelfth street, in which there was an equity of \$5,000. Down to the end of 1872 the real-estate market was rising, and he realized considerable profits, which were mostly reinvested in property heavily mortgaged. He was unable to carry this property through the depression which followed the panic of 1873. Except the buildings and lots now in question, it was all disposed of by sales at a loss, by foreclosures with deficiency judgments, or by reconveyances to the grantors upon nominal consideration. At the end of 1873 he became distressed for money, paid little or no accruing interest after 1874, was insolvent in 1875, and in 1878 was adjudicated a bankrupt. This suit was commenced within two years after the delivery of the assignment to the assignee. The statute of limitations is therefore no bar to this suit.

For the defendants it is contended that there is no proof of any fraudulent intent as respects any creditor, existing or subsequent; and that no relief can be had upon the Littlefield claim, because he voluntarily released sufficient real estate which was primarily charged with the payment of his judgment.

The Revised Statutes of this state provide that where a grant is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the for-

mer, except only that "such conveyance shall be presumed fraudulent as against creditors, at that time, of the person paying the consideration;" and, "if a fraudulent intent is not disproved, * * * a trust shall result in favor of such creditors to the extent necessary to satisfy their just demands." 1 Rev. St. p. *728, §§ 51, 52.

The above provisions apply to the original purchase, and to Littlefield's judgment, which was a claim then existing. Mead, as I have said, put about \$15,000 into this purchase in his wife's name. The statutory provisions do not apply to the improvements made upon the lots from three to five years afterwards, even though the land be held to belong to Mrs. Mead as against creditors. The husband's expenditures in building upon them valuable houses stand in no better position than a voluntary gift from husband to wife; and, as against creditors, if intended as a gift, it must stand or fall according to the rules applicable to such gifts, having reference to the debtor's means and a reasonable provision for his family, and the rights of creditors, existing and subsequent.

As respects the Littlefield claim, it is urged that a fraudulent intent is disproved by the circumstances, because the judgment was already abundantly secured, it is said, by real estate standing in Mead's name; because he had other personal means to a considerable amount; and because the inconveniences attending real-estate transactions in one's own name while a judgment in litigation attaches a lien upon them, furnish a perfectly innocent and justifiable reason for dealing in the name of another, without any presumption of a fraudulent intent. These considerations are entitled to much weight; and they would be deemed controlling were they not overcome by other evidence and by Mead's subsequent conduct. Besides the general evidences of his intention referred to below, the evidence demonstrates that Mead did not intend to leave any real estate standing in his name as a security for the Littlefield judgment any further than he could help; and that, long before Littlefield's final judgment was perfected, Mead withdrew his interest completely. He himself procured the release of one house in 1867 upon a nominal consideration. He sold the other to Mrs. Travis upon full consideration, in 1872; and a third in West Twelfth street, which was taken in his own name at the same time with the sale to Mrs. Travis, (probably as a substituted, though inadequate, security for the judgment to satisfy Mrs. Travis,) he sold with full covenants and warranty a few months afterwards, without reference to the judgment. This last house was sold on execution on the Littlefield judgment in 1876, realizing but \$1,000, and leaving upwards of \$4,000, besides 12 years' interest, still unpaid. My conclusion is that Mead not only meant to contest the Littlefield claim, but meant never to pay it if he could help it; and that his taking the subsequent titles in his wife's name was partly with this intent.

The two releases executed by Littlefield do not prejudice the claim under his judgment. The release of the house 103 West Forty-Third street in 1867 was evidently obtained by Mead himself, to enable him to convey that property, and thereby obtain a part of the consideration which was used to purchase the Sixth-Avenue lots in question. The re-

lease of the other house, 128 West Forty-Third street, was made in consideration of \$200 paid by Mrs. Travis in February, 1873, about a year after its conveyance to her by Mead. This property had stood in Mead's name before the recovery of the judgment, and was undoubtedly sufficient security for the judgment. The conveyance was made "subject to all assessments for widening Broadway, which are to be paid by the party of the second part, [Mrs. Travis;] also subject to the lien" of the Littlefield judgment for \$3,183.83.

It is contended by the respondent that this subject clause made this property the primary fund for the payment of the Littlefield judgment; and that the release of it by Littlefield estops him from making any subsequent claim under the judgment against Mead or his property. There are several reasons why this view cannot be sustained: (1) Even if the effect of the whole transaction between Mead and Travis was to make the land, as between them, the primary fund for the payment of the judgment, it would not have bound Littlefield, a prior lienor, unless he had notice of facts sufficient to constitute Mead a surety merely. *Ingalls v. Morgan*, 10 N. Y. 178, 187; *Cheesebrough v. Millard*, 1 Johns. Ch. 414; *Guion v. Knapp*, 6 Paige, 43; *Palmer v. Purdy*, 83 N. Y. 147. There is no evidence that Littlefield had any such notice, actual or presumptive. The case is wholly different from that of a specific lien like a mortgage. This judgment was a general lien merely; and, when Littlefield was applied to for a release, the only knowledge with which he was chargeable was simply that the property was subject to the lien of his judgment, like any other real estate that had belonged to Mead, without any obligation on his part to look to that property primarily or alone. The record of the subsequent deed was not constructive notice of its terms to Littlefield. *Cheesebrough v. Millard*, *supra*. Even if Littlefield had had knowledge of all the facts that now appear, it would have made no difference; for these facts do not show that the Travis property became the primary fund for the payment of Littlefield's claim, or that Mead became in equity a surety only. For (2) the deed does not say that Mrs. Travis was to pay the judgment; while it does state that she was to pay the assessments. Had the same intent existed as to the judgment, it would have been so expressed. (3) The conveyance was only "subject to the lien" of the judgment, not to the payment of it,—a wholly different thing. *Dingeldein v. Railroad Co.*, 37 N. Y. 575. (4) It is certain that the amount of the judgment was neither agreed to be paid by Mrs. Travis, nor deducted from the consideration money. Mead does not so testify on either point, as he would have done if either were true. The judgment then amounted with interest to about \$4,400. Mead says he considered the property conveyed worth \$18,000, or \$2,000 more than the price named in the deed. But there is no evidence that Mrs. Travis so considered it; and, besides, she was to pay the Broadway assessments. But even this \$2,000 difference is not half the judgment. Had it been understood that Mrs. Travis or her property was to pay the judgment, the whole amount of it would have been deducted from the consideration money; and Mead does not say that anything was deducted. And if the

purchase price was made less in consequence of the judgment, Mead would have taken some agreement from Travis to pay it. No such agreement was taken; nor is it probable that Mead would have continued an active litigation, as he did for several years afterwards, simply for Mrs. Travis' benefit.

The right of a debtor to make a particular fund the primary fund for payment of a debt is a purely equitable right. It rests either upon express contract, or upon the consideration of the transaction that raises such an equity. Where the debtor's lands, for instance, are sold on execution, subject to a prior mortgage, the purchaser is presumed to have bought only the debtor's equity above the mortgage, and to have paid the consideration for that equity only; and the land therefore becomes thereafter the primary fund for the payment of the bond and mortgage. *Tice v. Annin*, 2 Johns. Ch. 128; *McKinstry v. Curtis*, 10 Paige, 503; *Vanderkemp v. Shelton*, 11 Paige, 34. In this case there was neither any such agreement, nor any abatement or deduction from the consideration in Mrs. Travis' purchase, such as to give Mead any equitable right to have her property pay the judgment. He has no such equity. Littlefield's release of that property for \$200 was therefore immaterial. Had the release not been given, and had Mrs. Travis been compelled to pay the whole judgment, she would have had a right to an assignment of the judgment for her benefit, to have it enforced against Mead in any legal or equitable proceeding like the present. *Ingalls v. Morgan*, *supra*. It is not improbable that this subject clause was inserted in the deed through the caution of Mead's attorneys for the very purpose of giving him the unquestioned right to litigate Littlefield's claim, and to prevent the grantee from either discharging the judgment, or claiming that the covenant against incumbrances was broken as soon as the grant was made, which otherwise might have been done. See *Barnes v. Mott*, 64 N. Y. 397, 400, 402. The defense that the Travis property became the primary fund was not pleaded; and very likely all the obtainable evidence pertinent to the question may not have been produced. It is possible that some agreement was taken by Mrs. Travis from Mead in reference to that judgment, and that the title to the house in West Twelfth street, which he had bought for \$5,000 cash over the mortgage at the same time with the Travis deed, both being acknowledged on the same day, was designed to be a substituted security so far as to allay any apprehensions of Mrs. Travis. I do not credit Mead's statement that he believed the Littlefield judgment was "arranged upon the Travis sale," except in some such way as the above. He afterwards continued taking titles in his wife's name precisely as before, though the business was intended as his own. Upon the original purchase I must therefore hold that the Littlefield judgment attaches as a statutory trust.

2. *The buildings.* If Mead's improvements on the lots had been intended as a gift to his wife, its validity as against creditors would be determined in reference to the amount of his means thus disposed of, his other property at the time, his existing indebtedness, the reasonableness of the gift as a provision for his wife, and the use afterwards made of it,

as respects creditors, existing or subsequent. The evidence, however, satisfies me that neither the lots nor the buildings were intended as a gift to Mrs. Mead, or really to become her property, as between her and her husband. Her name was a mere cover for Mead's own business. In his numerous purchases after the Littlefield judgment, all contracts were in his own name. Payments were made with his own checks. The receipts on sales of property standing in his wife's name, were deposited in his own bank. All the rest of his real-estate transactions (except the house in West Thirty-Sixth street, purchased in 1865, above referred to) were acknowledged to be substantially his own. Even the mortgages of \$24,000 and \$20,000, given by Fitzgerald and Bradley on a sale of lots in Mrs. Mead's name, were stoutly claimed by Mead to be his, apparently supposing that the mortgages had been given to him, whereas they were in fact executed to his wife; other persons, however, being interested therein. There is nothing to distinguish the purchase and holding of the lots in question at the time they were bought, or the buildings built thereon in 1870 and 1871, from the many other real-estate transactions managed in the same way. Mead stated, in answer to the inquiries of some of the tenants, that this property was put in Mrs. Mead's name on account of the Littlefield judgment, and when that was out of the way, that it was to be turned over to him. He usually spoke of this property as his own, and so stated to many persons. He had the entire management of it, and until his insolvency deposited the rents in his own bank-account. Some general statements that Mrs. Mead had property or notes of his, representing means of her own, on account of which the property in question was bought, find no corroboration. No such notes are produced. Mrs. Mead was not called as a witness to verify this or any other claim in her favor. The inference is that she could testify to nothing which would support her case. I must find, therefore, that none of these transactions save that of the house in West Thirty-Sixth street were designed as gifts at all, and that the use of Mrs. Mead's name was nothing but a cover for her husband's interests. Doubtless these facts would in no way prejudice the legal title of Mrs. Mead and her heirs as against Mead himself, or persons claiming merely in privity with him. It is otherwise as respects creditors, where the real intent and object of the transaction are of prime importance. In such cases, if the transfer is a mere cover for the debtor's own use, and not intended to give the transferee any beneficial interest, it is void as to existing creditors, and equally so as to subsequent creditors, when employed to their prejudice, and to mislead them, except in so far as our statute in regard to trusts in lands prevents; and, as above stated, the statute has no application to what Mead subsequently invested in the buildings.

The amount invested by Mead in the houses cannot be determined within \$50,000. Mead's sworn statements at different times differ by more than that sum. His check-books, which would have furnished valuable data as to this and other matters, have been kept concealed. He had access to them himself; but he refused to disclose where, or un-

der whose control, they were, or by whom he had himself been permitted to see them when desired. His last testimony was from memoranda made up by him, from which he read during his examination before the notary; but he refused to produce these memoranda for inspection or cross-examination by the opposing counsel. His earlier statement, made some years previous on affidavit, was that the buildings cost \$169,000; next, that the buildings cost \$128,484.50; lastly, that the buildings and nine lots cost \$142,596.13; which, deducting \$29,500 for the nine lots, would leave \$113,096 for the buildings. As \$76,000 only was raised by first mortgage on the property during the progress of the work, the amount raised from other sources must have been from \$37,000 to \$93,000.

Mead states that he was worth at that time from \$75,000 to \$150,000, and did not owe over \$10,000. On cross-examination he fails to show with any definiteness property worth over \$50,000 or \$60,000, all told, except such as rested on mere estimate or conjecture, including what stood in his wife's name, aside from the house in Thirty-Sixth street. The explanation given of his failure, and the fact that upon his bankruptcy he had no assets, and owed at least \$72,000 of unsecured debts, (excluding all of the alleged debt to James C. Mead of \$32,000, excepting \$8,000,) confirms the belief that practically all that he had above what he owed was invested in these houses. He states that his failure was caused by the shrinkage of real-estate values; and that, after 1873, the loss of cash invested therein was, all told, \$186,535. Other parts of the evidence, however, show that his receipts from profits on wholly new transactions after the houses were all built in 1871, and from mortgages on the property in question, together with the debts unpaid and unsecured at the time of his bankruptcy, amounted to from \$193,000 to \$210,000, which is made up as follows: Additional sums raised on mortgage of the property in question after 1872, (amount per schedules, \$155,750; per deed to J. C. Mead, \$172,150,) \$65,650 to \$82,150; profits on lots bought from and after the summer of 1871, (McKee, Andrews, Beer, Gillies, Burns,) \$55,552; debts unpaid, \$72,000; making altogether from \$193,000 to about \$210,000; or from \$7,000 to \$24,000 more than all his losses, without counting the net rentals received by him from this property during many years. Assuming that all these net rentals—some \$5,000 or \$6,000 a year—were consumed in his expenses of living, (certainly a liberal allowance,) and that he earned nothing in his plumbing business from 1871 to 1878, it would seem, considering that his schedules show no assets, that unless some considerable assets were concealed at the time of his bankruptcy, he and his wife together, aside from the Thirty-Sixth street house, had nothing in 1870 and 1871, over his debts, except what was put into this property; and that, whatever his apparent property may have been, it was really absorbed in paying a part, but not all, of his indebtedness at that time in its continued and substituted forms. As to the amount of his indebtedness, Mead testifies that it did not exceed \$10,000 when he began building, including the Littlefield judgment and Haight's claim, which

are still unpaid. From this, however, is evidently excluded his obligations on bond and mortgage, which would amount to a great deal more. The proof of debts in bankruptcy shows only two existing at that time, viz., those of Littlefield and Haight, amounting together, with interest, to about \$6,000, as to which debts these transactions are plainly invalid. Besides those debts there are others proved to the amount of about \$30,000 for moneys loaned to Mead, mostly upon notes dated in 1872 and 1873. But the evidence indicates that a number of these were for loans obtained previously,—how far back cannot be stated. To some extent they were probably substitutions for previous debts. No books of account were kept, and the check-books, which might have thrown light on this matter, have been concealed. A considerable amount was alleged to have been loaned by James C. Mead, running back prior to 1870; and from that year downward Mead appears as a borrower from his friends, and more and more from his bank, upon discounts of accommodation paper,—in November of 1870, \$6,000; in November, 1871, \$10,000; in November, 1872, \$21,000; May, 1873, \$35,000; July, 1873, \$41,000. During 1873 the bank held security for these loans on the lots in question. These debts to the bank were discharged on the execution of the new mortgages above referred to in the latter part of 1873.

Mrs. Mead had no claim upon her husband for money or property brought to him upon her marriage, or through her family. The contrary suggestions made by Mead in the earlier part of the examination were afterwards disproved. She had no estate of her own, and received from her father only \$460, which was but a repayment of what Mead had invested in furniture. I accept Mead's testimony that the house bought in 1865, and taken in Mrs. Mead's name, "was intended to be hers from the start." It was their place of residence; it was a reasonable provision for her at that time; it was not prejudicial to Mead's existing creditors, and was not used to mislead subsequent creditors. When the buildings on the lots in question were commenced, the house in Thirty-Sixth street was worth, as Mead says, \$30,000. It was sold in 1873 for \$31,000, netting \$22,500 over the mortgage. I shall sustain this provision for Mrs. Mead to the amount of \$22,500, considering that sum as practically turned into the Fifty-Fifth street property, where the family afterwards went to reside.

The subsequent use of the property in question by Mead was such as legally subjects it to the claims, not only of his existing creditors, but of subsequent ones misled by it. Mead alone was in apparent possession, as he undoubtedly had the sole management and control of it. He appointed agents of the property, who understood him to be owner. He usually spoke of it as his; made some long leases of it in his own name; and received and used all the rents, and contracted all debts in reference to the property. It was a valuable property. It gave him a reputation for wealth; and, in my judgment, was the backbone of his credit. The evidence shows that many of those who loaned him money did so on the faith of his supposed ownership of this property, to several of whom he

spoke of it as his, as he was generally accustomed to do. His partner and his agent supposed that it was his, and that it stood in his name of record. There can be no doubt that at that time, and for several years after, he considered the property as practically his, and so treated it. Mrs. Mead is chargeable with full knowledge of this course of dealing, and full assent to it. As a mere cover, she in no way interfered. She now offers no evidence to the contrary. Both are bound by the position practically assumed during the time when these subsequent debts were contracted on the faith of Mead's ownership. To permit a contrary position to be taken now on the strength of a merely nominal legal title in Mrs. Mead, which was originally intended only as a cover for Mead's use, would be to defraud the creditors misled by it. Any such attempt to change front afterwards is strong evidence, and ought to be interpreted as proof, of a fraudulent intent at the start. The cases are numerous showing that subsequent creditors thus actually or constructively misled are entitled to relief against such transfers, as much as creditors at the time. *Savage v. Murphy*, 34 N. Y. 510; *Case v. Phelps*, 39 N. Y. 164; *Sedgwick v. Place*, 12 Blatchf. 163, 179, 95 U. S. 3, *Shand v. Hanley*, 71 N. Y. 319. The cases of *Carr v. Breese*, 81 N. Y. 584, and *Graham v. Railroad Co.*, 102 U. S. 148, 153, 160, are inapplicable, the circumstances being quite different.

Mead's investment of his money in building on his wife's lots, when the intent of both was that Mead should have all the fruits of it from rentals or the proceeds of sales or mortgages, as the facts here prove that he did have to a considerable extent, in part execution of the trust, is virtually a "transfer" of Mead's personal assets to Mrs. Mead "in trust for his use," and as such is by the statutes of this state "void as against creditors, existing or subsequent." 2 Rev. St. p. *135, § 1; *Curtis v. Leavitt*, 15 N. Y. 9, 132, 148, 149; *Wilson v. Robertson*, 21 N. Y. 591-594; *Young v. Heermans*, 66 N. Y. 381; *Dewey v. Moyer*, 72 N. Y. 70, 76, 103 U. S. 301. The statute applies to "all transfers, verbal or written." This expenditure was a "verbal" transfer of his means. That it was in trust for his "use" is as clear to me as if it had been declared in writing. Though a trust in lands cannot be created by parol *inter partes*, this does not apply to trusts for creditors, by operation of law; nor, I think, to moneys laid out on another's land, but for one's own use; nor to the proceeds to be derived therefrom, when such was the common intention. Section 1, p. *135, and section 2, p. *137, N. Y. Rev. St., are thus harmonized. To a considerable extent the real trust has been executed in the application of rentals and of the moneys raised on mortgage of the property to the security or payment of Mead's debts at the close of 1873 and subsequently. In either point of view, subsequent creditors misled are entitled to relief.

When Mead's insolvency became certain in 1875, the insecurity of this property, though standing in his wife's name, became apparent. It was accordingly conveyed to his cousin, James C. Mead, of Sing Sing, in June, 1875, for the consideration as stated in the deed of \$300,000, subject to mortgages for \$172,150, and taxes of 1874. A memorandum of

Mr. Mead's of the year previous included it among his "effects," and stated its estimated value at \$350,000, *i. e.*, from \$125,000 to \$175,000 above the incumbrances upon it. Under this deed the ownership of the property was claimed by James C. Mead from June, 1872, till his death, in 1884, after which it was first learned in this suit that a reconveyance, not recorded, was executed by James C. Mead to Mrs. Mead on the day after the deed from her to him, and placed in the hands of a relative; the transaction being as security to James C. Mead for a balance of about \$8,000 owing to him by the bankrupt. In the mean time the bankrupt had been collecting the rents of the property under a power of attorney from James C. Mead. The execution of this deed had been kept concealed through long examinations of both James C. Mead and Abraham Mead, and has led to no small amount of prevarication. The complaint charges that the conveyance to James C. Mead was in fraud of creditors; and there can be no doubt that such was its actual intent. The reconveyance to Mrs. Mead has since been delivered.

Upon all the testimony, I do not find that at the time of the original purchase of the lots there was an actual and positive intent on Mead's part to hinder, delay, or defraud any creditor except Littlefield, whom he did by this means intend to hinder and delay in the collection of his debt. But I do find that the subsequent investment by Mead in 1870 and 1871 of a large amount of his means in the erection of houses on lots standing in his wife's name was greatly in excess of what was legally justifiable as a provision for her, having reference to his then existing means, and the uncertain and speculative nature of the chief business in which he was engaged, and the large obligations he had assumed in it, and the still larger ones he soon after assumed; that neither this investment, nor the original purchase, was intended as a gift to Mrs. Mead, but was a mere trust for his own use; that the provision previously made for Mrs. Mead, which is herein sustained to the amount of about \$30,000, was all that his circumstances warranted; and that the investment in these houses of so large a part, if not the whole, of his means over and above his unsecured liabilities, and his subsequent possession and use and representation of the property as his own, upon the faith of which subsequent loans were made to him, were incompatible with the rights and interests of creditors misled, and were in law fraudulent as to them, as well as void under the provisions of the Revised Statutes of this state.

The complainant is entitled to a decree declaring the original purchase of the lots subject to a trust for the payment of the amount now due and owing upon the Littlefield judgment; (2) the balance of the amount invested by Mead in the original purchase of the lots, after deducting the above, will go to Mrs. Mead, together with the sum of \$22,500, the net proceeds of the Thirty-Sixth street house; (3) that there be next paid from the proceeds of the property the rest of the debts as they now stand proved against Mead in the bankruptcy proceedings *pro rata*; excluding, however, therefrom the debt to Maclay for a deficiency judgment on foreclosure. The presumption from the circumstances, and the ordinary well-known course of business in this city, is that Maclay's bond and

mortgage were not taken upon any personal credit of Mead, or of the property in question; and there is no evidence or suggestion to the contrary. If the proceeds of the sale of the property are insufficient to satisfy the above sums in full after the payment of incumbrances existing thereon at the time the complaint herein was filed, together with any subsequent taxes or assessments, the defendants will be directed to account for the rents and profits received, so far as necessary to pay the above amounts in full, with interest and costs, (*Loos v. Wilkinson*, 110 N. Y. 210-215, 18 N. E. Rep. 99;) and such rents and profits, so far as received by Mrs. Mead, will be deducted from the amount above reserved for her benefit, if not otherwise collectible, and that be necessary, in order to made good the amounts due upon the other claims allowed herein, together with costs and disbursements of suit.

UNITED STATES v. MEAGHER.¹

(Circuit Court, W. D. Texas. November 23, 1888)

1. COURTS—FEDERAL JURISDICTION—CRIMES.

A cession by a state to the United States of "exclusive jurisdiction" over certain land, providing that the state shall retain concurrent jurisdiction with the United States so far that all process, civil or criminal, issued under authority of the state, may be executed by the state officers upon any person amenable to the same within the limits of the land so ceded, confers on the United States "exclusive jurisdiction," within the meaning of Rev. St. U. S. § 5839, prescribing punishment for crimes committed in places within the exclusive jurisdiction of the United States.

2. SAME—BURDEN OF PROOF.

The burden is on the government to show that the crime was committed on land which was under the exclusive jurisdiction of the United States.

3. HOMICIDE—INDICTMENT—DEGREE OF CRIME.

Under a statute providing that one may be found guilty of any offense, the commission of which is necessarily included in the one with which he is charged, one charged with murder may be found guilty of manslaughter.

4. SAME—MURDER—DEFINITION.

Murder is where a person of sound memory and discretion unlawfully and feloniously kills any human being, in the peace of the sovereign, with malice prepense or aforethought, express or implied.

5. SAME—MALICE.

Malice, as applied to murder, need not denote spite or malevolence, hatred or ill will, to the person killed, nor that the slayer killed his victim in cold blood, as with a settled design; but a killing from an evil design and malignant spirit may be of malice, implied by law from the absence of lawful excuse.

6. SAME.

All the facts in the case, however trivial, should be considered as bearing on the question of malice.

7. SAME—ACCIDENTAL KILLING.

The killing of a person by the accidental discharge of a pistol by one engaged in no unlawful act, and without negligence, is homicide by misadventure, and is no crime.

¹Publication delayed by failure to obtain copy of opinion at time of its delivery.

8. SAME—MANSLAUGHTER.

Any unlawful and willful killing of a human being without malice, including a negligent killing, which is also willful, is manslaughter, and it may exist where there is no evidence of sudden heat of passion.

9. SAME—INTOXICATION AS DEFENSE.

Intoxication is no excuse for crime, but should be considered as affecting defendant's mental condition, with reference to his capability of a specific intent.¹

10. SAME—REASONABLE DOUBT.

A reasonable doubt of guilt sufficient to acquit exists, if, after an impartial comparison and consideration of all the evidence, the jury can candidly say that they are not satisfied of defendant's guilt.²

11. SAME.

The jury should convict, if, after an impartial comparison and consideration of all the evidence, they have an abiding conviction of defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs.³

Indictment against William Meagher for Murder committed on a government reservation.

Rudolph Kleberg, for the Government.

A. J. Evans, for defendant.

MAXEY, J., (*charging jury*.) The indictment preferred against William Meagher, the defendant in this case, is for the murder of Joseph Horan. An important question affecting the jurisdiction of the court has arisen during the progress of the trial, the disposition of which must, under the facts in evidence, be remitted to your determination. It is alleged in the indictment that the offense was committed in the county of Kinney, within the Western district of Texas, "and at the military post of Fort Clark, which said post and fort was then and there, and before said time, [October 10, 1888,] ceded to the United States, and was then and there, and is now, under the exclusive jurisdiction of said United States." This court could not entertain jurisdiction of the offense charged against the defendant unless it be made to appear that the homicide was committed "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States." Rev. St. U. S. § 5339. Ordinarily offenses of this character are tried and determined by courts of the respective states, and it is only when they are committed, following the words of the statute, in some "place or district of country under the exclusive jurisdiction of the United States," that the jurisdiction of the federal courts attaches. It is insisted by the government that jurisdiction is complete in this case, for the reason that the chief executive of the state of Texas, acting pursuant to a general

¹ On the general subject of intoxication as an excuse for crime, see the note to *State v. Tatlow*, (Kan.) 8 Pac. Rep. 267; *Territory v. Davis*, (Ariz.) 10 Pac. Rep. 359, and note; *Buckhannon v. Com.*, (Ky.) 5 S. W. Rep. 358, and note; *Wilkerson v. Com.*, (Ky.) 9 S. W. Rep. 886; *Clore v. State*, (Tex.) 10 S. W. Rep. 242; *Cleveland v. State*, (Ala.) 5 South. Rep. 426.

² For definitions of "reasonable doubt" in criminal cases, and instructions on that subject, see *U. S. v. Hughes*, 34 Fed. Rep. 732, and note; *State v. Sauer*, (Minn.) 33 N. W. Rep. 355, and note; *State v. Walker*, (Mo.) 9 S. W. Rep. 646, and note.

law of the state, has by public proclamation ceded to the United States exclusive jurisdiction over the site or territory occupied by the military post of Fort Clark. A copy of that proclamation, duly authenticated by the secretary of state, has been admitted in evidence, which, after minutely defining the boundaries of the ceded territory, proceeds as follows:

"Now, therefore, I, John Ireland, governor of the state of Texas, under and by virtue of the authority vested in me by the constitution and laws of the said state of Texas, have ceded, and by these presents do cede, to the United States, exclusive jurisdiction over the above-described land, to hold, use, occupy, own, possess, and exercise said jurisdiction over the same: provided, that this cession of jurisdiction is granted and made upon the express condition that the state of Texas shall retain concurrent jurisdiction with the United States over said land, and every portion thereof, so far that all process, civil or criminal, issued under authority of this state, or any of the courts or judicial officers thereof, may be executed by the proper officers of this state upon any person amenable to the same within the limits of the land so ceded, in like manner, and with like effect, as if no cession had taken place, saving to the United States security in the possession and enjoyment of said land, and all property within said limits and extent, and exemption of the same, with all improvements and property thereon, from any taxation under the authority of the state so long as the same is held and occupied by the United States for the purposes expressed and intended in this cession, and not otherwise."

The condition expressed in the cession of the governor seems to follow substantially the language of the state statute. Rev. St. arts. 334, 335. And it is contended by counsel for the defendant that the statute and executive cession reserve to the state of Texas concurrent jurisdiction with the United States over offenses committed within the ceded territory. If that position be correct, this court would be without jurisdiction to proceed further, as it can take cognizance of the offense of murder (so far as the clause of the Revised Statute under consideration is concerned) only when it is committed in a place or district under the exclusive jurisdiction of the federal government. But I cannot adopt the view of defendant's counsel, although at first inclined to believe that construction to be the proper one. The state, in the instrument of cession, merely reserves the right to serve process upon persons within the ceded land who may have committed offenses elsewhere, and I do not understand that its purpose is to reserve a concurrent jurisdiction over the territory ceded. In construing a somewhat similar statute, in the case of *U. S. v. Cornell*, 2 Mason, 65, Judge STORY uses this language:

"It provides only that civil and criminal processes, issued under the authority of the state, which must of course be for acts done within, and cognizable by, the state, may be executed within the ceded lands, notwithstanding the cession. Not a word is said from which we can infer that it was intended that the state should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the state. Now there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state, that it should permit another state, in such cases, to execute its processes within its limits."

And it is said by the supreme court, in the case of *Railroad Co. v. Lowe*, 114 U. S. 533, 5 Sup. Ct. Rep. 995, that—

“The reservation which has usually accompanied the consent of the states that civil and criminal process of the state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice.”

I therefore charge you, gentlemen, as matter of law, that the instrument executed by the governor, which is in evidence before you, cedes to the United States exclusive jurisdiction over the lands therein particularly described. But in thus holding I do not mean to say to you that the offense charged against the defendant—if offense it be—was committed within the limits of the boundaries set forth in the instrument. That is a question of fact for you to determine from a consideration of the evidence; and if you find that the homicide was not committed within the boundaries covered by, or included within, the cession, then it would be your duty to acquit the defendant. It devolves upon the government to prove to your satisfaction that the killing was done at a place within the exclusive jurisdiction of the United States; and in this case the burden is upon the government to show that the homicide was committed within the boundaries described in the cession made by the governor. If you are satisfied that Joseph Horan was killed by the defendant at or within a place under the exclusive jurisdiction of the United States, it will next be your duty to inquire into the circumstances of the homicide, in order to determine the question of guilt or innocence of the defendant.

The offense—as I have already stated to you—charged by the indictment is murder, but in your consideration of this case you will not confine your attention solely to that offense. The statutes provide that in all criminal cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, (*U. S. v. Carr*, 1 Woods, 485;) and you are instructed that the crime of manslaughter is included in the crime of murder. And, hence, if you should conclude that the defendant is not guilty of murder, you may still find him guilty of manslaughter, if the testimony warrants such finding, or you may find him not guilty of any offense. Let me first direct your attention to the offense specifically charged against the defendant; that is, the crime of murder. Not every homicide is murder, nor is every killing of a human being a crime; and it therefore becomes necessary for the court to instruct you what constitutes the crime of murder as known to the law. By approved authors it is defined thus: “Murder is where a person of sound memory and discretion unlawfully and feloniously kills any human being, in the peace of the sovereign, with malice prepense or aforethought, express or implied.” In this case it is admitted by the defendant that he killed the deceased, Joseph Horan, by shooting him with a pistol. It is not denied that the defendant at the time of the killing was of sound memory and discretion, nor that Horan was under the peace and protection of the law. It will therefore be necessary for you to determine whether the killing was

an unlawful one on the part of the defendant, with malice aforethought, express or implied. Upon the point whether or not the killing was unlawful, you will inquire, first, whether the act of the accused, which resulted in the death of Horan, was intentional or unintentional. If it was unintentional, if the defendant had no purpose to fire his pistol, but it was discharged by him accidentally, and at the time of its discharge the prisoner was engaged in no unlawful act, and if it was not negligently discharged, as hereinafter considered, then the act of killing was a homicide by misadventure,—as the law terms it,—and is no crime; and under such circumstances it would be your duty to acquit him.

If you should be of opinion that the killing was committed under circumstances which would not authorize you to find the defendant entirely guiltless of any offense, you will next inquire whether it was committed with malice aforethought, express or implied; and to reach a conclusion upon that point you must understand the meaning of the terms used. It is said by the supreme court of this state that malice aforethought, when attempted to be defined, has been necessarily given a more comprehensive meaning than enmity or ill will or revenge, and has been extended so as to include all those states of the mind under which the killing of a person takes place without any cause, which will in law justify, excuse, or extenuate the homicide. *McCoy v. State*, 25 Tex. 39. Malice, as applied to the offense of murder, need not denote spite or malevolence, hatred or ill will, to the person killed; nor that the slayer killed his victim in cold blood, as with a settled design and premeditation. Such a killing would, it is true, be murder; but malice, as essential to the crime of murder, has a more extended meaning. "A killing flowing from an evil design in general may be of malice, and constitute murder; as a killing resulting from the dictates of a wicked, depraved, and malignant spirit—a heart regardless of social duty, and fatally bent upon mischief—may be of malice, necessarily implied by law from the fact of killing without lawful excuse, and sufficient to constitute the crime of murder, although the person killing may have had no spite or ill-will towards the deceased. Malice, as thus described, is either express or implied. Express malice is where one with a sedate and deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention; * * * as by lying in wait, antecedent menaces, former grudges, and concerted schemes to do bodily harm." *Jordan v. State*, 10 Tex. 492. In reference, gentlemen, to malice, it is said by eminent judges that it is rarely, if ever, the case that express malice is proven upon the trial of a cause. Its existence lies in the heart of the slayer, and he alone knows its secrets. "He is the only possible direct witness to that; and if he meant so to testify, he would plead guilty. The existence or non-existence of malice is an inference to be drawn by the jury from all the facts in the case." It is said that malice may be implied from the fact of killing with a deadly weapon. But that rule, however correct as an abstract proposition, can seldom, it is said, be of practical utility in ascertaining the species of malice; for that fact is rarely, if ever, presented in a case unaccompanied with other facts and circumstances ex-

plaining the killing; and when other facts appear, the presumption as thus stated is apt to mislead. The rule is aptly expressed by a learned judge in the following language:

"Malice is to be inferred from all the facts in the case. If malice is found, it must be drawn as an inference from everything that is proved taken together and considered as a whole. Every fact, no matter how small; every circumstance, no matter how trivial, which bears upon the question of malice, must be considered by the jury at the same time that they consider the use of the deadly weapon; and it is only as a conclusion from all those facts and circumstances that malice, if inferred at all, is to be inferred." *U. S. v. King*, 34 Fed. Rep. 312.

The malice, you observe, must be aforethought. It implies premeditation,—a prior intent to do the act. It may have existed but for a moment, an inappreciably brief period of time, or longer. No limit has been, nor can be, fixed as to its duration. If it in fact existed for any period, however brief, the killing would be murder; and, if malice was wanting, the homicide, whatever it may be, would not be murder.

I will not attempt a review of the facts in this case, for they are fresh in your memory; and if, after a careful consideration of the testimony, you are clearly satisfied that the defendant killed Horan with malice aforethought, as above defined to you, it would be your duty to find him guilty as charged in the indictment. But if you conclude that he is not guilty of murder, you will next look into the offense of manslaughter, and ascertain whether he is guilty of that offense. By the Revised Statutes of the United States, the crime of manslaughter, for the purpose of this case, is defined as follows:

"Every person who, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, is guilty of the crime of manslaughter." Rev. St. § 5341.

Manslaughter is said by Mr. Blackstone (4 Bl. Comm. 191) to be the unlawful killing of another without malice, express or implied, which may be voluntary, upon a sudden heat, or involuntary, but in the commission of some unlawful act. Voluntary manslaughter, as defined by the common-law writers, is an intentional killing in hot blood, without malice; and "involuntary manslaughter, according to the old writers, is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed." 1 Whart. Crim. Law, (8th Ed.) § 305. But the distinction above adverted to between voluntary and involuntary manslaughter is now obsolete at the common law, and becomes here immaterial. Any unlawful and willful killing of a human being without malice is manslaughter, and, thus defined, it includes a negligent killing, which is also willful. It is insisted by the defendant's counsel that the killing was by misadventure,—a mere accident,—with no formed intent on the part of the defendant to kill Horan. I have told you that to constitute manslaughter the killing must be willful,—

must be willfully done. The word "willfully," says a text writer, "sometimes means little more than plain intentionally, or designedly. Yet it is more frequently understood to extend a little further, and approximate the idea of the milder kind of legal malice; that is, as signifying an evil intent without justifiable excuse." 1 Bish. Crim. Law, § 428. Now, in this case, it is not insisted that there was an altercation between deceased and the defendant, and that the killing was committed in sudden heat. Manslaughter, however, may exist where there is no evidence of sudden heat of passion; as, for example, where the killing results from the negligent use of dangerous agencies, as fire-arms. The rule is thus stated by Mr. Wharton:

"Whoever possesses a dangerous agent must take such care of it as good business men, under such circumstances, are accustomed to apply; and if from his neglecting to exercise such care death ensue to another, he is liable for manslaughter." Whart. Crim. Law, § 343.

But, gentlemen, you must accept this rule with the qualification or explanation that the killing must also be willfully committed, as the word "willfully" is defined in a foregoing part of this charge. You will carefully weigh all the testimony, and determine whether the defendant is guilty of murder or manslaughter, or not guilty of either offense, and render your verdict accordingly.

There is another point to which your attention is directed, and that is intoxication. There is evidence before you tending to show that at the time of the killing defendant was laboring somewhat under the influence of liquor.

You are instructed that intoxication is no excuse for crime, but it may be considered to discover the specific intent which actuates a party in the commission of the offense, and thus it may sometimes reduce the offense of murder to manslaughter; and the rule is thus stated:

"Where the question of a specific intent is essential to the commission of a crime, * * * the fact that an offender was drunk when he did the act which, being coupled with that intention, would constitute the crime, should be taken into account by the jury in deciding whether he had that intention."

But this excuse is to be received with great caution, and the question is left for the jury to determine, "whether the defendant's mental condition was such that he was capable of a specific intent to take life."

Lastly, gentlemen, you are not to presume the defendant guilty. The presumption of law is in favor of the innocence of the accused until his guilt is established to the satisfaction of the jury beyond a reasonable doubt; that is, a doubt based upon reason, and arising out of the testimony. "Reasonable doubt" has been defined, in a case which has passed the scrutiny of the supreme court, as follows:

"A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence; and if, after an impartial comparison and consideration of all the evidence, you can candidly say you are not satisfied of the defendant's guilt, you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would

be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

If, in view of the evidence and charge of the court, you believe defendant guilty of murder, you will find him guilty as charged in the indictment. If, however, you find that he is guilty of manslaughter, your verdict will be: "We the jury find the defendant not guilty of murder, but guilty of manslaughter." But if you find that he is not guilty of either offense, murder or manslaughter, you will simply find him not guilty.

Verdict or guilty or manslaughter.

RODEBAUGH *et al.* v. JACKSON *et al.*

(Circuit Court, E. D. Michigan. February 25, 1889.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION.

Though a patentee of a combination, whose original claim was rejected in view of the prior state of the art, is to be held strictly to the combination described in his modified claim, he is entitled to the benefit of the doctrine of equivalents.

2. SAME—PATENTABILITY—SAW-MILL DOGS.

Claim 1 of letters patent No. 196,102, October 16, 1877, to George W. Rodebaugh, for an improvement in saw-mill dogs, is for the combination of an eccentric lever, pivoted to the standard, with a connecting strap articulated to an arm of the reciprocatory shaft carrying the dog-head, the parts being so arranged that a downward movement of the lever will imbed the dog into the log, and lock it there, the lever assuming a perpendicular position against the standard, out of the way. *Held*, that the use of such eccentric lever in place of the "T" lever used in the prior invention, described in the Craney patent, the operation of the two being the same, and the alleged difference, that the eccentric lever is not affected by back pressure, being strongly denied, and it being always intended that the lever shall be locked or held in place by a weight, is not a patentable improvement.

3. SAME.

The arrangement by which the lever is perpendicular to the standard when the dog is locked, if an equivalent for a lever which locks horizontally, is anticipated by the Craney device, and, if a patentable improvement, is not infringed by defendant's combination, which does not use it.

ON APPLICATION FOR REHEARING.

4. SAME.

The device was anticipated also by the Ely patent, No. 163,309, May 18, 1875, for a head-block, which was a combination of an eccentric lever working with a cam, and operating on the vertically reciprocating bar carrying the dog, and capable of locking the bar in any position; the dog-head being carried upon a cylinder in substantially the same manner.

5. SAME—CONSTRUCTION OF CLAIM.

The original claim was the eccentric lever and connecting strap combined with the vertical shaft carrying the dog-head, substantially, etc., and was rejected on referring to the Ely patent. *Held*, that claim 1 of the patent must be limited to the specific device described, and is not infringed by a device in which the lever has its greatest locking capacity when in a horizontal position, and losing its locking capacity when perpendicular.

In Equity:

This was a bill in equity to recover damages for the infringement of the first claim of letters patent No. 196,102, issued October 16, 1877, to George W. Rodebaugh, for an improvement in saw-mill dogs. The claim alleged to be infringed read as follows:

"(1) The combination of the eccentric lever, E, E¹, pivoted to the standard, B, at O, with the connecting strap, F, articulated to the arm, G, of the reciprocatory shaft, D, carrying the dog-head, the parts being so arranged that a downward movement of the lever will imbed the dog into the log, and lock it there; the lever assuming a perpendicular position against the standard, out of the way, substantially as described."

The defense was anticipation and non-infringement.

Charles J. Hunt, for plaintiffs.

Coulter & Griffin, (*Harry E. Knight*, of counsel,) for defendants.

BROWN, J. A dog is an instrument for holding a log in position while it is being sawed into boards or planks. Formerly the log was supported on the ends of the carriage, and was held firmly down, and secured against lateral displacement by iron dogs hinged to the carriage, and having teeth, which were driven into the ends of the log. When the circular saw came into use the form of the carriage was changed. Instead of supporting the log at the end, it was laid so that its side rested on the side rail of the carriage, and was supported its entire length. To hold it in position, two or more movable supports, called "knees," were placed upon the carriage behind the log. To prevent the rolling of the log, two or more pieces of iron were hinged or hung to the cross-pieces of the carriage, having at their free ends a right-angled hook, which was driven into the log. These were also called "dogs." After a time this arrangement was followed by teeth attached to the knees, and operated in various ways. Some were driven down into the timber by blows, and some by means of levers of various shapes. In some cases the teeth moved simultaneously in an upward and downward direction,—that is, into the upper and under sides of the log or cant,—and in others the action was separate. These teeth were not often locked in place, but in a few cases the adjustment of the lever locked them in position. These teeth were also called "dogs," but the term was also applied to the whole device, which was placed on the knee of the carriage, and included all the mechanism for protruding and retracting the teeth. Under this state of the art the patent in this suit was issued. The patentee, Rodebaugh, claims an improvement in these dogs, consisting of an eccentric lever, pivoted to the standard upon which the dog slides, the office of which is to raise and lower the reciprocating shaft, which carries the dog-head by means of a connecting strap between the eccentric lever and reciprocating shaft. By the use of this device the teeth of the dog are forced into and withdrawn from the log at pleasure. In order to ascertain the full scope of Rodebaugh's invention it is necessary to advert for a moment to the first claim of his original application. It read as follows:

"(1) The eccentric lever, E, E', connecting strap, F, combined with the vertical shaft or bar, D, carrying the dog-head, substantially as described for the purpose specified."

This was a broad claim for the use of an eccentric lever and connecting strap, combined with a shaft carrying the dog-head, for the purpose of raising and lowering the teeth, and was rejected by the patent-office upon the ground that it had been substantially anticipated by patent 163,309, issued to C. R. Ely, for a head-block. This was a combination of a lever working with a cam, the object of which was to elevate and depress the dog-head, which was carried upon a cylinder in much the same manner as Rodebaugh's. The ground of the rejection is not stated, but it is obvious that it must have been upon the theory that the eccentric lever of Rodebaugh was a substantial equivalent for the weighted lever and cam of the Ely patent. The operation of the two is admitted to be substantially identical; and, in our opinion, the action of the examiner in holding that there was no invention in substituting the one for the other was correct. Upon this intimation from the patent-office, Rodebaugh amended his claim, and restricted himself to the combination of the eccentric lever pivoted to a standard, with a connecting strap articulated to an arm of the reciprocating shaft carrying the dog-head; the parts being so arranged that a downward movement of the lever will imbed the dog into the log, and lock it there, the lever assuming a perpendicular position against the standard, out of the way. Defendants' theory is that Rodebaugh, having assented to the rejection of his original claim, and having substituted another, is bound by the literalism of his new claim; and, inasmuch as in the defendants' device the lever when locked does not assume a perpendicular position, as required by Rodebaugh's claim, there is no infringement. If it be broadly true that a patentee who has reformed his claim under instructions from the patent-office is thereby debarred from the benefit of the doctrine of equivalents, his position is correct. It is true, there is an intimation in the case of *Sargent v. Hall*, 114 U. S. 86, 5 Sup. Ct. Rep. 1021, that the limitations introduced into an application after it was persistently rejected, must be strictly construed against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers; but, on a careful consideration of this and other cases, we think nothing more is meant than that where, under the state of the art and the action of the office, a patentee of a combination has modified and limited his claim, he shall be held strictly to the combination as he has described it. Thus, in *Leggett v. Avery*, 101 U. S. 259, it is intimated that if an applicant, in order to obtain the issue of a patent, acquires in the rejection of a claim thereto, a reissue containing such claim is invalid. But there is no suggestion that the patentee of such reissue is not entitled to the benefit of the doctrine of equivalents. So, in *Vulcanite Co. v. Davis*, 102 U. S. 222, 227, after disclaiming an assertion that the correspondence between the applicant for a patent and the commissioner of patents can be allowed to enlarge, diminish, or vary the language of a patent after it is issued, it is said that a patent, like any other written instrument, is to

be interpreted by its own terms. "But when a patent bears on its face a particular construction, inasmuch as the specification and claim are in the words of the patentee, it is reasonable to hold that such a construction may be confirmed by what the patentee said when he was making his application. The understanding of the parties to a contract has always been regarded as of some importance in its interpretation." So, all that was said in *Fay v. Cordesman*, 109 U. S. 420, 3 Sup. Ct. Rep. 236, is that, if the patentee specifies any element as entering into the combination, he makes such element material, and the court cannot declare it to be immaterial. It is his province to make his own claim, and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is filled by an equivalent device or instrumentality. There is nothing in any of these cases inconsistent with what had been previously regarded as well settled, or to lead one to believe that it was the intention of the court to debar the patentee from his right to pursue an infringer, who has endeavored to avoid his patent by the use of a well-recognized mechanical equivalent. We think, therefore, that we are bound to look to the state of the art at the time this patent was applied for to determine the limitations upon the claim in question.

Under the first clause of plaintiffs' patent as amended, there are none of the so-called "anticipations" which are worthy of serious consideration, except that of Craney, which undoubtedly resembles Rodebaugh's device in all its important particulars. There is a fixed standard, A, corresponding to plaintiffs' standard, B, a guide-bar, B, answering to the reciprocating shaft, D, and the same lever, E, though in one it is a "T" lever and in the other an eccentric; a connecting bar, D, performing substantially the same functions as the connecting strap, F, of the Rodebaugh patent, and a projecting or horizontal arm, C, which answers the purpose of plaintiffs' arm, G, projecting from the upper end of the reciprocating shaft. All these elements perform substantially the same functions as the corresponding elements of the Rodebaugh patent. There are, however, three distinctions in the two devices which it becomes necessary to notice before determining finally the question of anticipation:

1. In the use of a "T" lever, instead of an eccentric. This fact is relied upon by the plaintiffs as constituting the improvement which distinguishes the Rodebaugh patent, not only from that of Craney, but from all the others which are claimed as anticipations. But the testimony, even of plaintiffs' expert, indicates very strongly that for the purpose of driving the teeth of the dog into the log, a "T" lever performs the same function, and in as effectual a manner, as an eccentric. The operation of the two is precisely the same. Indeed, a model was exhibited in which an eccentric and a "T" lever were used to move coincidentally the same connecting rod, and their operation was shown to be practically identical. The one difference suggested is that eccentrics are not affected by back pressure,—a distinction which is strenuously denied by defendants' experts,—while the lever may be moved backward and forward,

unless it is locked. This, however, is of no importance, as it is always intended that the lever operating the dog shall either be locked or held in place by a weight upon the end of the lever. We are clear in our opinion that there is no invention in substituting one for the other.

2. There is in the Rodebaugh patent a rearrangement of the entire combination of the Craney patent, by placing the lever and locking device midway between the upper and lower ends of the standard, instead of at the bottom, and using it to depress the upper dog, instead of raising the lower dog into the log. We do not understand, however, that the rearrangement of an old combination, where each element of the combination operates practically as before, is patentable, unless a new or greatly improved result is gained. *Woodward v. Dinsmore*, 4 Fish. Pat. Cas. 163, 169. The variations of the Rodebaugh patent from that of Craney are scarcely greater than those of defendants' device from that of Rodebaugh, and it is entirely clear to our mind that defendants' device differs from that of Rodebaugh only in the rearrangement of the combination, by which a connecting rod, operated by a thrust, and articulating with the movable shaft at the bottom, is substituted for the connecting strap, F, operating by tension, and articulated with the reciprocating shaft at the top by means of the arm, G. In this particular the case is much like that of *Ives v. Hamilton*, 92 U. S. 426.

3. The feature of the Rodebaugh patent, by which the lever, when the dog is locked, assumes a perpendicular position against the standard, out of the way, is not found in the Craney patent, and is probably the novel arrangement which obtained from the patent-office the allowance of his first claim as amended. Now, this is either a mechanical equivalent for a lever which locks horizontally, or it is not. If it be such an equivalent, then it is anticipated by the Craney patent, but if it be not such equivalent, and be a patentable improvement upon the Craney patent, then it is not infringed by the defendants, since they do not use this feature of the claim. There was undoubtedly considerable mechanical ingenuity shown by Rodebaugh in readjusting the various elements of the Craney combination, and perhaps some improvement in its mechanical operation, and we think his device approaches very near the border line of invention; but upon the point which has been most earnestly pressed upon our attention, that the eccentric is a patentable improvement over the "T" lever,—and the plaintiffs' case was practically put upon this ground,—we have not been able to adopt their view.

ON APPLICATION FOR REHEARING.

(March 13, 1889.)

JACKSON, J. I concur fully in the conclusion reached by the district judge, that the Rodebaugh patent of October 16, 1877,—letters patent No. 196,102, was anticipated by the patent issued to Thomas Craney,—No. 150,534,—dated May 5, 1874; that in so far as the Rodebaugh improvement differs from that of the Craney patent nothing more than mechan-

ical skill was involved and exercised. I am further of the opinion that said Rodebaugh patent was anticipated by the patent of Ely,—No. 163,309,—dated May 18, 1875.

2. If the Rodebaugh patent could be held valid, it would, in view of the action of the department, as shown by the file-wrapper and contents, have to be limited to the precise mechanism and construction therein described, and, as thus limited, it is not infringed by the machine used by the defendants. Rodebaugh's original claim was broad enough to have covered the machine as used by defendants. It was "(1) the eccentric lever, E, E¹, and connecting strap, F, combined with the vertical shaft or bar, D, carrying the dog-head, substantially as described, and for the purpose specified." This claim was rejected by the patent-office on reference to said Ely patent, No. 163,309, in which is found an eccentric lever operating on the vertically reciprocating bar, which carries the dog, and capable of locking the bar in any position it may be set. Upon the rejection of this broad claim Rodebaugh was compelled to present the new claim now shown in claim 1 of the letters patent issued to him, which cannot by any construction, or under any rule of doctrine of equivalents, be enlarged so as to cover or embrace what was previously rejected. It must manifestly be limited to the specific device therein described, in which the dog-head is locked when the eccentric lever has been moved through the half circle, or 180 degrees of the circle, of its action, and brought into a perpendicular position with the standard or shaft. The defendant's lever is differently constructed, having its greatest locking capacity when in a horizontal position, and losing this locking capacity entirely when carried to the position of the perpendicular at which the Rodebaugh lever makes its most effective lock. I am clearly of the opinion that the application for rehearing should be denied, and that complainants' bill should be dismissed, with costs.

BOYD v. JANESVILLE HAY TOOL CO.¹

(Circuit Court, W. D. Wisconsin. November 9, 1898.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—HAY ELEVATOR.

Letters patent to John M. Boyd, No. 300,687, dated June 17, 1894, are void for want of novelty, being anticipated by prior patents.

2. SAME—PATENTABILITY.

Mere differences of form and mechanics, which do not involve invention, are not patentable.

(Syllabus by the Court.)

In Equity.

This was a bill for infringement of letters patent of the United States No. 300,687, to John M. Boyd, for hay elevators. The defendant man-

¹ Publication delayed by failure to obtain copy of opinion at time of delivery.

ufactured hay carriers under letters patent of the United States No. 279-869, to Frank B. Strickler. The defenses were want of novelty and non-infringement.

Erwin & Benedict, for complainant.

Offield & Towle, for defendant.

BUNN, J. The best judgment I have been able to form in this case from the evidence and from an inspection of the various patents and machines introduced on the hearing is this That the complainant's device is anticipated by the various patents introduced by the defendant; especially by the Walters patent, the Brower patent, the Church patent, the Jordon patent, the Kirch patent, the Hennyton patent, the Hustis patent, the Drake patent, and the Van Sickle patent. That in view of the several patents and machines, all prior to that of complainant, and apparently accomplishing substantially the same results by substantially the same means, there was very little left upon that line for inventors to work upon, and that the difference between the complainant's device and those preceding it is a difference of form and mechanics, and not one of art and invention. Complainant's bill dismissed, with costs.

RALLI *et al.* v. TROOP *et al.*

(District Court, S. D. New York. March 4, 1889.)

1. SHIPPING—AVERAGE—FIRE—WATER DAMAGE.

By our law, as well as by the York-Antwerp rules, the ship-owner is entitled to general average contribution from the cargo for water damage done to the vessel in extinguishing fire.

2. SAME—NEGLIGENCE—WHAT CONSTITUTES—EVIDENCE.

No general average contribution is due from the cargo to the ship-owners if the sacrifice is caused by such negligence of the vessel as the ship-owners are responsible for. *Held*, on the facts, that no negligence of the vessel was shown. The omission to comply with a port by-law requiring a locked lantern, is not, of itself, negligence, when such a regulation is not enforced by the local authorities, and is not shown to have been known to the master, and where the usual ship's lantern was actually used. The proceedings before a foreign board of inquiry are not legal evidence here.

3. SAME—SACRIFICE ORDERED BY PORT AUTHORITIES.

To entitle to general average contribution, the act of sacrifice need only be ordered by those who for the time being are in lawful control of ship and cargo, and, although this fire was finally extinguished under the direction of the port authorities, *held* that, as this was done by them while in control, under the *lex loci*, and as the act was a maritime act for the common benefit of vessel and cargo alone, and not for the supposed interests of other property in the port, the ship-owners were equitably entitled to contribution, under the maritime law, as if the master had retained sole control, and ordered the sacrifice.

4. SAME—ADJUSTMENT.

A British ship was chartered to load saltpeter and jute at Calcutta for a voyage to New York. The charter-party provided that all questions of general average should be settled in accordance with the York-Antwerp rules and the customs of the port of destination. After the vessel had loaded at her moorings, and was getting under way, fire broke out in the fore hold,

which the mate and men on the ship and those summoned from other vessels were unable to put out. The port authorities thereafter took charge, in accordance with the law of Calcutta. A portion of the cargo was unladen, and finally the vessel was scuttled, and the fire "drowned out." The rest of the cargo was thereafter taken out in a damaged condition, and sold by the master, and the sound cargo was forwarded for the owner's account to the port of destination, and there delivered. A general average bond having been given for the cargo, and an adjustment had, by which the ship-owners were allowed for the injury to the vessel caused by swelling of the jute, and for other water damage, *held*, in an action brought by the cargo owners against the ship-owners, claiming to recover the whole value of the cargo sold in Calcutta, that, as no errors in the adjustment had been shown, the ship-owners should be allowed such general average contribution, and libelants have a decree only for the amount due them under the adjustment.

In Admiralty.

Libel, by Stephen H. Ralli and others against Howard D. Troop and others, to recover \$22,000 for cargo sold by master at Calcutta, in March, 1886.

Sidney Chubb, for libelants.

Wing, Shoudy & Putnam, for respondents.

BROWN, J. The ship *J. W. Parker*, of 1,190 tons, was chartered by the libelants to load at Calcutta with saltpeter and jute in bales. On the morning of February 18, 1886, as the ship was getting under way, a fire broke out in the fore hold, which the men on board the ship and from other vessels in the neighborhood were unable to put out. After a half hour's work it was somewhat subdued, the hatches were put on to smother it, and the pumps were kept playing. Not long after, the port authorities came, and took general charge of the efforts to put out the fire, pumping large quantities of acid, steam, and water into the ship. That night the fire smoldered, all the openings being covered. The following day, 552 bales of jute were taken out by the master, when the port authorities required that she should be removed to the flats where the tide could flow over her, for the purpose of extinguishing the smoldering fire. The rest of the cargo was subsequently taken out in a damaged condition, and sold by the master for \$20,723.83, for which sum the libelants, as owners of the cargo, asked a decree.

The defendants claim an offset for a general average charge in favor of the ship as against the proceeds of sale, on the ground that the ship was sacrificed for the safety of the cargo; the water that was poured in, and that flowed over her after she was scuttled, in order to put out the fire, having practically destroyed the ship, through the expansion caused by the water in the jute bales that had been screwed tightly into the hold. A general average adjustment was made, first at Calcutta, and afterwards at New York, the port of destination. By this adjustment, allowing the general average claim of the ship, the sum of \$7,420.48 only was found due to the libelants out of the proceeds of ship and cargo. The libelants having refused to admit their liability for a general average contribution, that sum has been paid into the registry of the court. The libelants resist the general average charge on the ground that the fire was caused by the ship's negligence, and that the scuttling and loss of the

ship were under the order of the port authorities, and not of the master.

1. *As to negligence.* It is no doubt the ordinary rule in the law of general average, that, where the ship's negligence has made the sacrifice necessary, she cannot recover a general average contribution from the cargo. Many of the maritime codes expressly so provide; and the textbooks so state the rule. See the recent case of *The Ontario*, ante, 222. This proceeds, as I understand, upon the ground that the ship is herself responsible to the cargo for her own neglect. She therefore cannot take from the cargo under the name of "general average" what she is at the same moment bound to make good and restore by reason of negligence. If that is the foundation of the rule, it cannot apply to those causes of sacrifice for which the ship and owners are not legally liable; and by the British statute, as well as the statutes of the United States, there is no liability for loss by fire "without the owner's fault or privity." *Macl. Shipp.* 9, 121; *Rev. St. U. S.* § 4282. To deny the owners the benefit of a general average contribution on the ground of negligence would impose upon them, in effect, a liability for the fire, from which the statute exempts them.

This ship belonged to New Brunswick, and the owners are therefore exempted from any liability by reason of this fire, there being no fault or privity on their part. The charter, moreover, provided that "all questions of average should be settled in accordance with the York-Antwerp rules, and with the established usages and laws of place of destination." Rule 3 of those rules declares that "damage done to the ship or cargo, or either of them, by water or otherwise, in extinguishing fire on board the ship, shall be general average." This rule does not except cases of negligence by the ship, nor require the sacrifice to be made by the master, or by his order. In the Antwerp conference of August, 1885, the question was propounded whether the rules should be modified in case the original cause of the loss was the ship's negligence, or the proper vice of the ship or cargo. The solution determined by the conference was that "the rules of common average ought to be applied, even though the danger, the primordial cause of the sacrifice or expense, had been brought about by the fault of the captain or crew, or of a person interested in the cargo, or by the proper vice of the ship or cargo; the recourse that the fault or proper vice gives ought to be kept independent of the rule of common average." 5 *Valroger Droit Mar.*, App. question 32, p. 389; solution 22, p. 405. The cause of the fire, and, therefore, the alleged negligence, are moreover not established in this case with any certainty. The cargo had been covered the night before, preparatory to sailing. On the morning of the fire, as the ship's chains were being hove in, one of the seamen was directed to go into the chain locker forward to stow them away. He took a globe lantern, and went into the chain locker, through a narrow passage between the bales of jute under the deck, and about 10 or 15 minutes afterwards was heard to scream, and at the same time smoke came pouring out of the hatch. The libelants charge that the jute was set on fire by some improper use of the lamp. But there is no proof of this. The lamp may have been taken out of the lantern, or

broken accidentally in handling the chains. The respondents claim that the fire was spontaneous, and naturally showed itself soon after the opening of the hatch gave it air. Jute in bales is liable to spontaneous combustion; and, as the seaman lost his life, there is no testimony sufficient to determine with any certainty the origin of the fire. The proceedings of the marine court of inquiry at Calcutta are not competent evidence here. The frequency of fires in cargoes, and the difficulty of determining their origin, are said to be among the reasons of the statutes exempting owners from liability for damage by fire. A regulation of the port of Calcutta required that no lantern should be taken below except by an officer, and only when it was secured by lock and key. There is no proof that the master or officers of this vessel had any knowledge of this regulation. The regulation is a strictly local one. The evidence shows that other foreign vessels at Calcutta had no knowledge of it; and it would seem to have been a dead letter. The port pilot, who was in charge of the ship at the time, was not examined in reference to it. The lantern is proved to have been such as was usual in such vessels, having brass guards, with the lamp fastened by a screw at the bottom. The failure of foreign ships to comply with local regulations not brought to their knowledge does not, in general, constitute a fault. *The J. Fraser*, 21 How. 184, 188; *The New York v. Rea*, 18 How. 223; *The E. A. Packer*, 10 Ben. 520.

The question of negligence, as respects general average, must be determined according to the general rules of navigation. Manifestly the use of an unlocked lantern in going below cannot be held to amount to negligence in one port, and not in another port, upon the same voyage and with the same cargo. This was the ordinary ship's lantern, secured like those in almost universal use. The use of such a lantern was not in itself negligence. The chief witness for the libelants on this branch of the case, Inspector Forsyth, says twice that it was not unsafe to go below with this globe lantern. It is not at all certain, as above stated, that the lantern caused the fire; or, if it did, that its being unlocked had anything to do with it. I think the claim of general average cannot be rejected on these grounds.

2. *Sacrifice.* The libelants contend that the sacrifice of the ship arose from her scuttling; that this was done by the order of the port authorities, and was not by the act of the master; and that the motive was not the preservation of the cargo, but the protection of the port, and of other vessels and property. By the local law it appears that the commissioners and, under them, the conservator of the port of Calcutta, have a general authority over vessels on fire; and the master is subject to heavy penalty, in case of fire, for not taking the proper order, and observing their directions. Calcutta act of 1875, §§ 17, 36. The master, when this fire broke out, was ashore seeking a tug. The chief officer gave the alarm, and the port officials soon appeared, and took the chief direction of affairs. The master, several times during the following two days, was desirous of having the hatches opened, and of removing more bales, which the officials prevented. But it is evident from their testimony that the

fire was at no time subdued until it was "drowned out" by scuttling the ship. Large quantities of carbolic acid, steam, and water had successively been pumped into the ship without extinguishing the fire. The master did not object to the scuttling. The chief difference between them was in respect to keeping the hatches open longer for the purpose of removing more of the cargo, to which the officials objected in consequence of the increased draft of air serving as fuel to the flames. It is perhaps to be inferred that the general authority given to the port officials was either on account of their better knowledge of the mode of dealing with fires likely to arise in cargoes shipped at that port, or for the protection of the port or other shipping, which might sometimes require other measures than the masters might adopt; and if it appeared in this case, or if the evidence warranted the inference, that their measures were adopted in view of any actual or supposed danger to the port, or to other ships, and that they acted differently than if the common benefit of the ship and cargo alone were considered,—in other words, if there was any sacrifice of the ship and cargo for the supposed interests of other property,—I should consider the case not one of general average. But there is no evidence to warrant any such inference. This ship was far from shore, and apparently threatened no other property. The circumstances do not indicate that there was any conflict of interests between the ship and the shore, or that the port officials in any degree designed to sacrifice, or did sacrifice, any interest of the cargo to the safety of other property. There was no occasion, and no motive, for their doing so. The most that can be inferred is that there was some difference of judgment between them and the master as to the amount of exposure that it was prudent to permit to the smoldering fire; and in a case of a difference of judgment the determination must rest with those upon whom the law for the time being imposes the responsibility of action,—in this case, the port officials. There is no sufficient reason to conclude that they did not act intelligently and honestly, or that their order to fill the ship with water was not the best thing that could be done for ship and cargo. The interests of all were apparently identical. It is sometimes said that the sacrifice, in order to give rise to general average contribution, must be made by the master, or by his order. *Wamsutta Mills v. Old Colony*, 137 Mass. 471, 474. But this is not exact. Such a condition is not an essential part of the right to a general average contribution. It is sufficient if the sacrifice be made for the common benefit, and by those who for the time being are charged with the control and responsibility. The duty of contribution is one of the oldest maritime rules. It does not rest upon contract, or upon any artificial theory of agency, but upon the fundamental natural equity, that what is sacrificed for the safety of all shall be made good by contribution from all that is thereby saved. The sacrifice is, doubtless, usually made by the master. But his order is not essential. Such a condition forms no part of the prescriptions of most of the maritime codes. Among the provisions of very many of these codes to be found in the appendixes in Lown. Av. (4th Ed.) 351-672, I find no such requirement, except in the Code of Germany, § 702. Val-

roger, commenting on this peculiarity of the German Code, says, (5 Droit Mar. § 2006:) "An action for contribution cannot be denied simply on the ground that the jettison was made without the captain, if it was really necessary." Ulrich, the German commentator, observes upon this text of the German Code that what is meant is, "the commander of the vessel at the time;" and that a proper order made by the next officer in command during the master's temporary absence would be a case of general average. Upon the same view he further states that, where a pilot is in command, he is considered as the master's representative; and that the pilot might order the sacrifice "in conflict with the master, without depriving the sacrifice of the character of a general average loss." *Haverrei-Gesetze*, 6, 7. In *Price v. Noble*, 4 Taunt. 123, general average for a jettison was sustained in the case of a British ship, though the jettison was made by a prize crew put on board upon a capture by a French privateer. In *Walker v. Insurance Co.*, 11 Serg. & R. 61, Chief Justice GIBSON says that "the loss must arise from the direct agency of some one acting for the general benefit;" and the general rule requires only that that person shall be some one having lawful authority to determine for the time being. In *Lawrence v. Minturn*, 17 How. 100, 110, Mr. Justice CURTIS, speaking of a jettison, says: "It will be deemed to have been necessary for the common safety, because the person to whom the law extended authority to decide upon and make it has duly exercised that authority."

Under the local law of Calcutta, the port commissioners for the time being had this authority. They were in the situation of master as respects all measures to be taken to put out the fire, and for the common benefit. To disobey them was a criminal offense in master or crew. For the most part, they and the master acted in concert; and upon a difference of judgment as to the length of time it was expedient to keep the hatches off, or to delay filling the ship with water, since fires in jute cargoes were not uncommon in Calcutta, it is probable that their judgment was better than the master's, and this may be one reason why this authority was committed to them. Both ship and cargo were subject to the operation of the municipal law of Calcutta so long as they remained in port; and it is that which made the conservator's order equivalent to the master's. This in no way excludes the application of the maritime law as respects contribution. In hundreds of cases the municipal law becomes the basis of the application of maritime rules; cases of pilotage, and of statutory liens for supplies are familiar instances. In the case of *Wamsutta Mills v. Old Colony*, *supra*, emphasis was laid upon the fact that the ship was moored to the wharf, and subject to the general police authority on shore. This case is different. The ship was not along-side the wharf, but far away, and the conservator's authority over the ship was special. The act of filling and scuttling was a maritime act, in the interest of the ship and cargo only, and, as I think, subject, as respects contribution, to the maritime law. It is not uncommon that municipal aid is obtained in extinguishing fire. *Nelson v. Belmont*, 21 N. Y. 36. If that is ever to be held sufficient to absolve from

the duty of contribution, it is not, I think, in a case like the present.

Considering that the whole doctrine of general average rests upon the highest equity; that no technical rules prevent its application to all cases that come within its general purpose; that the York-Antwerp rules were specially adopted by this charter; that there was no opposition of interests in the sacrifice made by filling and scuttling the ship; that the port officials were by law in command while the ship was on fire; that the purpose of the act of sacrifice was the common good of the ship and cargo alone; that the circumstances indicate that there was not in this case any interest of the port or of other vessels that in the least influenced the port officials in their action, or the smallest sacrifice of the ship or cargo in reference to any outside interests; and that there is no reason to suppose that the orders were not honestly and intelligently given, or were not such as the officials would have given, as actual master, having nothing in view but the common benefit of ship and cargo, —I think the claim of general average contribution should be sustained. By the law of this country, water damage is a subject of contribution, (*Heye v. North German Lloyd*, 33 Fed. Rep. 60, 36 Fed. Rep. 705,) and in this case, as I have said, the charter expressly adopted the York-Antwerp rules, which so declare, (rule 3.) These rules do not require the master's order. An average bond having been given by the libelants, and the loss being adjudged a proper subject of general average, and no errors being shown in the adjustment, the decree should be for the libelants for the balance stated by the adjustment. Though the libel does not claim the amount resulting from the general average, but the whole proceeds of the cargo, the amount due the libelants on the average adjustment having been paid into court, it should be decreed to them, under the prayer for general relief. *Dupont v. Vance*, 19 How. 162; *The J. P. Donaldson*, 21 Fed. Rep. 673.

OLIVARI v. THAMES & MERSEY MARINE INS. CO.

SAME v. CHUBB *et al.*

(District Court, E. D. New York. July 16, 1888.)

1. SHIPPING—GENERAL AVERAGE—PLACE OF ADJUSTMENT.

The bark *Nina Mathilda*, with a general cargo from Leghorn, bound for New York, put into Bermuda in distress, where she was subsequently condemned and sold. Portions of the cargo were delivered by the captain at Bermuda to the agent of the consignees, and average bonds were signed at Bermuda by the respondents, whereby they agreed to pay their contribution in accordance with the established usages and laws in similar cases. The adjustment was subsequently stated by New York average adjusters according to New York rules. *Held*, that New York was the proper place for stating the adjustment, and that New York rules must govern; also, that it was plain from the evidence that the parties so understood it at the time of the delivery of the cargo at Bermuda.

2. EVIDENCE—PRESUMPTIONS—LAWS OF FOREIGN COUNTRY.

In the absence of an averment, supported by proof, that the usages and laws of Bermuda are different from the usages and laws of New York in such cases, the court must proceed on the presumption that the usages and laws of Bermuda are similar to the laws in force in the port of New York.

8. ADMIRALTY—PLEADING—AMENDMENT.

Where the proofs show that libellant is entitled to recover more than the amount for which judgment is demanded in the libel, he will not be limited to the amount stated in the pleading, but the libel may be amended in respect to the amount claimed, so as to conform to the facts.

In Admiralty.

Ulo, Ruebsamen & Hubbe, for libellant.

Sidney Chubb, for respondents.

BENEDICT, J. These two actions, tried together, were brought by the master of the Italian bark *Nina Mathilda*, upon two general bonds, to recover of the defendants the contributions in general average shown to be due from them respectively by an adjustment by Jones & Whitlock, average adjusters, at New York, on the 4th of June, 1885. The defenses set up in the answers were: *First*, that the disaster in question arose from the unseaworthiness of the vessel; *second*, fraud on the part of the master in procuring the bond; *third*, that the adjustment described in the libel was not made up in accordance with the law and custom in such cases, was not correctly made up, and did not state correctly the amount due from these respondents. No proof has been offered in support of the first and second of the defenses above stated, and they are accordingly deemed abandoned. The third defense is insisted on. The following facts appear: The *Nina Mathilda* left Leghorn, Italy, on the 22d of July, 1884, with a general cargo, bound for New York. During her voyage she encountered a storm, in which her masts, spars, and sails were sacrificed, and by which she was compelled to put into Bermuda in distress. She arrived in Bermuda on October 3, 1884. Among the cargo were 265 half cases of citron, consigned to Hill Bros., of New York, which had been insured by Chubb & Son, the defendants in the second-entitled suit; also 75 half cases of citron consigned to Levi Lewis, which had been insured in the Thames & Mersey Company, the defendant in the first-entitled suit. The citron in these two shipments was transhipped at Bermuda to New York, and, as the answers state, was there received by the consignees. General average bonds were executed in behalf of the defendants in Bermuda, whereby they severally agreed to pay their proportion of the losses and expenses, when stated and apportioned by a duly and legally authorized adjuster of marine adjustments, in accordance with the established usages and laws in similar cases. Thereupon an adjustment in general average was stated in New York by Jones & Whitlock, in accordance with the usages and laws governing similar cases in the port of New York, which adjustment states the amount due from Chubb & Son, after giving them credit for some advances made to the master, to be \$1,555.25; and the amount due from the Thames & Mersey Company, after all deductions, to be \$1,431.89.

After this adjustment had been completed and placed before the underwriters, objections were raised by some of them as to the allowances for sacrifices, as too high, whereupon a compromise was effected with such parties by reducing such allowance one-half. The defendants did not accept the compromise, and declined to pay any sum, and now contend in the support of the third defense set up in the answer that by the terms of the bond the adjustment was to be made in accordance with the established usages and laws in similar cases; that the interests of the defendants and the ship became separated in Bermuda; that the adjustment of Jones & Whitlock, confessedly made in accordance with the usages and laws in force in the port of New York, is not in accordance with the usages and laws in force in Bermuda in similar cases, and accordingly is not in compliance with the terms of the average bond. The difficulty with this contention is that the answer does not permit it. The answer contains a simple averment that the adjustment is not made in accordance with the usages and laws in similar cases. It does not aver that the usages and laws of Bermuda in similar cases differ from the usages and laws in the port of New York in such cases, and sets up no foreign laws. In the absence of such averment, supported by proof, this court must proceed upon the presumption that the usages and laws of Bermuda, in such a matter as this, are similar to the laws in force in the port of New York. Such being the presumption, the evidence which shows that the adjustment was made in accordance with the usages and laws of New York, shows an adjustment in compliance with the terms of the bond. Upon the pleadings and proofs, therefore, the libelant is entitled to recover the amount stated in the adjustment as made by Jones & Whitlock. But the proof discloses a fact fatal to this defense upon another ground. It is plain from the evidence that the understanding of all parties, including these defendants, was that the losses and expenses should be adjusted in New York, the port of destination, whither the cargo was forwarded, and where, according to the pleadings, the defendants' cargo was received by them. Under this agreement, which was supplementary to the bond, and not contradictory thereof, the presumption must be that the agreement contemplated an adjustment stated according to the laws in force where the adjustment was to be made. It is not, therefore, open to the defendants to say that an adjustment, as made in accordance with the laws of New York, is not the adjustment contemplated by the average bond. According to these views, the libelant is entitled to recover the sums stated in the adjustment of Jones & Whitlock to be their proportion of the losses, less their respective advances. This sum cannot be limited because of the compromise effected by other shippers, in which the defendants refused to join. This much they concede, but they say that because the amount claimed in the libel is according to the compromise, and not the full sum stated in the adjustment, the libelant's recovery must be limited to the sum claimed. The libelant is not, however, so limited. The libel may be amended as respects the amount claimed, and it should be so amended to conform to the facts.

THE CITY OF BROCKTON.¹

THE J. C. HARTT.

CORNELL STEAM-BOAT CO. v. THE CITY OF BROCKTON.

OLD COLONY STEAM-BOAT CO. v. THE J. C. HARTT.

(District Court, E. D. New York. February 5, 1889.)

COLLISION—BETWEEN STEAMERS—OVERTAKING VESSEL—PASSING TOO NEAR—SUCTION.

The steam-tug H. was going out of the bay of New York towards the Scotland light-ship. Overtaking her was the steam-boat B. As the B. came up with and began to draw ahead of the H., the latter gave a sudden sheer, and went into the side of the steamer. Both vessels were damaged, and cross-libels were filed. It appearing that the H.'s sheer was caused by the suction from the wheels of the B., *held*, that the collision was caused by the failure of the B., as the overtaking vessel, to come up along-side of the H. at a sufficient distance to pass her in safety.

In Admiralty. Cross-libels for damages by collision.

R. D. Benedict, for the J. C. Hartt.

Shipman, Barlow, Larocque & Choate, for the City of Brockton.

BENEDICT, J. These actions arose out of a collision which occurred between the steam-boat City of Brockton and the steam-tug J. C. Hartt, in broad daylight, in the open sea, just outside of Sandy Hook, on the 29th day of September, 1887. Each vessel charges the other with fault causing the collision; and in order to make the facts plain 59 witnesses were examined before the court. The testimony of these witnesses, written out by the stenographer, has been since examined with care. On some points it is a mass of contradictions, in others it is harmonious. A careful analysis of it has enabled me to see clearly the proper disposition to be made of the cases. Upon the evidence the following facts are beyond dispute: Both vessels were bound for a yacht-race, in which the yachts were to start from the Scotland light-ship. They were the leading vessels of a large fleet bound upon the same errand. When Sandy Hook was passed, and the South Channel reached, the Hartt was ahead of the Brockton, both following the channel. The Brockton, being the faster vessel of the two, soon overtook the Hartt, and attempted to pass her on her starboard hand. While passing, and when the bow of the Brockton, then running at 14 or 15 miles an hour, had reached ahead of the bow of the Hartt 100 feet or more, the two vessels came in collision, the bow of the Hartt striking first the port paddle-box of the Brockton, and then running under the Brockton's port-guard, where her nigger-head broke in the sponsons of the Brockton, and she was near being capsized, most of her passengers being thrown into the sea. Before the Brockton's

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

speed could be slowed the Hartt received considerable injury, and some damage was done to the Brockton. The pleadings on each side charge that fault in the other caused the collision. The Brockton's pleadings aver that while the Brockton was passing the Hartt, at a distance of about 250 feet, on a nearly parallel course, and after the pilot-house of the Brockton had passed the bow of the Hartt, the Hartt changed her course more to the southward, to pass under the stern of a yacht that was standing across the bows of the Hartt, and then rapidly sheered towards the Brockton, and struck her guard about 46 feet abaft the shaft on her port side. The same pleadings assert that no collision would have occurred if the Hartt had straightened up on her course after passing the yacht. The pleadings of the Hartt aver that while the Hartt was proceeding down the south channel, heading south-south-east upon her proper course, the Brockton undertook to pass her on her starboard side, but did not come up at a sufficient distance from the Hartt to pass in safety, and before she got by the Hartt starboarded her wheel, and attempted to cross the bows of the Hartt, then still on her course of south-south-east; that the wheel of the Hartt was then immediately starboarded, and her engine stopped and backed, notwithstanding which she was struck by the Brockton, and seriously injured.

Inasmuch as it is conceded that the Brockton was the overtaking vessel, and consequently charged with the duty of passing the Hartt at a safe distance, it will be convenient to consider first the testimony adduced in behalf of the Brockton, to prove the fault charged upon the Hartt in the Brockton's pleadings; for, if the collision be found to have occurred without any porting on the part of the Hartt, the Brockton must be held responsible, whether the collision arose from the starboarding of the Brockton's wheel just before the collision, or from the fact that the course upon which the Brockton undertook to pass the Hartt was not sufficiently distant from the Hartt to enable the Brockton to pass in safety. And first it should be observed that in the Brockton's pleadings the Hartt is charged with having changed her course twice, and it is averred that these changes were made while the Brockton was passing, and after the pilot-house of the Brockton had passed the bow of the Hartt. The first is alleged to have been made in order to get under the stern of a yacht which crossed the Hartt's course ahead of her; the second to have been a rapid sheer, which carried the Hartt head on, or nearly head on, into the Brockton. In regard to these movements charged upon the Hartt, the testimony leaves it beyond dispute that the first change on the part of the Hartt which the pleadings identify as made to get under the stern of a yacht was not made while the Brockton was passing the Hartt. The Hartt did sheer to the southward to pass under the stern of the yacht, and, according to the proof, straightened up again; but this was before the Brockton had come up to the Hartt. The movement was without effect to embarrass the Brockton in her endeavor to pass the Hartt, and had nothing to do with the collision which occurred while the Brockton was passing the Hartt. Several witnesses called by the Brockton prove this. Such is the testimony of Chase and of Battey, who were in the Brockton's

pilot-house; and so say Ludlam, and Rotch, and Harrison. The testimony of Fletcher, who was on the *Perseus*,—a vessel astern of both the Brockton and the Hartt,—and who is called in behalf of the Brockton, is to the same effect. In regard to the second movement on the part of the Hartt charged in the Brockton's pleadings, testimony is given by many witnesses called in behalf of the Brockton. Among these, two of the most intelligent observers are Charles Francis Adams and Charles Choate; the latter the president of the Old Colony Steam-Boat Company, to which corporation the Brockton belongs. These two witnesses were standing together on the deck of the Brockton, on the port side, between the pilot-house and the paddle-box, in full view of the Hartt as the Brockton passed. These witnesses paid no attention to the Hartt, and know nothing of her movements prior to the time when the paddle-box of the Brockton was nearly abreast of the pilot-house of the Hartt; from that time, however, they observed her with care. According to the testimony of these two witnesses, the Brockton was passing the Hartt 300 feet distant, as Mr. Adams says, 150 feet, as Mr. Choate says, from the Hartt. The latter is the more correct estimate. Several witnesses put the distance at 100 feet, some at 75 feet. As the two witnesses looked at the Hartt she gave a sudden lurch towards the Brockton, which shortened the distance between the two vessels about one-third. The Hartt then straightened up. Then she again lurched towards the Brockton, and instantly the collision occurred. The Hartt was a tug 125 feet long. The Brockton's length was 283 feet. The character of the movements of the Hartt, as described by these two witnesses, considering the relative positions of the two vessels, has satisfied me that the change of course on the part of the Hartt observed by them was not caused by a porting of the Hartt's wheel, but, so far as the Hartt was concerned, was involuntary. The fact testified to by Mr. Adams, Mr. Choate, and also by many other witnesses, that after the first lurch the Hartt straightened up, is conclusive to show that the Hartt was under a starboard instead of under a port helm. And it is impossible to believe that the pilot of the Hartt, when his vessel had been suddenly carried, no matter by what force, off her course, and within 50 or 100 feet of a steamer like the Brockton, then passing at high speed on his starboard hand, and when he had straightened her up, would then put his wheel hard a-port. Such action at that time on the part of the pilot would mean swift destruction for his boat. No sane man would have ported his wheel under those circumstances. It was something other than a port helm that caused the Hartt to go off her course in the manner described. Nor is there direct evidence of a porting from those on the Brockton. Witnesses on the Brockton have inferred from the movements of the Hartt while the Brockton was passing that the wheel of the Hartt had been ported, but the improbability of such action on the part of the pilot under such circumstances is too great to permit such an inference, if the movements of the Hartt can be reasonably attributed to any other causes. Moreover, the language used to describe the movement of the Hartt does not indicate that the Hartt was acting under a port helm. Mr. Adams and Mr. Choate

describe it by the word "lurch." Says Mr. Adams: "She seemed to lurch right over towards us; it wasn't a case of gradual converging." Another witness speaks of it as "a grand swoop right around." Another says: "She made a dive for us." Again, Mr. Adams says: "She seemed to get wild in her steering. She rolled, as it were, first towards us, then a little off, then a roll towards us. She seemed to give a wild lurch. They were lurches rather than sheers." Such language does not describe a change of course effected by the rudder, but points strongly to the presence of some other force outside of the Hartt, to which her change of course should be attributed. And such a force was present, namely, the force of currents created in the water by the powerful action of the Brockton's wheels driving so large a vessel through the water at high speed. Currents of water more or less strong are necessarily created by a vessel like the Brockton moving at high speed. They will differ according to the locality, and are largely affected, no doubt, by the depth of water. There is evidence that their power is increased when two vessels of about the same speed are passing each other. What the depth of water or the configuration of the bottom was at the place where the Brockton's wheels approached the bow of the Hartt is not proved. But the extent and power of the current actually created by the Brockton seems to me to be shown by what the Hartt did as the wheels of the Brockton neared her bow. It is also proved by direct evidence. Ludlam, a man of experience as a master of steam-ships, who saw the collision, and who was called as a witness on behalf of the Brockton, testifies that the Hartt's wheel was starboarded, but her stern was set off the Brockton by a current made by the Brockton's wheel, there setting away from the Brockton, while her bow was being pulled towards the Brockton by the draught of the Brockton's wheel. He says: "The suction and the power of the Brockton's wheel in motion is tremendous. There is not a centrifugal pump in the world that would compare with the water from that bucket, which has a throwing force of tremendous area." Against this there is nothing but testimony to the effect that the Brockton has frequently passed vessels without affecting them by her suction.

As it seems to me, therefore, the testimony given by the witnesses called in behalf of the Brockton warrants the conclusion that the change of course on the part of the Hartt, testified to by Mr. Adams and Mr. Choate, and to which they attribute the collision, was not caused by the fault of the Hartt in porting her helm, as charged in the Brockton's pleadings, but was caused by the fault of the Brockton, charged in the Hartt's pleadings, namely, either by her sheering across the Hartt's bows, or "that she did not come up to the starboard side of the Hartt at a sufficient distance from the Hartt to pass in safety." Several general considerations tending to support this conclusion, and suggested by the testimony, may be mentioned. In the first place, the testimony of those in the pilot-house of the Hartt makes it plain that the Hartt's bells were rung, and her helm starboarded simultaneously, that both occurred immediately upon the sudden change of relation in the courses of the two vessels, and the collision was then inevitable. If a fault of the Hartt

caused the collision, it must therefore have been before her bells were rung. But no fault previous to that time is charged in the pleadings, except the change when the yacht was passed, and that change, as has been pointed out, had no effect to cause the collision in question. In the next place, no sufficient reason for any porting on the part of the Hartt while the Brockton was passing has been suggested. An intention to cross the Brockton's bows cannot have existed, for the evidence is that the Hartt had slowed her speed before the Brockton caught up to her, and at the time of the Hartt's rapid sheer the bow of the Brockton was ahead of the Hartt some 50 or 60 feet. One of the witnesses on the Brockton supposes that the Hartt ported "because she wanted to come and take a look at us." The answer is that she was near enough to the Brockton for any such purpose without porting. Moreover, when by the first lurch the Hartt had been carried near the Brockton, and when she had straightened up again, no such reason, or any other that I can imagine, would justify a porting of the Hartt's helm. To the suggestion that the Hartt ported with a view of getting into the Brockton's wake, close under her stern, the answer is that the change made by the Hartt could not possibly carry her clear of the Brockton's stern. Collision was imminent before the second lurch came, and the lurch was so sharp that the master of the Brockton, who seems not to have seen the first lurch, but who, on seeing the second lurch, ran to the bells, some 40 feet distant, intending to stop the Brockton, failed to reach them before the collision took place. Indeed, the movements of the Hartt were so eccentric as to cause in the minds of several on the Brockton the belief that her tiller-ropes had parted. In the minds of these witnesses it was want of helm on the part of the Hartt, rather than the porting of her helm, that brought the vessels in collision. There was no parting of the Hartt's tiller-rope, but the belief in some accident shows the extraordinary character of the movements of the Hartt; which, it may be here remarked, occurred within the space of not to exceed 30 seconds.

If notice should be taken of some testimony from the Brockton to the effect that the Hartt steered badly as the Brockton came up to her, one witness saying that she fell off 100 feet on every sea, it can be said that other witnesses called by the Brockton testify to the contrary. Among these is Ludlam, who says that the Hartt steered particularly well as to steadiness in the sea; and, besides, if the Hartt was seen to be steering so wildly, that was a reason for keeping further away from her than the Brockton did. Here, as well as anywhere, may be noticed the testimony of some witnesses from the Brockton, who seem to speak of a sheer of the Hartt after the yacht had passed, and before the rapid sheer seen by Mr. Adams and Mr. Choate. As to this testimony, it is sufficient to say that it is uncertain, is contradicted by other witnesses from the same side, and is without importance in view of the pleadings. The Brockton's pleadings complain of two movements of the Hartt, and only two,—one when she passed the yacht; the other, the rapid sheer seen by Mr. Adams and Mr. Choate. No other change is alluded to in the pleadings. As bearing upon the probabilities of the case, it may be noticed that the

Brockton was a new boat, famous for speed. She had come off the Fall River line to carry a party of guests to the yacht-race. In going down the bay she had distanced all vessels, and at the time of the collision she was passing the Hartt in sight of the fleet. The circumstances were calculated to excite that well-known inclination to shave close, which is so fruitful of collisions. The supposition that on this occasion the pilot in charge of the Brockton—who, by the way, was navigating her for the first time—yielded to the temptation above alluded to, would be in harmony with a large portion of the testimony given in these cases. Adding these considerations to what appears to me to be shown by the Brockton's witnesses, a decision adverse to the Brockton upon the controlling question of the case, namely, whether the collision was caused by a porting of the Hartt's helm while the Brockton was endeavoring to pass her, must follow. Such a decision is strongly supported by the testimony produced in behalf of the Hartt. In this testimony there is much evidence, from disinterested as well as interested observers, in support of the assertion in the Hartt's pleadings that the Brockton made a sudden sheer across the Hartt's bows. Between this testimony from the Hartt and the equally positive testimony to the contrary from the Brockton, I find it unnecessary to decide. It might, perhaps, be possible to reconcile the apparent contradiction by supposing that the sudden pulling of the Hartt's bows out of her course by the suction created just in advance of the Brockton's wheels led those on the Hartt to believe that they saw a sudden change in the Brockton's course. But into this inquiry I do not enter, for whether the collision was caused by a sudden sheer by the Brockton a moment before the collision, or by her taking and holding a course which carried her so near the Hartt as to overpower the Hartt by currents of water caused by her wheels, the responsibility of the Brockton is clear if there was no porting of the Hartt's helm after the Brockton began to pass. Setting aside, therefore, the testimony of the Hartt's witnesses going to prove a sudden sheer by the Brockton, there remains in that testimony convincing evidence that the change of course on the part of the Hartt, to which Mr. Adams and Mr. Choate testify as the cause of the collision, was not caused by a porting of the helm of the Hartt, but was caused by the currents of the Brockton. Thus is confirmed the conclusion arrived at from a consideration of the Brockton's testimony, that the fault to which the collision is to be attributed was the fault of the Brockton in attempting to pass the Hartt as she did. The Brockton was the overtaking vessel; she had the Hartt in plain sight; no other vessels were near to embarrass her. There was no reason why she should not have passed the Hartt at a safe distance, and yet she passed so near as to overpower the Hartt by the currents she created, and to force the Hartt into collision. For these reasons my decision is that in the action brought by the Brockton the libel be dismissed, and in the action brought by the Hartt there be a decree in favor of the libellant, with an order of reference to ascertain the damages.

THE EIDER.

NEW YORK, L. E. & W. R. Co. v. THE EIDER.

(District Court, D. New Jersey. February 16, 1889.)

1. COLLISION—BETWEEN STEAM-SHIP AND FERRY-BOAT—SPEED AND COURSE OF STEAM-SHIP.

An ocean steamer proceeded up the North river on an ebb-tide and in daylight at a speed of at least 8 to 10 miles an hour, until not more than 300 feet from a ferry-boat, which was then 5 points off its starboard bow, and was beginning to cross its course at about the same speed. The ferry-boat suddenly checked its speed, and, there then being no time to change the steam-ship's helm, the vessels collided. *Held*, that the steam-ship, whose officers knew that the ferry-boat was about to cross its course, was in fault for maintaining its course and speed until it was unable to meet the emergency.

2. SAME—LOOKOUT ON FERRY-BOAT.

The ferry-boat was struck abaft the wheel-house, from the rearward. The upper part of the pilot-house was protected by sliding windows, having a solid door on the after-port side, and one of the wheelmen, who had an unobstructed view ahead and on each side, did not see what had struck the ferry-boat until the door was opened. *Held*, that the absence of a lookout forward did not contribute to the collision, and was not a fault.

3. SAME—CHECKING SPEED OF FERRY-BOAT—OVERTAKING VESSEL.

The ferry-boat checked its speed because of a tug and tow, 500 or 600 feet ahead, passing between the ferry-boat and its slip. None of the officers of the ferry-boat saw the steam-ship before the collision. *Held*, that as the ferry-boat might have maintained its speed and course for 200 or 300 feet more with no risk, and by doing so would have cleared the steam-ship, it was in fault in checking its speed in the absence of an emergency without due consideration of the movements of a following vessel.

In Admiralty.

Libel for damages from a collision by the New York, Lake Erie & Western Railroad Company against the steamship Eider, the North German Lloyd Steam-Ship Company, claimant.

Wilcox, Adams & Macklin, for libellant.

Shipman, Barlow, Larocque & Choute, for claimant.

WALES, J. This suit has been brought to recover damages caused by a collision between the libellant's ferry-boat, Pavonia, and the claimant's steam-ship, Eider, which occurred in the North river, on the 25th of January, 1888. The Pavonia had left her slip at the foot of Chambers street, New York, at 15 minutes past 9 o'clock A. M., for the Pavonia ferry, about one mile distant on the opposite shore, and bearing northwest. The Pavonia's course was straight out to the middle of and then up the river for some distance, until she gradually sheered towards her slip on the opposite side. The weather was clear and cold, with a light wind from the north, and the tide running ebb. At this stage of the tide, she generally made the distance between the two ferries in 8 minutes; and on this occasion, and just before the collision, she was going at the rate of 8 or 10 miles an hour. She had reached a point within 700 to 1,000 feet of the New Jersey shore, and from 400 to 700 feet south of

the Pavonia ferry, when her engine was stopped, and her speed slackened, to allow a tug with a mud-scow in tow to pass across the mouth of the slip. The Pavonia's headway was not entirely stopped, and she was still forging ahead, and angling up the river, when her engine was again started at full speed, but had not made more than one revolution before the Eider, which was going up the river, struck her on the port side, abaft the wheel-house, and about 75 feet from her stern, cutting through her guard planking and deck, and slightly indenting her hull. No person on board the Pavonia saw the Eider before the collision, or heard any signal of her approaching.

The Eider, a large ocean steam-ship, 450 feet in length, and of 2,953 net tonnage, had left her anchorage, at Staten Island, at 8:25 A. M., and, after passing the Battery, headed straight up the river, at the distance of 700 feet from the New Jersey shore, for her dock at Hoboken, which is one mile above the Pavonia ferry. Pilot Jackson, who was in charge of the Eider, was shaping her course in such a direction as to "split the tide," because in that position she was more easily handled. He saw the Pavonia leave Chambers street when the Eider was some distance below, and had her in full view while she was going ahead and up the river, and knew that she was bound for her slip on the opposite side. Both vessels appear to have kept their respective courses, without any change of speed, until they were not more than 300 feet apart, with the Pavonia still leading, and five points off the starboard bow of the Eider, and beginning to cross the course of the latter. At this juncture, Jackson says that he stopped and reversed the Eider, to let the Pavonia pass; and that the latter, a few seconds later, suddenly stopped her engine, and reduced her speed so much that the tide brought her down against the stern of the Eider, which was then at a stand-still, or going astern. Neither Jackson nor Capt. Baur, of the steam-ship, saw the tug and tow passing up the river between the Pavonia and her slip. The libellant charges the Eider with the fault of the collision because she did not pass under the stern, or otherwise keep out of the way of the Pavonia, which it is alleged she could have done by stopping and reversing sooner than she did, or by putting her helm hard a-port in time, and thus changing her course; and that the neglect to do either was aggravated by the Eider keeping too near the shore, and going at too great speed under conditions which demanded the utmost caution. It is not denied that it was the duty of the Eider to keep out of the way of the Pavonia under articles 16 and 20 of the revised international regulations, (23 U. S. St. 441, 442;) but the claimant insists that the precautions taken by the Eider in the performance of that duty were thwarted by the sudden and unexpected checking of the Pavonia's speed, thus leaving the latter at the mercy of the tide, which carried her down against the Eider.

As is usual in these cases, there is much conflict of testimony in relation to speed, distances, and time of giving orders; making it difficult to ascertain all the facts with reasonable certainty. The captain and the pilot of the Eider differ materially in fixing the time when the or-

ders were given to stop and reverse the steam-ship. The captain says that these orders were not given until 10 or 15 seconds after the Pavonia's speed had been checked. His statement is:

"I saw the ferry-boat coming on, and apparently crossing our bow, until her bearings were about a point and a half on the starboard, but still going ahead a little. I couldn't explain it to myself, but about ten or fifteen seconds after she stopped, I ordered my engine to be stopped to half speed and full speed back, and told the officer to blow the whistle three times."

There was then no time to change the Eider's helm, and the vessels collided 25 seconds afterwards. It is evident from this that the captain of the Eider did not intend to stop her until he saw that the Pavonia had slackened her speed; for he goes on to say, in effect, that had both vessels continued on their respective courses without change of speed, the Eider would have passed 50 feet astern of the Pavonia. The testimony of the pilot is that when the Pavonia was 300 feet distant, and four points off the Eider's starboard bow, and about going across at full speed, the order was given to stop and reverse the Eider; and that the Pavonia would have crossed without trouble, if she had not slackened her speed. His opinion is that if both vessels had kept on without change of course or speed by either, the ferry-boat might have struck the Eider amid-ships. There is some further discrepancy between these two witnesses as to the rate of speed of the Eider before she stopped and reversed her engine; but on this question the testimony of witnesses outside of the Eider, and the distances covered by each vessel prior to the collision, furnish more satisfactory evidence. The Eider had made the distance between her anchorage and the place of collision—eight and a half miles—in less than 55 minutes, including two stoppages, while going up the river, for passing boats. According to her pilot, she was going slow all the way up; but her speed may also be measured by the fact that when he first sighted the Pavonia the latter had rather a shorter distance to cover before the courses of the two vessels would cross than the Eider; and that consequently the Eider must have been running at a speed equal to, if not in excess of, the Pavonia's. It is questionable whether keeping up such speed by the Eider, while so near the shore, was either safe or prudent. The rule laid down by the admiralty courts of the Southern and Eastern districts of New York, in which collisions on the water are of frequent occurrence, is that these large steamers should occupy as nearly as possible the middle of the river, and proceed with such speed as to be easily stopped. *The Favorita*, 8 Blatchf. 589; *The Columbia*, 8 Fed. Rep. 716; *The Monticello*, 15 Fed. Rep. 474; *The Hackensack*, 32 Fed. Rep. 800; *The E. H. Webster*, 22 Fed. Rep. 171. Although, in the cases just cited, the defaulting vessels were much nearer to the shore than the Eider is proved to have been, the latter would have diminished the risk of collision if she had kept further out in the river. Be this as it may, the speed of the Eider was excessive, and those who were in charge of her should not have approached so near to the Pavonia, when they knew that the latter would soon cross the Eider's course, and that a sufficient distance must be kept between

the two vessels to enable them to go clear of each other. It was inconvenient for the Eider to change her helm, and her fault was in maintaining her course and speed until she was unable to stop and back, or change her course, in time to successfully meet an emergency which daily occurs in the crowded waters around the city of New York.

But it is objected that the Pavonia was in fault in not having a competent lookout, properly stationed, who could have seen the Eider, and given notice of her proximity; also that the Pavonia should have maintained her speed, and not slackened it just as she was crossing the Eider's bow. The relative positions of the vessels, when the Pavonia slackened her speed, were such that if there had been a lookout forward he could not have seen the Eider without turning half around and looking over his shoulder. The two men who were at the wheel of the Pavonia had an unobstructed view ahead, and on each side, and they did not see the Eider until the moment of collision. The photograph of the port side of the Pavonia, and the diagram of her deck plan, show that the Eider struck the Pavonia at less than a right angle, which would have been more acute except for the facts that, in reversing, the Eider's stem was turned to the starboard, and that her first impact with the Pavonia pushed the latter's stern up the river. The upper part of the pilot-house of the Pavonia is protected by sliding windows, having a solid door on the after-port side; and Capt. Higgins, who was one of the men at the wheel, says that he did not see what had struck the Pavonia until this door was opened immediately after the collision. Under these circumstances it is plain that the absence of a lookout on the forward part of the Pavonia did not contribute to the collision; and whenever this clearly appears, the obligatory rule of navigation which requires a special lookout does not apply. *The Farragut*, 10 Wall. 334.

The conduct of the Pavonia in suddenly altering her speed, if there was no urgent necessity for her to do it, cannot be so readily excused; for it is evident from the proof that this action just as she began to cross the Eider's bow contributed to the collision; and it follows that unless the reduction of speed under the circumstances was justifiable, or made to escape impending danger, she cannot be exempted from blame. Capt. Wilson, one of the libellant's witnesses, who was coming down the river on the ferry-boat, Passaic, and saw the Pavonia and Eider just before the collision, places the Eider more than 900 feet from the shore, and says the Pavonia was still further out. He also testifies that it is the duty of the officers of a ferry-boat which is about to enter her slip to look out for any vessels that may be going up or down the river, and that the Pavonia's pilots could and ought to have seen the Eider. The tug and tow, which were passing in front of the slip, were 500 or 600 feet from the Pavonia, and not near enough to compel the latter to stop at the moment she did. There was sufficient room ahead and to the starboard of the Pavonia to have allowed her to keep up her speed for 200 or 300 feet more, and by so doing she would have easily cleared the Eider without incurring the smallest risk of running into the tug. The Pavonia was the privileged vessel, and entitled to the right of way, both as leading

and being on the starboard bow of the Eider; but it was none the less her duty to keep her course and speed, and not to interfere with the action of the Eider, which was endeavoring to leave room for her passage, and would probably have succeeded had the Pavonia not changed her speed. It was incumbent on the Pavonia, under article 22 of the regulations, to hold her course; and, failing to do this, she committed an error. The rules of navigation imply that an overtaken vessel shall hold her course and maintain her speed. *The Britannia*, 34 Fed. Rep. 552. The officers of the Pavonia should have been more vigilant in observing whether any other vessel was coming up astern, or on her quarter, before stopping her engine. While the law does not require a special lookout to be stationed aft, it will not excuse the want of ordinary prudence on the part of those whose business it is to determine whether they can change the course or speed of their own vessel without improperly embarrassing the movements of a following one. There was no imminent peril confronting the Pavonia demanding instant action, and excusing an error of judgment. The accident happened in broad daylight, and the remarkable fact that no one on the Pavonia saw the Eider, until after the collision, can only be accounted for on the supposition that the officers and crew of the ferry-boat had sought shelter from the intense cold, and were looking in only one direction. From the whole evidence, it would seem that each vessel was consulting its own convenience, without due consideration of the movements of the other; and, as both were in fault, the damages must be divided.

THE SAMMIE.

THE R. W. BURKE.

MACMASTER *et al.* v. THE SAMMIE AND THE R. W. BURKE.¹

(Circuit Court, S. D. New York. March 18, 1889.)

COLLISION—TUGS—LEAVE TO CROSS COURSE.

The tug S., having the tug B. on her starboard, at a distance of 700 to 900 feet, gave two whistles, to which the B. responded with two whistles. The S. thereupon starboarded its wheel, so as to approach somewhat nearer shore, and continued its course. The B. continued its course nearly at right angles to the S., and when 50 to 100 feet apart the S. reversed, but the tows collided, 250 to 300 feet from shore. *Held* that, having given leave for the S. to cross its course, the B. was in fault for continuing in its course instead of reversing under a starboard helm; that the collision was not proof that the agreed course was unsafe, especially as all the witnesses agreed that it was safe; and the stoppage of the S. was so near the moment of collision as to be considered a measure *in extremis*.

In Admiralty. Libel for damages. On appeal from district court. 35 Fed. Rep. 327.

¹Modifying 35 Fed. Rep. 327.

Libel by Robert MacMaster and others, owners of the bark *Mary MacMaster*, against the tug *R. W. Burke* and the tug *Sammie*, for a collision between the bark and a car-float, while the bark was in tow of the *Burke* and the float was in tow of the *Sammie*. Decree against both tugs, and both appeal.

E. D. McCarthy, for the *Sammie*, cited *The B. B. Saunders*, 23 Blatchf. 387, 25 Fed. Rep. 727; *The Tug Brothers*, 2 Biss. 106; *The Albemarle*, 8 Blatchf. 200; *The City of Hartford*, 11 Blatchf. 72; *The Greenpoint*, 31 Fed. Rep. 231; *The Susquehanna*, 35 Fed. Rep. 320.

Biddle & Ward, for the *R. W. Burke*, cited (in addition) *The Rosecrans*, 34 Fed. Rep. 766.

LACOMBE, J. The libellant's bark, lashed to the starboard side of the tug *R. W. Burke*, while proceeding from Buttermilk channel to pier 4, East river, came into collision with a railroad float along-side the steam-tug *Sammie*, receiving damages for which this libel was filed. The *Burke's* course from Buttermilk channel was to the eastward of Diamond Reef buoy, passing about 500 or 600 feet off, and continuing on up the river till about opposite pier 6, when she rounded to, so as to head to the flood-tide when making her slip at the lower side of pier 4. She was then heading across and a little down. The *Sammie* rounded the Battery, some 300 or 400 yards off, and bore up the river nearer in to the piers than the *Burke* was when she rounded to. The *Sammie* first sighted the *Burke*, and gave her a signal of two whistles. Getting no answer, she, about half a minute afterwards, repeated the signal of two blasts, to which the *Burke* promptly responded with a like signal of two blasts. The distance between the vessels at the time of the interchange of signals is in dispute, the witnesses for the bark making it about 500 or 600 feet, and those for the *Sammie* about twice that distance. There seems no reason for rejecting the conclusion upon that point of the district judge, who finds it from 700 to 900 feet. The *Sammie*, after the exchange of signals, starboarded her wheel so as to approach somewhat nearer to the shore, and continued on, making up the river. The *Burke* continued moving in towards shore, heading nearly at right angles to the *Sammie*, and when she had reached a point within about 50 or 100 feet of the *Sammie*, the latter stopped and reversed, the bark and car-float thus coming into collision about opposite pier 6 and between 250 and 300 feet off shore. On behalf of the *Burke* it is claimed that immediately upon giving the answering signals she stopped, reversed full speed, and put her wheel hard a-starboard. This is disputed by the *Sammie's* witnesses, and the finding upon that point of the district judge, who heard the conflicting testimony, will not be disturbed, especially as it seems impossible to reconcile the claim of the *Burke* with the fact of the collision. The distance between the tugs and their relative positions when they agreed on their respective courses was such that the prompt execution of such a maneuver as above described would have carried the *Burke* to the stern of the *Sammie*, even if it did not keep her entirely outside of her course. The learned district judge has upon this state of

facts found the Sammie liable for undertaking to pass across the bows of the Burke, instead of porting to go under her stern, or stopping until the latter had crossed the Sammie's course. Before the signals were exchanged, the Sammie, having the Burke upon her starboard hand, was bound to keep out of her way,—a duty she would have performed by porting or stopping, or both. By her signal she asked leave to pass across the Burke's bows instead. She did not proceed with her maneuver without waiting for an assenting reply, as did *The Doris*, 31 Fed. Rep. 301, and *The Columbia*, 25 Fed. Rep. 844. When the Burke assented to her proposition she was not in fault for continuing on the course agreed upon, modified by sheering further inshore, as the district judge found she did, unless some faulty navigation on her part while on such agreed course caused the collision, or unless the maneuver which she thus asked and obtained leave to execute was a dangerous one. The subsequent collision is not alone sufficient to condemn the attempt as an unsafe one, in view of the fact that the Burke did not at once execute the maneuvers necessary to keep her out of the course which the Sammie had obtained her consent to take. Moreover, all the witnesses, without exception, concur in the statement that the course agreed upon was a proper one, and entirely safe and easy; each boat insisting that the collision occurred solely because the other did not keep to it. In this respect the case is to be distinguished from *The City of Hartford*, 11 Blatchf. 72, and *The Albemarle*, 8 Blatchf. 200. Having agreed to the mode of passing, which the Sammie proposed, the Burke was in fault for continuing on her course into the water through which the Sammie must necessarily pass in executing the maneuver, when, by a prompt stoppage, and reversal under a starboard helm, the Burke could have left the Sammie's course free and clear. It was no doubt the duty of the Sammie, after the signals were exchanged, to keep her course, (perhaps sheering towards shore as she did,) but her subsequent stoppage was so close to the moment of collision that it may fairly be considered a measure *in extremis*. Howard, the deck-hand on the tug "Howard," a disinterested witness, called by the Burke, testified that the Sammie was going ahead till the bowsprit of the bark was within 100 feet of the car-float, and himself thought there would be a collision even before she stopped. Libelants are entitled to a decree against the tug R. W. Burke, for their damages and interest. The decree of the district court against the tug Sammie is reversed, with costs to the Sammie as against the Burke.

MILLER *et al.* v. THE ARGONAUT AND THE JOHN C. INGRAM.

(District Court, N. D. Illinois. March 14, 1889.)

1. COLLISION—IN CHICAGO RIVER—TUGS AND TOWS.

The barge A., loaded quite deeply with iron ore, was proceeding up the south branch of the Chicago river, in tow of the tug T. She had her steam on, but was not using it for propulsion. Her course lay along the west bank of the river. When she reached the bend of the river between Mason's slip and Allen's slip, the curve being from west to east and back again, she was obliged to swing over to the middle of the stream, in order to pass a schooner, lying at a dock just at the point of the bend, the river being only about 120 feet wide. The I., with libellant's schooner in tow, was just rounding the east curve, going down the river, at the rate of five or six miles an hour, and checked her own headway for a moment, but without checking that of her tow, and then proceeded rapidly on her way, and in attempting to pass on the east side of the river, between the stern of the barge and the dock, the collision occurred. *Held*, that the I. was at fault in attempting to take her tow through so perilous a passage, with the barge occupying so much space.

2. SAME—IMPUTED FAULT.

The signal by the T. for the I. to go ahead, after she had checked her speed, though it may have contributed to the collision, cannot be imputed as a fault to her tow, the A.

In Admiralty. Libel for collision.

H. W. Wolseley, for libellants.

R. Rae, for the Argonaut.

Schwytler & Kremer, for the John C. Ingram.

BLODGETT, J. The libellants, as owners of the schooner Moselle, bring this suit to recover damages for injuries sustained by the schooner from a collision with the steam-barge Argonaut, which occurred on the 6th day of August, 1887, in the waters of the south branch of the Chicago river, on the bend between Mason's slip and Allen's slip. It appears that the tug Ingram took the schooner Moselle in tow at some point on the south branch of Chicago river above Main-Street bridge, for the purpose of towing her into the lake. The barge Argonaut was proceeding up the river, loaded quite deeply with iron ore, in tow of the tug Robert Tarrant. She had her steam on for emergencies, but was not using it for the purposes of propulsion; and her course lay along the west bank of the river. When she reached the knuckle or bend in the river between Mason's slip and Allen's slip, the curve being from the west towards the east and back again, she was obliged to swing from the west side of the river over towards the middle, for the purpose of passing the schooner Colin Campbell, which lay at a dock just upon the point of the bend, the river being at that point only about 120 feet wide. At this time, the Ingram, with the Moselle in tow, was just rounding the concave or east curve of the bend, and the Ingram checked her own headway for a moment, but without materially checking the headway of the schooner, and then put on steam, and proceeded rapidly down the river, and in attempting to pass upon the east side of the river, through the space between the stern of the barge and the east dock, the collision occurred. The proof

shows that the Ingram's speed was quite fast, say five or six miles an hour, from the time she passed through the draw of the Main-Street bridge until she nearly reached the bend, when, as I have said before, the tug checked up, but the schooner, by the impetus which she had before that received, drifted quite rapidly down the stream towards the barge. The proof also shows, I think, that the master of the Tarrant, towing the Argonaut, signaled the master of the Ingram to go ahead after the Ingram had checked up. The libelant claims there was bad management and fault on the part of both the tug Ingram and the Argonaut, whereby the accident occurred. It seems to me the proof makes a clear case of bad management on the part of the master of the tug Ingram. It was a fault on his part to attempt to pass the Argonaut on this bend; she was deeply loaded, the water was shallow at that point, and a barge drawing as much water as she did, was liable to sheer, in swinging around a bend like this, so as almost necessarily and unavoidably to bring her stern close to the east bank, or at least so close up the passage-way as to make it difficult to take the Moselle safely through. The fact that the Argonaut was obliged to make a deflection from her course to pass the Campbell would increase her tendency to swing, or sheer, to port. All these were circumstances palpable and apparent to the master of the Ingram, and should have been a sufficient warning to him not to attempt to take his tow through along-side the Argonaut, while she was swinging around the bend; but, instead of doing this, he vacillated. He first stopped, perhaps thereby losing some of the headway upon his tow, and then changed his mind, either as the result of his own conclusions, or at the suggestion or direction of the master of the Tarrant, and attempted by a rapid motion to carry his tow through the gap. The Tarrant and her tow, and the Campbell, lying at the dock on the knuckle of the bend, were all in plain sight of the Ingram from the time she passed the Main-Street bridge, a distance of about a half mile above; and under these circumstances, it seems to me, the conduct of the master of the Ingram can be considered little less than reckless in attempting to carry his tow through so perilous a passage as that upon this bend, with the Argonaut occupying so large a space in the river as she necessarily did; and by swinging out to pass the Campbell there was unavoidably imparted to her some tendency to swing further over towards the east bank of the river. Undoubtedly the master of the Ingram, under the circumstances, should have proceeded down the river so slowly as to have had his tow completely in control, and been able to either stop her or go so slowly as to allow the Argonaut to get clear of the bend before he brought his tow along-side of her. This he did not do, for at no time does he seem to have had the tow under control. It is probable, I think, from the testimony, that the master of the Ingram intended to slow up after he had taken in the situation, but perhaps at too late a moment, and hence checked the movement of his tug, but not substantially the movement of the tow. He saw quickly, afterwards, that the tug, from the impetus she already had, was rapidly approaching the gap between the stern of the barge and the east dock, and hence he put on steam, and attempted

by a rapid movement to carry his tug and tow through this gap before the swinging of the barge should effectually close the passage, and failed in his effort so to do, as the barge swung so rapidly as to bring the schooner violently against the port quarter of the barge. It is possible that, if the Ingram had not slowed at all, but had kept her full speed, he might have carried the Moselle clear of the barge, but this hesitation was fatal. I do not wish to be understood as saying that I think he should have kept his speed, and have attempted to pass it at this dangerous place. The prudent and proper thing was for him to have stopped and waited until the Argonaut had passed the bend. The proof shows that the Ingram, after having checked her own headway, but not materially that of her tow, as I have said, was signaled by the master of the Tarrant, towing the Argonaut, to go ahead. This action on the part of the master of the Tarrant, although it may have contributed to bring about the collision, cannot be imputed as a fault to the Argonaut. The Argonaut was in tow of the Tarrant and helpless in her hands, and is not responsible for the mistakes made by the master of the Tarrant, in either advising or directing the Ingram to proceed; and hence, as the Tarrant is not a party to this suit, I do not conceive that what took place between the masters of these tugs is at all material to the questions in this case, or to be imputed as a fault to the Argonaut.

I, therefore, find that the collision was brought about solely by the fault of the Ingram, and there will be a decree dismissing the libel as against the Argonaut for want of equity, and awarding damages sustained by the collision against the Ingram.